COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP1405
2015AP1406

Cir. Ct. Nos. 2014TP8
2014TP9

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NO. 2015AP1405

IN RE THE TERMINATION OF PARENTAL RIGHTS TO B. S.,
A PERSON UNDER THE AGE OF 18:

A. N.,

PETITIONER-RESPONDENT,

V.

F. S.,

RESPONDENT-APPELLANT.

NO. 2015AP1406

IN RE THE TERMINATION OF PARENTAL RIGHTS TO E. S.,
A PERSON UNDER THE AGE OF 18:

A. N.,

PETITIONER-RESPONDENT,

V.

F. S.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

¶1 HRUZ, J.[1] F.S. appeals orders terminating his parental rights to his two minor children, B.S. and E.S. He asserts the circuit court lost competency to proceed to the dispositional phase of the termination proceedings because the court failed to explicitly state that it was finding F.S. unfit after granting the petitioner, A.N., partial summary judgment in the grounds phase. Under the applicable statutes and case law, a circuit court *must* find the parent unfit if it concludes grounds for termination have been established. Because the circuit court's duty to find a parent unfit necessarily flows from the conclusion that sufficient grounds for termination exist, we conclude the circuit court's implicit finding of unfitness was sufficient in this case. Accordingly, we affirm the orders.

BACKGROUND

¶2 In 2014, A.N. petitioned to terminate F.S.'s parental rights to their two minor children. The cases were set for a jury trial at F.S.'s request. Approximately one month prior to trial, A.N. filed motions for partial summary judgment as to grounds for termination, which motions the circuit court granted.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The court observed that A.N. had submitted her own affidavit in support of her motions, along with affidavits from her attorney and her parents. The court also noted F.S. had filed his own affidavit, in which he alleged "vague 'due process' violations but did not otherwise challenge [A.N's] assertions … or the timeline of events."[2] In a written decision, the circuit court determined the undisputed facts established, as a matter of law, three of the statutory grounds for termination of F.S.'s parental rights: (1) abandonment; (2) continuing denial of periods of physical placement or visitation; and (3) failure to assume parental responsibility. The court proceeded to the dispositional phase and, following an evidentiary hearing, concluded termination was in the children's best interests. Orders terminating F.S.'s rights to B.S. and E.S. were then entered.

DISCUSSION

¶3 F.S. appeals. He does not assert the circuit court erred by granting A.N.'s motion for partial summary judgment in the grounds phase. Indeed, he concedes "[t]he petitioner in these cases proved one or more grounds alleged in her petitions against F.S." Instead, F.S. asserts the circuit court was statutorily required to make an explicit finding that F.S. was an unfit parent before proceeding to the dispositional phase. F.S. asserts this finding was required even after the circuit court granted summary judgment in the grounds phase of the

[2] The circuit court later stated F.S. "submitted nothing of evidentiary value" in terms of matters relevant to the grounds phase of the termination proceeding. We have independently reviewed F.S.'s affidavit and concur with the court's assessment. The perceived due process issue apparently involved F.S.'s failure to appear at a May 2011 hearing due to his incarceration. F.S. does not argue any due process violation on appeal, and we therefore deem any such argument abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised in the trial court but not raised on appeal are deemed abandoned).

termination proceedings. F.S. reasons that because the circuit court failed to make the requisite finding, it lost competency to proceed to the dispositional phase, and we must reverse the termination orders.

¶4 Although F.S.'s brief-in-chief suggests the "explicit finding" requirement flows from case law regarding termination of parental rights, his reply brief clarifies that he believes this requirement is embedded in WIS. STAT. § 48.424(4). That statute provides, in pertinent part, "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." Subsec. 48.424(4). Whether this subsection requires an explicit finding of unfitness is a question of law subject to de novo review. *See* ***Seider v. O'Connell***, 2000 WI 76, ¶26, 236 Wis. 2d 211, 612 N.W.2d 659 ("Statutory interpretation is a question of law."); *see also* ***Steven V. v. Kelly H.***, 2004 WI 47, ¶20, 271 Wis. 2d 1, 678 N.W.2d 856 (circuit court's statutory obligations in termination of parental rights cases are a question of law).

¶5 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V.***, 271 Wis. 2d 1, ¶24. In the first phase of the proceeding, known as the "grounds" phase, the petitioner must demonstrate by clear and convincing evidence that one or more of the statutory grounds for termination of parental rights exist. ***Id.*** (citing WIS. STAT. § 48.31(1) (2001-02); ***Waukesha Cty. Dep't of Soc. Servs. v. C.E.W.***, 124 Wis. 2d 47, 60, 368 N.W.2d 47 (1985)); *see also* WIS. STAT. § 48.424(1)(a). "There are [twelve] statutory grounds of unfitness for termination of parental rights …." ***Steven V.***, 271 Wis. 2d 1, ¶25 (citing WIS. STAT. § 48.415(1)-(10) (2001-02)). If a court finds that the elements of one or more statutory grounds for termination has been established, the "court has no discretion to refrain from finding a parent unfit." ***Id.***; *see also* WIS. STAT. § 48.424(4). After that finding, the court moves to the second phase,

known as the "dispositional phase," wherein the court, applying the "best interests of the child" standard, must determine whether the parent's rights should be permanently extinguished. ***Steven V.***, 271 Wis. 2d 1, ¶¶26-27.

¶6 The applicable case law makes clear that the required finding of unfitness in the grounds phase flows directly from the finding that one or more grounds for termination have been established. The supreme court at one time understood the termination statutes to confer upon circuit courts discretionary authority to dismiss a petition if, despite a finding that grounds for termination had been established, "the evidence of unfitness [was] not so egregious as to warrant termination of parental rights." *See* ***B.L.J. v. Polk Cty. Dep't of Soc. Servs.***, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991), *overruled by* ***Sheboygan Cty. Dep't of Health & Human Servs. v. Julie A.B.***, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402. In ***Julie A.B.***, a unanimous supreme court concluded this interpretation was erroneous and held the termination statutes do not establish "an intermediate step between fact-finding by the jury and disposition by the court, in which the court must decide whether the parent's already established unfitness is 'egregious' enough to warrant considering termination as a disposition." ***Julie A.B.***, 255 Wis. 2d 170, ¶36. Similarly, the circuit court is not required to make an independent finding of parental unfitness once grounds for termination are established. ***B.L.J.***, 163 Wis. 2d at 109.

¶7 As a result, there is no practical difference between the fact-finder's conclusion that grounds for termination have been established, and a circuit court's finding that a parent is unfit. Once the circuit court in this case determined the petitioner was entitled to partial summary judgment on the three grounds alleged for termination, it had no discretion to do anything other than find F.S. unfit. *See* ***Steven V.***, 271 Wis. 2d 1, ¶25; WIS. STAT. § 48.424(4). Indeed, the

circuit court recognized that its grant of partial summary judgment in the grounds phase of the termination proceedings was synonymous with a finding of unfitness, stating, "the motion for partial summary judgment is therefore granted *in the unfitness phase of this case*." (Emphasis added.)

¶8 Under these circumstances, we conclude the circuit court's implicit finding of unfitness was sufficient.[3] Although the circuit court in this case failed to explicitly state that it was finding F.S. unfit, "[t]here would be no point in sending this case back to the circuit court for a specific declaration to that effect." ***B.L.J.***, 163 Wis. 2d at 109. Rather, "directing the court to make an explicit finding where it has already made unmistakable but implicit findings to the same effect would be both superfluous and a waste of judicial resources." ***Id.*** (quoting ***Englewood Cmty. Apts. Ltd. P'ship v. Alexander Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984)).

¶9 Accordingly, the circuit court's failure to make an explicit finding that F.S. was unfit following its grant of partial summary judgment to the petitioner in the grounds phase did not prevent the court from proceeding to the dispositional phase. F.S. does not challenge the circuit court's determination that

[3] The circuit court did ultimately and explicitly find F.S. unfit by checking the requisite box in the form orders terminating his parental rights to the children. However, we elect not to decide these cases on the basis of that explicit finding, as the orders were necessarily entered following the dispositional phase of the proceedings, which would not have been held absent a finding of unfitness in the grounds phase.

termination was in the children's best interests. We therefore affirm the orders terminating F.S.'s parental rights to B.S. and E.S.[4]

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] A.N. alternatively argues that: (1) F.S. has forfeited any argument regarding the circuit court's failure to make an explicit finding of unfitness because he never raised the issue in the circuit court; and (2) any alleged error by the circuit court in failing to make an explicit finding of unfitness was harmless. We elect to decide this appeal on the merits, and therefore do not address these alternative arguments.