COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1635 **Cir. Ct. No. 2014TP000187**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A. D. C., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. C.,

RESPONDENT-APPELLANT.

APPEAL from the orders of the circuit court for Milwaukee County: DAVID C. SWANSON, Judge and LAURA GRAMLING PEREZ, Judge. *Affirm.*

¶1 Dugan, J.[1] D.C. appeals from an order terminating his parental rights to A.D.C. and the order denying his postdisposition motion. He asserts that the trial court lost competency to terminate his parental rights because the trial court[2] did not conduct an initial appearance[3] in accordance with WIS. STAT. § 48.422(1). He also asserts that the trial court erred in denying his discovery motion.

¶2 We hold that the trial court complied with WIS. STAT. § 48.422(1) and that the trial court did not err in denying D.C.'s discovery motion. We affirm.

¶3 The following background provides context for the issues in this case. We will refer to additional relevant facts in the discussion section.

BACKGROUND

¶4 D.C. is the father of A.D.C. who was born on March 16, 2009. The Division of Milwaukee Child Protective Services (DMCPS) removed A.D.C. from

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision within thirty days after the filing of the reply brief. We may extend the deadline pursuant to WIS. STAT. RULE 809.82(2)(e) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline through the date of this decision.

[2] The Honorable Rebecca Grassl Bradley presided over proceedings through the grounds phase, the Honorable David Swanson presiding over the proceedings through disposition and the Honorable Laura Gramling Perez presided over the postdisposition motion. We refer to them collectively as the trial court.

[3] The parties use the phrase "initial appearance" as a shorthand reference to a hearing pursuant to WIS. STAT. § 48.422(1). We will also use the phrase, although it does not appear in the statute.

the care of K.C. on September 14, 2012.[4] A.D.C. was found to be a child in need of protection and services (CHIPS) on October 23, 2012, and the trial court entered a dispositional order placing her outside of the parents' home. On August 4, 2014 the State filed a petition to terminate the parental rights (TPR petition) of D.C. and K.C. for A.D.C.[5]

¶5 The matter was set for a hearing on the petition on August 27, 2014. D.C. failed to appear and the trial court granted a default. The hearing was adjourned to September 30, 2014 for an "initial appearance." On September 30, 2014, D.C. appeared and the default was vacated. The trial court advised D.C. that he had the right to contest the petition, the right to a jury trial in the first phase of the proceeding, and the right to substitution of the judge.[6] The trial court referred D.C. to the State Public Defender's Office (SPD) to determine if he qualified for the appointment of an attorney. The hearing was adjourned to October 28, 2014 for a further hearing on the petition.

¶6 On October 28, 2014, D.C. appeared with trial counsel. The father of K.C.'s other child, P.H., appeared without counsel and the trial court stated it would adjourn the matter and refer that father to the SPD. The trial court asked

[4] K.C. is A.D.C.'s mother. K.C.'s parental rights were terminated, but she does not appeal the termination of her rights.

[5] The petition was filed as to two of K.C.'s children, A.D.C. and P.H. D.C. is not the father of P.H.

[6] Wisconsin has a two-part statutory procedure for an involuntary TPR. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the grounds phase, the petitioner must prove by clear and convincing evidence that at least one of the twelve grounds enumerated in WIS. STAT. § 48.415 exists. *See* WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶¶24-25. In the dispositional phase, the court must decide if it is in the child's best interest that the parent's rights be permanently extinguished. *See* WIS. STAT. § 48.426(2); ***Steven V.***, 271 Wis. 2d 1, ¶27.

D.C. if he also wanted an adjournment, to which trial counsel stated that he did. The case was adjourned to December 11, 2014 for a hearing on the petition as to D.C. and the other father.

¶7 On December 11, 2014, D.C. arrived late and K.C. failed to appear. The hearing was adjourned to February 3, 2015 for initial appearance for K.C., D.C., and the other father and hearing on D.C.'s motion to change placement to D.C.'s sister, B.R.

¶8 At the February 3, 2015 hearing, trial counsel was present, but D.C. failed to appear. The trial court took a motion for default as to D.C. under advisement and proceeded with the initial appearance as to K.C. and the other father. The hearing was then adjourned for a possible initial appearance as to D.C., and a final pretrial and a jury trial as to D.C. and the other father. The trial court also set March 2, 2015 as a hearing date for K.C.'s plea and stipulation to the grounds phase and D.C.'s motion for change of placement.

¶9 On March 2, 2015, D.C. appeared with trial counsel. Testimony was taken on the motion to change placement and the hearing was continued for further testimony. Before adjourning, trial counsel stated that she had forgotten that she was not available for D.C.'s trial date and asked the trial court if it could reschedule the grounds trial. The trial court then severed D.C.'s grounds trial from the other father's grounds trial and set D.C.'s trial on May 18, 2015, with a final pretrial on April 30, 2015.

¶10 Prior to April 30, 2015, the trial court held two hearings regarding D.C.'s motion to change placement. On April 30, 2015, the trial court denied the motion for change of placement.

¶11 On the May 18, 2015 trial date, D.C. entered a plea and stipulated to the failure to assume parental responsibility grounds. The trial court conducted a thorough colloquy with D.C., including a waiver of all his rights. After hearing testimony to support the grounds, the trial court found that the State established the ground of failure to assume parental responsibility and that D.C. was unfit to be a parent. The case was adjourned to August 20, 2015 for a contested dispositional hearing as to D.C.

¶12 On the morning of August 20, 2015, D.C. filed a second motion for change of placement. The trial court heard testimony regarding disposition and D.C.'s motion for change of placement on August 20, 21, 31, and September 1, 2015. At the conclusion of the September 1, 2015 hearing, the trial court granted D.C.'s motion for change of placement and ordered that A.D.C. be placed with D.C.'s sister, B.R. The trial court also adjourned the dispositional hearing to December 11, 2015.

¶13 The trial court heard additional testimony regarding disposition on December 11, 2015, January 12 and February 17, 2016, and adjourned the matter to April 14, 2016, for closing arguments.

¶14 The case was again scheduled for an April 8, 2016 hearing on D.C.'s third motion for change of A.D.C.'s placement.[7] However, on April 8, 2016, D.C. filed a motion to dismiss or, alternatively, to allow him to withdraw his stipulation to the ground in the petition of failing to assume parental responsibility. D.C. alleged that the State had withheld discovery, was conspiring with DMCPS to

[7] DMCPS had removed A.D.C. from B.R.'s care on an emergency basis on February 23, 2016.

deprive him of information to prepare his case, and of his rights to object to the change of placement. The trial court adjourned the case to July 5, 2016 to address D.C.'s motions, the change of placement motion, and disposition.

¶15 On July 5, 2016, the trial court denied D.C.'s motion to dismiss, denied his motion for change of placement, and terminated D.C.'s parental rights.

¶16 D.C. filed a notice of intent to pursue postdisposition relief on July 15, 2016 and a notice of appeal on August 22, 2017. On October 12, 2017, he filed a motion to remand the matter to the trial court, which this court granted on October 18, 2017.

¶17 D.C. filed a motion to dismiss with the trial court on November 27, 2017, contending that the trial court lost competency to proceed because it did not hold an initial appearance hearing. In its November 27, 2017 oral decision denying D.C.'s postdispositional motion, the trial court stated that it was not clear that D.C. was told of his right to a jury trial and a paternity determination, but found there was no prejudice because the paternity determination had already been made and that during the proceedings, the matter was set for jury trial on the grounds so that D.C. was "certainly aware of that right."

¶18 On appeal D.C. argues that the trial court lost competency to terminate his parental rights because the trial court did not conduct an initial appearance in accordance with WIS. STAT. § 48.422(1). He also asserts that the trial court erred in denying his discovery motion.

DISCUSSION

I. The Trial Court Had Competency to Proceed

¶19 D.C. argues that the trial court lost competency to proceed because it failed to conduct an initial appearance in accordance with WIS. STAT. § 48.422(1). He states that the issue in this case is the trial court's failure to conduct a hearing as mandated by the statute. However, he merely makes the assertion that the hearing was not held, but does not develop the argument. Here, the hearing was adjourned multiple times for various reasons discussed below.

¶20 The issue D.C. raises is not whether the trial court advised him of his right to a jury trial or determined whether he contested the petition. Rather, implicit in his argument is an assumption that there is a formal hearing procedure that trial courts must follow to comply with the statute. However, he does not describe that procedure.

¶21 D.C.'s argument may be based on the procedure often used in Milwaukee County trial courts at initial appearances on TPR petitions. That procedure involves the trial courts explaining to the parties the grounds set forth in the TPR petition and the facts alleged in the petition to support those grounds. The trial courts also explain the two phases of a TPR proceeding, the right to a jury trial in the first phase, the State's burden of proof and numerous other rights beyond the rights referred to in WIS. STAT. § 48.422(1). At the hearing's end, the trial courts ask if the party is preserving his or her right to a jury trial and what the party's posture is in the case. Although that may be a best practice, it is not required by the statute.

¶22 The determination of what is required by WIS. STAT. § 48.422(1) is a matter of statutory interpretation which is a question of law. *See* ***Estate of Miller v. Storey***, 2017 WI 99, ¶25, 378 Wis. 2d. 358, 903 N.W.2d 759. "'[S]tatutory interpretation begins with the language of the statute.'" ***Id.***, ¶35 (quoting ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110). The words of a statute are to be understood in their "ordinary everyday meaning." ***Id.***

¶23 The statute states, "[a]t the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition and inform the parties of their rights under sub. (4) and s. 48.423."[8] Subsection four addresses a party's right to a jury trial that must be requested before the end of the hearing on the petition. *See* WIS. STAT. § 48.422(4).

¶24 WISCONSIN STAT. § 48.422 does not prescribe the nature (or the name) of the hearing in which the trial court must determine whether a parent is contesting the petition and advise the parent of his or her right to a jury trial. It merely states that it must be done at a hearing on the TPR petition.[9] We hold that

[8] WISCONSIN STAT. § 48.423 involves rights of a person who appears at the hearing under WIS. STAT. § 48.422(1) and claims that he is the parent of the child. Such person is entitled to a paternity hearing. That is not an issue in this case. D.C. does not assert that the trial court should have advised him of those rights. Moreover, D.C.'s paternity had been adjudicated prior to the hearing.

[9] Although WIS. STAT. § 48.422 provides that the hearing on the petition must be held within thirty days of the filing of the petition, D.C. does not argue untimeliness. Here, D.C. argues that the trial court failed to hold the required hearing.

Moreover, D.C. would be precluded from arguing that the hearing was not timely held. He failed to appear at two hearings and trial counsel requested or agreed to the adjournment of hearings on the petition. *See* ***State v. Dowdy***, 2012 WI 12, ¶4, 338 Wis. 2d 565, 571, 808 N.W.2d 691 (stating that as a general rule, issues not raised before the trial court will not be considered for the first time on appeal.)

under the statute the trial court must, during a hearing on the petition, determine whether any party wishes to contest the petition and inform the party of his or her right to a jury trial and, if applicable, to a hearing on paternity. Here, the record shows that the trial court complied with the statute albeit over several adjourned hearing dates.

¶25 As previously recounted, D.C. did not appear at the August 27, 2014, initial hearing on the petition and, therefore, the trial court could not address the statutory requirements. At the adjourned hearing on September 30, 2014, D.C. appeared, but he was not represented by counsel. Regardless, the trial court advised D.C. of his right to contest the petition, his right to a jury trial in the grounds phase of a TPR, his right to substitution of judge, and his right to be represented by an attorney of his choosing or, if he could not afford one, to be represented by the SPD. It then adjourned the hearing and sent him to the SPD.

¶26 At the next hearing on the petition on October 28, 2014, D.C. appeared with trial counsel, who asked that the trial court adjourn the hearing and that the new date include additional time for the trial court to hear a motion to change A.D.C.'s placement. At the next hearing on December 11, 2014, trial counsel was present and D.C. arrived late, but K.C. did not appear. Although trial counsel told the trial court that she had reviewed all matters with D.C. as necessary to conduct an "initial," she agreed to an adjournment of the hearing until K.C. was present.

¶27 At the next hearing on February 3, 2015, D.C. failed to appear. The trial court set the matter for final pretrial and jury trial in case D.C. appeared for trial. Trial counsel did not object to setting the matter for jury trial. By not objecting, trial counsel was informing the trial court that D.C. was in a contest

posture and was requesting a jury trial. Once again, the "initial appearance" hearing was adjourned to the trial date.

¶28 A hearing had been set on D.C.'s motion for change of placement on March 2, 2015. D.C. was present and the trial court heard testimony on D.C.'s motion. At the end of the hearing, while the trial court was looking for a new trial date, trial counsel advised that "my client's trial posture may, frankly, change depending on the outcome of the motion [to change placement] should the [trial] [c]ourt decide it." Again, trial counsel was informing the trial court that D.C. was in contest posture, but that could change. D.C. continued to exercise his right to a jury trial.

¶29 On May 18, 2015, when D.C. entered a plea and stipulated to the failure to assume responsibility grounds, the trial court conducted a thorough colloquy. Trial counsel stated that she was satisfied that D.C. was stipulating to that ground, freely, voluntarily, intelligently, and understandingly. The trial court then found that D.C. freely, voluntarily, intelligently, and understandingly stipulated to the ground of failure to assume parental responsibility with full understanding of the nature of the proceedings, the possible consequences of his decision, and all the rights he was giving up by stipulating to that ground.

¶30 The hearing on the petition required by WIS. STAT. § 48.422(1) was adjourned to the trial date. At the first hearing that D.C. appeared, and at several others, D.C. was advised of his right to contest the petition and his right to a jury trial. Throughout the hearings, he exercised his right to a jury trial, which reflected his contest posture. In fact, in his April 2016 motion to dismiss filed with the trial court, D.C. asserted that he had been in a contest posture as to the grounds phase for the first nine months of the TPR case. In other words, D.C.

acknowledged that he had been in a contest posture from August 4, 2014, when the TPR petition was filed, until May 18, 2015, when he stipulated to the TPR grounds.

¶31 Based on the facts above, we conclude that the trial court complied with WIS. STAT. § 48.422 in conducting hearings on the TPR petition, advising D.C. of his right to a jury trial, and determining that he was in a contest posture. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990) (appellate court may sustain discretionary decision on an independent basis).

II. D.C. Failed to Refute the State and GAL's Work Product Arguments

¶32 D.C. maintains that the trial court erred when it denied his discovery request, which he states primarily revolves around emails and communications between the assistant district attorney (ADA) assigned to the case and the DMCPS case manager. He asserts that the trial court should have ordered that those emails in the District Attorney's (DA) file be disclosed to him.

¶33 The issue before this court is whether the trial court erred in holding that D.C. was not entitled to discover any undisclosed email communications between the ADA and DMCPS employees in the DA's file on this case.[10]

¶34 Discovery in TPR cases is governed by WIS. STAT. § 48.293, which provides that all records relating to a child maintained by an agency, that are

[10] The emails between the ADA and DMCPS in DMCPS's possession were produced at the case manager's deposition. Other emails were deleted pursuant to Children's Hospital of Wisconsin's policy of routinely deleting emails for storage purposes. Children's Hospital is the contract agency for ongoing services with DMCPS that was involved in this case. It routinely requires case managers to delete emails for storage purposes.

relevant to the subject matter of a proceeding under Chapter 48, shall be open to inspection by all parties. Additionally, the discovery procedures under Chapter 804 apply to proceedings under Chapter 48. *See* WIS. STAT. § 48.293(4). WISCONSIN STAT. § 804.01(2)(a) provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the pending case if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." The general rule under that statute is that a party cannot obtain the work product of the lawyer of another party under the general discovery process. *See* § 804.01(2)(c). The seminal Wisconsin case on attorney-client privilege and the work product privilege is ***State ex rel. Dudek v. Circuit Court***, 34 Wis. 2d 559, 150 N.W.2d 387 (1967).

¶35 The discovery issue arose when some emails between the ADA and the case manager at DMCPS were disclosed as a result of a subpoena directing A.D.C.'s case manager to appear for a deposition during the disposition phase of the action and to bring various materials with her, including all emails she had exchanged with anyone regarding A.D.C. When the case manager appeared for her deposition, she brought some emails that included communications with the ADA assigned to the case.

¶36 The discovery of these emails led D.C. to file a motion to dismiss and, alternatively, to allow him to withdraw the stipulation he entered in the grounds phase. In the motion, D.C. asserted that the State had withheld discovery and that the ADA and DMCPS were conspiring to deprive him of his rights to object to a change of A.D.C.'s placement. He asserted that the ADA had orchestrated an emergency change of A.D.C.'s placement from the home of his

sister, B.R., to a foster home to occur at a time when neither he nor B.R. would have standing to contest the change in placement.[11] As previously noted, the trial court denied D.C.'s motion to dismiss and his motion for change of placement, and terminated D.C.'s parental rights.

¶37 In denying D.C.'s motion to dismiss, the trial court held that the attorney-client privilege and the common interest doctrine under § 905.03(2) applied to communications between the ADA and DMCPS and, therefore, those communications were protected from discovery. The trial court also held that the work product privilege had been waived as to the emails disclosed by the case manager at her deposition. However, it did not make any finding that the work product privilege had been waived as to any undisclosed emails in the DA's files.

¶38 The trial court also described the content of the disclosed emails, stating they involved "standard case planning" on how to handle a case and the attorney's opinions about how the judge would behave or rule or interpret a particular fact. The trial court further concluded that the fact that those discussions occurred was no indication that the State was engaging in any underhanded activity or that there was any violation of D.C.'s right to obtain information necessary to prepare for the case. With the trial court's denial of D.C.'s motion to dismiss based on the alleged discovery violation, the court proceeded with the disposition phase without any additional discovery.

[11] D.C. and B.R. would have lacked standing to object to any change in placement, if the change of placement had not occurred until after the trial court had terminated D.C.'s parental rights, but before A.D.C. was with B.R. for six months. Parenthetically, we note that A.D.C.'s placement was changed before disposition was completed and D.C.'s rights were terminated and both he and K.C. contested the change in placement.

¶39 In arguing that the trial court erred in not ordering additional discovery, D.C. states that ***Dudek*** is limited to the attorney-client privilege and contends that in opposing his motion to dismiss in the trial court, the State only argued the discovery D.C. sought was protected by the attorney-client privilege. D.C. maintains that the State's argument that the requested discovery is protected by the attorney-client privilege must fail because DMCPS is not a party and the DA does not represent DMCPS in this action.

¶40 However, D.C. has not addressed the State's (and the GAL's) work product arguments. Because D.C. has not attempted to refute those arguments, we conclude that D.C. has conceded that the emails in the DA's file constitute work product. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (holding that failure to refute an argument constitutes a concession.)[12]

¶41 Relying on D.C.'s concession, we conclude that the trial court examined the relevant facts, applied a proper standard of law, and used a demonstrative rational process and reached a conclusion that a reasonable judge could reach.[13]

[12] Because D.C. has conceded the work product privilege issue, we do not address whether the attorney-client privilege or common interest doctrine apply under the circumstances of this case. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues needs to be addressed).

[13] D.C. argues that he should be allowed to withdraw his stipulation to the grounds that he failed to assume parental responsibility. Because his argument is solely based on his assertion that he was denied discovery and we reject that argument, we need not address his plea withdrawal.

CONCLUSION

¶42 We conclude that the trial court complied with WIS. STAT. § 48.422(1) by advising D.C. that he had a right to a jury trial and determined that he was in a contest posture at hearings on the petition. Therefore, the trial court was competent to proceed with the TPR petition. We also conclude the trial court properly exercised its discretion in denying D.C.'s discovery request. For these reasons, we affirm the orders of the trial court.

By the Court.—Orders affirmed.

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