COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP253 **Cir. Ct. No. 2005TP22**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EATHAN J.C.,
A PERSON UNDER THE AGE OF 18:

WINNEBAGO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LISA L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Lisa L. appeals from an order involuntarily terminating her parental rights. She challenges the trial court's stated view that the jury verdict was a "recommendation" to terminate her rights. Lisa argues that in considering the verdict a recommendation encouraging it to terminate her rights, the court erred in not understanding that the verdict was a separate and discrete factual finding. She asserts that the court mistakenly acted as if the verdict was to guide its disposition. While the use of the word "recommendation" was an unfortunate choice, our review of the dispositional hearing satisfies us that the court did not act as if the jury had recommended, advised or suggested that Lisa's parental rights be terminated. Therefore, we affirm.

¶2 Winnebago County Department of Health and Human Services (DHHS) filed a petition to involuntarily terminate Lisa's rights to her infant son on the grounds that the child was in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). Lisa challenged the petition and requested a jury trial. At the conclusion of a one-day trial, the jury returned a unanimous verdict finding that grounds existed for the termination of Lisa's parental rights.

¶3 Following the requirements of WIS. STAT. § 48.424(4), the court delayed the dispositional hearing to permit the parties time to prepare evidence and argument on the question of whether termination of Lisa's parental rights was in the best interest of her infant son. After hearing the parties, the court began to set out its disposition, and it was during this bench ruling that it made three statements that are the focus of this appeal.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> A jury sat here and listened to some of these circumstances and surprisingly so reached a verdict recommending this termination in a very short period of time.
>
> ….
>
> I believe the jury felt that you were not doing that and their recommendation was, in effect, to terminate the parental rights.
>
> ….
>
> I would find that they did have sufficient evidence to recommend this termination.

¶4 Lisa asserts that in calling the jury's verdict a recommendation, the court elevated the verdict from an answer to a limited factual question to a suggested course of action for the court. She claims that the court misunderstood the legal significance of the verdict and, while the decision to terminate parental rights is discretionary, in this case the court erroneously exercised its discretion because the starting point was an error of law.

¶5 Whether circumstances warrant termination of parental rights is within the trial court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. ***Id.*** However, a decision based on an error of law is an erroneous exercise of discretion. ***Sullivan v. Waukesha County***, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

¶6 Before examining Lisa's argument, we first address DHHS's argument that this issue is waived because Lisa did not object during the court's bench ruling or she did not file a posthearing motion seeking reconsideration. Waiver is a doctrine of judicial administration; we retain the authority to address an issue on appeal even if it has not been properly preserved. *See* ***Wirth v. Ehly***,

93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). We choose to address Lisa's issue on the merits for the same reasons we gave in ***State v. Quinsanna D.***, 2002 WI App 318, ¶28 n.7, 259 Wis. 2d 429, 655 N.W.2d 752:

> As the supreme court has explained, however, despite a failure to present post-verdict motions, "the appeals court has jurisdiction over a timely appeal and may in its discretion conclude that, in the interest of justice, the issues not assertable as a matter of right may nevertheless be reviewed." Here, in the interest of justice, given the gravity of a termination of parental rights, we address the merits of Quinsanna's claim. (Citation omitted.)

¶7 The launching pad of Lisa's argument is the bifurcated nature of a contested termination of parental rights case. Under WIS. STAT. § 48.424(3), the initial stage is a fact-finding hearing in which the jury must determine whether there is clear and convincing evidence that grounds for terminating parental rights exist. Once grounds have been established under § 48.424(3), the court must decide whether to terminate the parental rights by determining what is in the best interest of the child.

¶8 While we agree with Lisa's description of the bifurcated proceedings employed in this case, we do not agree with the balance of her argument. She contends that in referring to the jury's verdict as a recommendation, the court elevated it from a limited factual inquiry to a suggestion to the court that involved the best interest of the child. Of course, the best interest of the child is an inquiry left for the court during the second stage of the proceeding. WIS. STAT. § 48.424(3).

¶9 After reviewing the court's bench ruling at the dispositional stage, we are satisfied that the trial court did not consider the jury's verdict to be a recommendation. When two of the three references are read in context, it is

evident that the court was familiar with its role and that of the jury and did not confuse the limited role of the jury with its role to consider the best interest of the child.

> I believe the jury felt that you were not doing that and their recommendation was, in effect, to terminate the parental rights.
>
> *I recognize that I have the responsibility of agreeing with that or not agreeing with it. I got the responsibility of determining today what the best interests of [the child] is and would be.* (Emphasis added.)
>
> ….
>
> I would find that they did have sufficient evidence to recommend this termination. *I recognize that I don't automatically have to follow that ….* (Emphasis added.)

¶10 After these introductory remarks, the court turned to the statutorily mandated best interest factors, WIS. STAT. § 48.426(3), and proceeded to address each factor as it affected the best interest of the child. During this part of its ruling, the court did not refer to the jury's verdict or give any indication that it was accepting or adopting the recommendation of the jury. We are satisfied that the court appropriately exercised its discretion in considering the standard and the factors in § 48.426.

¶11 Lisa criticizes the trial court for its terse review of the statutory factors supporting the termination of her parental rights. Just as the exercise of discretion is not dependent upon the recitation of "magic words," ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993), it is not dependent upon the loquaciousness of the court. A valid exercise of discretion requires a process of reasoning based on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. *See* ***McCleary v. State***, 49

Wis. 2d 263, 277, 182 N.W.2d 512 (1971). While the court's review of the statutory factors is succinct, it meets the standards for the appropriate exercise of discretion.

¶12 In her closing paragraph, Lisa suggests that the following comment reflects the court's disagreement with the verdict:

> A jury sat here and listened to some of these circumstances and *surprisingly so* reached a verdict recommending this termination in a very short period of time. (Emphasis added.)

We conclude that the statement is ambiguous; the court is either expressing surprise at the verdict or surprise that the jury deliberated a very short period. Because it is ambiguous, it does not help Lisa's argument that the court's improper treatment of the verdict resulted in an erroneous exercise of its discretion.

¶13 We affirm, convinced that the court correctly exercised its independent and unfettered discretion in making what is one of the most wrenching and agonizing determinations in the law. *See* ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶29, 255 Wis. 2d 170, 648 N.W.2d 402.

By the Court.—Order affirmed.

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