COURT OF APPEALS DECISION DATED AND FILED

February 24, 2009

David R. Schanker
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 No. 2008AP2959

Cir. Ct. No. 2007TP346

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

IN THE INTEREST OF ZARIE A. C. H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LATRICE A.H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Latrice A.H. appeals from an order terminating her parental rights to her daughter, Zarie A.C.H. She claims that the trial court

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08).

erroneously exercised its discretion when it stopped her from testifying further about her rehabilitative progress. She also states in her brief that the trial court erroneously found this testimony to be irrelevant. This court's review of the record reveals that the trial court did not find the rehabilitative testimony irrelevant, that it allowed some testimony on Latrice's rehabilitative efforts and that it considered those efforts in rendering its decision. Accordingly, the trial court did not erroneously exercise its discretion with respect to the issue Latrice raises and it did not erroneously exercise its discretion in terminating her parental rights.

BACKGROUND

¶2 Latrice gave birth to Zarie on November 19, 2006. Zarie was Latrice's seventh child. The parental rights of Latrice's six other children had been previously terminated going back to 2001. Most recently, the court terminated Latrice's parental rights to her son, Ive A., Jr., on November 21, 2005 based on failure to assume parental responsibility.

¶3 On October 7, 2007, when Zarie was ten months old, Latrice took her to Children's Hospital as she was running a fever, lethargic, vomiting, coughing and having trouble breathing. When Zarie tested positive for having cocaine in her system, Latrice admitted to having smoked crack cocaine in Zarie's presence a few days earlier.

¶4 On October 8, 2007, the Bureau of Milwaukee Child Welfare (Bureau) received a referral that Zarie had tested positive for cocaine. After further investigation, Latrice was criminally charged with felony child abuse (recklessly causing harm) and in January 2008 she pled guilty to the charge. Latrice was incarcerated with an expected release date of September 30, 2008.

¶5 Also on October 8, 2007, Zarie was removed from Latrice's care. On November 26, 2007, the trial court found Zarie to be a child in need of protection or services and she was placed in the foster home of Brian and Cindy H. This foster family had previously adopted one of Zarie's biological brothers.

¶6 On December 19, 2007, the State filed a petition seeking to terminate parental rights under WIS. STAT. § 48.415(10) (2005-06).[2] The petition alleged that grounds existed for termination because Latrice's parental rights to another child were involuntarily terminated within three years—Latrice's son, Ive, on November 21, 2005.

¶7 After a few procedural delays and adjournments, a grounds phase hearing was set for March 17, 2008. At the March hearing, the State filed a motion seeking partial summary judgment based on the undisputed fact that Latrice's parental rights to another child were involuntarily terminated within three years of finding Zarie to be a child in need of protection or services. Latrice's counsel did not file a response to the motion, explaining that there was no legal basis to oppose it. At the motion hearing on April 17, 2008, the trial court granted partial summary judgment as to grounds, and found Latrice to be unfit.

¶8 Due to the trial court's jury trial calendar, the dispositional hearing was adjourned several times. It was subsequently held on July 23, 2008. At the dispositional hearing, the trial court heard testimony from the Bureau's case manager, Tricia Blum; the foster mother, Cindy H; and from Latrice. At the

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. Although the petition sought termination of both the father's and the mother's rights, the father was never identified and a default judgment was granted terminating his parental rights.

conclusion of the hearing, the trial court addressed all six factors set forth in WIS. STAT. § 48.426(3) as well as the rehabilitative efforts of Latrice. The court found that all six factors favored termination and despite the fact that Latrice was making efforts toward rehabilitation, it had to base its decision on the best interests of Zarie. The trial court found that it was in the best interests of Zarie to grant the petition terminating parental rights. An order to that effect was entered. Latrice now appeals.[3]

DISCUSSION

I. Whether the trial court erred in prohibiting an answer to the question posed to Latrice about her volunteer work for a flood relief program.

¶9 Latrice contends that the trial court erred when it stopped her from testifying about her experience working in a flood relief program. Latrice argues that the trial court erroneously found her proffered evidence to be inadmissible and irrelevant to any of the statutory factors in WIS. STAT. § 48.426.

¶10 This court reviews a trial court's decision on termination of parental rights under the erroneous exercise of discretion standard. *See* ***Rock County Dep't of Social Servs. v. C.D.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). If the trial court considered the relevant facts, applied the pertinent law set

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[3] In her reply brief, Latrice complains that the State and guardian *ad litem* refer to facts contained in record document "12," which is the court report for termination of parental rights. She states that this document was never entered into evidence or given to her and therefore should not be cited as support for facts on appeal. Although the decision in this appeal was not based upon record document 12, this court notes that the facts Latrice complains about are found elsewhere in the record. In general, this court's review is based on a review of the complete record below and if Latrice believed record document 12 was not a proper part of the record, she should have objected to its inclusion.

forth and adequately explained a reasonable basis for its decision, this court will uphold the decision. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

¶11 The record demonstrates that Latrice's characterization of what the trial court did was not entirely accurate. Latrice was testifying at the dispositional hearing regarding the efforts she was taking to rehabilitate herself, including parenting classes, personal development and anger management classes. She said she had learned a lot. Then, her counsel asked her to describe some volunteer work she had done in the summer. Latrice described the work:

> Q I was sandbagging, helping them put the sand in, helping people houses [sic] when they got flooded. I was in the water helping them, putting the sand that they sent around their houses to support their houses so nothing would be damaged.
>
> Q Now, did you get paid for that?
>
> A No. I was volunteered to do that one.
>
> Q You get paid at the job in Racine though, right?
>
> A Yes.
>
> Q How would you describe that experience you had working in the flood relief program?

¶12 At this point the State objected on the grounds of relevance, stating: "I'm not sure how that really addresses any of the six factors here." The trial court asked for Latrice's counsel's response. Counsel replied: "I think we could show through the programs and the work experiences that [Latrice] has had that she has grown and developed from those programs and … the Court can hear her answer and give it whatever weight it wishes to do." The court then asked counsel what factor this testimony was relevant to and counsel responded "personal development." The court asked counsel which specific statutory factor "personal

development" fit under and counsel responded that he did not have the statute in front of him, but thought the testimony demonstrated that Latrice improving her ability to parent would be in the best interests of her child. The trial court then stated:

> THE COURT: Well, you've got … into whatever extent you're going to argue that from. Let's move onto another area. You've made your point to the extent that it's arguably relevant as a catchall. Because those aren't the only statutory factors. I don't see it as relevant to any of the statutory factors. It might be relevant to sort of a catchall or maybe to some argument regarding … her ability, I don't know. But I've heard that. Let's move on.

¶13 Accordingly, the trial court *did* allow testimony on Latrice's personal development, specifically, her volunteer work with the flood relief program. The testimony regarding the flood relief program was in the record and was considered by the trial court when it made its decision. Although the trial court stopped Latrice from testifying further on this issue, it did not rule that the testimony was irrelevant or inadmissible nor did it strike the testimony already in the record. The court found it "might be relevant to [some] sort of a catchall," and felt that it had heard enough about the flood relief work, instructing counsel to move on to something else. Later in the hearing, the trial court allowed Latrice to testify further on her personal development about her employment, her treatment progress and where she planned to live.

¶14 Based on the foregoing, this court rejects Latrice's claim that the trial court erred when it stopped her from answering additional questions about her flood relief work. The trial court's direction to "move on" was reasonable pursuant to WIS. STAT. § 906.11(1)(b) to avoid needless consumption of time with cumulative information. ***Id.*** ("The judge shall exercise reasonable control over the

mode and order of interrogating witnesses and presenting evidence so as to … [a]void needless consumption of time.”).

II. Whether the trial court erred in stating “personal development” evidence is not one of the statutory factors.

¶15 Latrice argues that the trial court erred in ruling that a parent’s “personal development” did not seem to fall into one of the six enunciated factors under WIS. STAT. § 48.426(3). Citing ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402, Latrice argues the trial court took too narrow a view as to what factors to consider and that it “may also consider factors favorable to the parent, including the parent’s markedly changed behavior.” *See* ***id.***, ¶¶4, 29. She points out that in a case such as hers, where the grounds for termination were undisputed, the disposition hearing provides the only opportunity to submit evidence of personal development and improvement. This court rejects her argument.

¶16 Latrice is correct in that ***Sheboygan County DHHS*** allows the trial court to consider factors not specifically enumerated in WIS. STAT. § 48.426 before making its termination determination. Nonetheless, whether to do so is a *discretionary* choice, not a mandatory one:

> At the dispositional hearing, the court *must* consider any agency report submitted and the six factors enumerated in § 48.426(3) in determining the best interests of the child. The court *may* also consider other factors, including factors favorable to the parent; but all factors relied upon must be calibrated to the prevailing standard: the best interests of the child.

Sheboygan County DHHS, 255 Wis. 2d 170, ¶4 (emphasis added). Clearly then, a trial court *must* consider the six statutory factors, but *may* consider other parenting-favorable factors, with the end goal being the best interests of the child.

¶17 The trial court in the instant case quite ably did both. It emphasized the "prevailing factor" in WIS. STAT. § 48.426(2) as to what would be in the best interests of Zarie. Against this best interest standard, it addressed each factor delineated in § 48.426(3): (1) "[t]he likelihood of the child's adoption after termination": the trial court found that the foster family would adopt Zarie; (2) "[t]he age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home": the trial court found that ten-month-old Zarie was in poor health at the time of detainment and had improved to having a manageable health situation supporting the adoption option; (3) "[w]hether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships": the trial court found that based on Latrice's testimony, there was no substantial relationship and therefore severing the parental tie would not cause any harm; (4) "[t]he wishes of the child": the trial court found the child was too young to express any wishes; (5) "[t]he duration of the separation of the parent from the child": the trial court found that the separation was substantial in Zarie's young life and therefore the factor favored termination; (6) "[w]hether the child will be able to enter into a more stable and permanent family relationship as a result of the termination …": the trial court found that Zarie would be adopted by the foster family who also had adopted her older brother and this factor favored termination.

¶18 Although we recount an abbreviated summary of the trial court's findings, it did a thorough and commendable job in specifically addressing each of these six factors and how each factor related to the best interests of Zarie. The trial court, however, did not stop after addressing solely the six required statutory factors. It also took into consideration all of Latrice's efforts toward personal

development. In its decision, it specifically addressed the efforts Latrice was making to get her life back on track:

> [Latrice] told us that … her release date was expected to be September 30 of ’08, a little over two months. Then she told us about the admirable efforts that she’s taking at Ellsworth. Taking classes, trying to get her life back in shape. That she works on weekends and she did volunteer work doing flood relief. That she wants to go to school when she gets out. She wants to obtain employment. She wants to work through Project Return. I think that’s an excellent idea. I am familiar with that program. I think it’s an excellent program. I hope that they can assist the mother for the future. … she hopes to have a home for herself and thus for Zarie. She hopes that she’ll be able to meet future conditions. She thinks she’ll be able to do so.
>
> ….
>
> I do have substantial empathy and sympathy for the mother under these circumstances. I think that this is a woman who’s trying very hard and I hope that she succeeds in the future and she’s trying to get her life together.

After weighing these considerations against the other factors it was required to consider by statute, the trial court found that termination was in the best interests of the child. The record here clearly shows that the trial court considered Latrice’s efforts to rehabilitate herself in making its determination. Thus, even though it was not obligated to consider Latrice’s personal development efforts, it did consider the parenting-favorable factors.

¶19 Based on this record, the trial court’s isolated question to Latrice’s counsel about what statutory factor the personal development testimony related to cannot be interpreted to be error. Yes, it asked the question. But, the record that follows clearly demonstrates that the trial court considered the parenting-favorable evidence in determining what was in the best interests of Zarie. Thus, even if the trial court erred, the error was harmless. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI

110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 ("If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.").

III. Whether the trial court erroneously exercised its discretion in granting termination.

¶20 Finally, Latrice alleges that the trial court erroneously exercised its discretion in granting the termination of parental rights petition. This court cannot agree. As noted above, the trial court considered all of the pertinent facts, applied the correct statutory law and, although not required to, it also took into consideration the parenting-favorable factors presented by Latrice. The trial court provided a reasoned analysis as to why the statutory factors favoring termination outweighed the personal development efforts of the mother. It reached a very reasonable determination that it would be in Zarie's best interests to have Latrice's parental rights terminated. Accordingly, this court affirms the order terminating parental rights.

By the Court.—Order affirmed.

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