COURT OF APPEALS DECISION DATED AND FILED

April 23, 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 Nos. 2008AP2932
2008AP2933
2008AP2934

Cir. Ct. Nos. 2007AP50
2007AP51
2007AP52

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT A.,

RESPONDENT-APPELLANT.

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT A.,

RESPONDENT-APPELLANT.

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT A.,

RESPONDENT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

¶1 BRIDGE, J.[1] Robert A. appeals judgments and orders of the circuit court terminating his parental rights to his three daughters—Avia A., Essence A. and Caprice A. Robert argues that the circuit court erred when it granted the Dane County Department of Human Service's motion for partial summary judgment on the issue of unfitness for purposes of terminating Robert's parental rights because the court did not first hold a hearing on the merits of the motion. Robert also argues that the court erred by proceeding with the dispositional hearing in his absence. We reject each argument and affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. On the court's own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion by three days to April 23, 2009.

BACKGROUND

¶2 In December 2003, the Department filed separate petitions alleging that Avia, Essence and Caprice were in need of protection and services, based on allegations that Robert had sexually and physically abused Essence.[2] The circuit court found that each girl was in need of protection or services (CHIPS) under WIS. STAT. § 48.13(10),[3] and they were placed in foster care where they have since resided.

¶3 In December 2004, the circuit court entered dispositional orders prohibiting Robert from having any visitation with the girls. There has been no modification of the dispositional order relating to Essence. The dispositional orders relating to Avia and Caprice, however, were modified in February 2005 to allow Robert "one brief visit" with the girls, but these modifications were vacated that same day. Robert has thus been denied visitation with Essence since December 2004, and, at a minimum, with Avia and Caprice since February 2005.

¶4 In June 2007, the Department filed a petition to terminate Robert's parental rights to all three girls, alleging as grounds that Robert has been denied physical placement and visitation by court order for more than one year pursuant to WIS. STAT. § 48.415(4).[4] The Department subsequently filed a motion for

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[2] In June 2006, Robert plead no contest to six felony counts, including two counts of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. The total confinement portion of Robert's sentences totaled thirty-three years.

[3] WISCONSIN STAT. § 48.13(10) applies when a child is in need of protection or services because the child's parent "refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

[4] WISCONSIN STAT. § 48.415(4) provides in relevant part:

(continued)

partial summary judgment on the issue of whether Robert was unfit. The circuit court granted the Department's motion without a hearing, based upon the undisputed fact that Robert had been denied placement and visitation with the girls by court order for more than one year.

¶5 A dispositional hearing was then held on the termination of Robert's parental rights. Robert initially appeared at the hearing with counsel and was present during the morning session of the hearing when a witness called by the Department testified in support of the termination of Robert's parental rights. However, when the proceeding resumed after a break for lunch, Robert refused to return to the hearing. Robert's attorney, Cynthia Fiene, explained to the court Robert's absence:

> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> (4) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
>
> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

> During the course of the hearing, he had told me he didn't understand that this was supposed to be the dispositional hearing; that he did not feel he was prepared for it and he did not want to participate in it. His words were "I'm sick of this bullshit." And at that point when the Court broke for lunch, he told me he had no intention of coming back.

Fiene also informed the court that Robert had told her twice that he was not returning to the afternoon session. The court asked Fiene to go see Robert where he was being held and ask him to return to court. The court also asked Fiene to inform Robert that if Robert elected not to return to the hearing, his refusal would be construed as a waiver of his right to be present and that the hearing would go forward without his presence.

¶6 Fiene consulted with Robert as requested by the court, but Robert continued to refuse to return to the hearing. Fiene informed the court that even though Robert would not return to the hearing, he did not want to waive his presence. Fiene also informed the court that Robert would like a continuance of the matter. Fiene explained to the court that Robert had been off his medication for depression for seven to eight days due to a shortage of the medication at the correctional institution where he was incarcerated, and that Robert did not feel he could be present for the remainder of the hearing because he was getting upset and confused. Fiene also explained that Robert was feeling stressed from appearing pro se in the related CHIPS matters.

¶7 Fiene's request to continue the matter was denied by the court, which determined that Robert made a voluntary and knowing waiver of his right to be present for the balance of the proceeding. The dispositional hearing therefore continued without Robert present, and the Department finished presenting its case. When it was the defense's turn to present evidence, Fiene advised the court that

Robert was the only witness she intended to call. Because Robert was not present to testify, no rebuttal witnesses were presented by Fiene. The dispositional hearing was then continued until the following day for closing arguments; however, it was later discovered that Robert had been inadvertently transported back to the correctional institution where he was serving his sentence. In light of this, the court found good cause to continue the hearing. When the dispositional hearing reconvened, Robert appeared in person with Fiene, and sought leave to reopen the record so that twelve exhibits of documentary evidence could be introduced. The court ultimately ruled that all the proffered documents except one were either already part of the record or were irrelevant and inadmissible. Thereafter, the court issued a written decision and order terminating Robert's parental rights to all three children.

¶8 Robert filed a motion for a new trial alleging the court erred in granting the Department's motion for partial summary judgment without first holding a hearing on the merits of the motion, and for proceeding with the dispositional hearing without Robert being present. The court denied Robert's motion. Robert appeals. We reference additional facts as needed in the discussion below.

STANDARD OF REVIEW

¶9 This case presents two questions: (1) whether the circuit court was required to hold a hearing before it granted the Department's motion for partial summary judgment; and (2) whether the court violated Robert's due process rights by proceeding with the dispositional hearing in his absence. Both are questions of law subject to our independent review. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶20, 271 Wis. 2d 1, 678 N.W.2d 856; ***State v. Littrup***, 164 Wis. 2d 120, 126, 473

N.W.2d 164 (Ct. App. 1991), *overruled on other grounds by* ***State v. Tiepelman***, 291 Wis. 2d 179, 717 N.W.2d 1 (2006).

DISCUSSION

PARTIAL SUMMARY JUDGMENT ON ISSUE OF UNFITNESS

¶10 The Fourteenth Amendment protects the interest a parent has in his or her parent-child relationship, and in the care, custody and management of his or her child. ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982); ***Steven V.***, 271 Wis. 2d 1, ¶22. Accordingly, to terminate the parental rights of an individual, the State must provide the parent with fundamentally fair procedures. ***Id.***, ¶23.

¶11 For the involuntary termination of parental rights (TPR), Wisconsin imposes a two-part statutory procedure. ***Id.***, ¶24. First, the petitioner must establish the basis, or "grounds," for the termination by presenting clear and convincing evidence that one or more of the twelve factors enumerated in WIS. STAT. § 48.415 exist. ***Id.*** If the petitioner does so, "the court shall find the parent unfit." WIS. STAT. § 48.424(4). The court's responsibility at this stage is mandatory, not discretionary. ***Steven V.***, 271 Wis. 2d 1, ¶25. If a determination of unfitness is made by the court, the matter then proceeds to the dispositional phase where the court must determine whether it is in the child's best interest that the parent's rights be permanently extinguished. ***Id.***, ¶27. The court's determination at this stage in the proceeding is discretionary. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993).

¶12 In ***Steven V.***, the supreme court held that a parent's procedural due process rights were not violated by the entry of partial summary judgment on the issue of unfitness during the first stage of the parental rights termination process,

provided "the requirements of the summary judgment statute and the applicable legal standards in WIS. STAT. §§ 48.415 and 48.31 have been met." ***Steven V.***, 271 Wis. 2d 1, ¶5. The court stated that "[s]ummary judgment procedure requires notice, an opportunity to respond, *and a hearing*, and imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim." ***Id.*****,** ¶35 (emphasis added); *see also* WIS. STAT. § 802.08(2). Robert interprets this statement in ***Steven V.*** to mean that under § 802.08, a hearing is required on the merits of a summary judgment motion. Robert correspondingly argues that because the court did not hold a hearing on the merits of the Department's motion—one at which the parties were able to argue "the law, facts, or ultimate issues"—the court was precluded from granting the motion.

¶13 We begin by noting that Robert did not request that the circuit court hold a hearing on the motion, nor did he object to the court's alleged failure to hold a sufficient hearing on the motion. The Department contends that any entitlement Robert had to a hearing was thus waived. Generally, the doctrine of waiver precludes a party who fails to object to an alleged circuit court error from raising such error on appeal. *See* ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988). As Robert points out, however, an appellate court may nonetheless consider the issue at its discretion.[5] We exercise that discretion here to reach the merits of the issue.

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[5] Robert also argues that waiver is inapplicable because his right to a hearing was a due process right and because the record does not demonstrate that his relinquishment of the right to a hearing was "intentional, knowing, and voluntary." Because we elect to address the necessity of holding a hearing prior to the granting of summary judgment, we do not address these arguments.

¶14 The Department also contends that the circuit court held multiple hearings which in part addressed the motion and Robert's potential responses, and that those hearings were procedurally sufficient to satisfy any hearing requirement. We assume for the sake of argument that the court did not hold a hearing on the merits of the Department's motion. We nonetheless conclude that the court did not err in granting the Department's motion without a hearing.

¶15 As noted above, in ***Steven V.***, 271 Wis. 2d 1, ¶44, the supreme court determined that the summary judgment procedure set out in WIS. STAT. § 802.08 applies to the unfitness phase of a TPR proceeding. The only provision in that statute that references a hearing is § 802.08(2). It provides in relevant part:

> [T]he motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing…. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law….

In construing a statute, we look first to the language of the statute. ***State ex rel. Kalal v. Circuit Court,*** 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If it is clear and unambiguous, the plain language of the statute guides us. *See* ***id.***

¶16 The plain language of WIS. STAT. § 802.08(2) does not mandate a hearing prior to the grant of summary judgment. A careful reading of § 802.08(2) suggests that the use of the word "hearing" in the statute is not mandate for the holding of a hearing on the merits of a summary judgment motion, but rather is used to establish the minimum amount of time which a court must provide to the parties before holding a hearing, if it so chooses to do so.

¶17 Nor do we read the sentence in ***Steven V.***, 271 Wis. 2d 1, ¶35, as stating that a hearing is *required* in every instance. Instead, the context for the court's statement was its overall ruling that WIS. STAT. § 802.08(2) applies to the unfitness phase of TPR proceedings. *See* ***id.*** Because § 802.08(2) does not mandate a hearing, the reference in ***Steven V.*** likewise cannot be read to require one.

¶18 Robert also argues that hearing was required before summary judgment may be entered because ***Steven V.*** suggests that due process requires a hearing before familial bonds may be destroyed by the court. We agree with Robert that due process mandates that a hearing be held prior to the termination of an individual's parental rights. ***Steven V.,*** 271 Wis. 2d 1, ¶23. However, the stage in the proceeding at which the court granted the Department's summary judgment motion was at the fitness stage. At that stage in the proceeding, the court determines if the parent is unfit, not whether the parent's rights should be terminated. Robert cites to no legal authority for the proposition that a hearing is required prior to a court's determination of fitness in a TPR proceeding. Arguments unsupported by legal citation are not addressed by this court. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. We therefore do not further address Robert's argument.

DISPOSITIONAL HEARING

¶19 A respondent in a TPR proceeding has a due process right to "meaningfully participate" in the dispositional hearing. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995). Robert contends that his right to meaningfully participate in the proceeding was violated when the circuit court continued with the dispositional hearing in his absence.

¶20 Robert first argues that his refusal to attend the afternoon session of the dispositional hearing was justified in light of the interruption in his usage of depression medication, which interfered with his ability to understand the proceedings, and therefore the court should not have continued without him. The record demonstrates, however, that Robert's lack of medication was not the real reason he did not return to the hearing and was simply another attempt by him to further delay the case.

¶21 There is no indication in the record that Robert was suffering difficulties from his lack of medication that were such that he was unable to participate in the proceeding. It appears that prior to Robert's refusal to return to the hearing, the circuit court was entirely unaware that Robert was not receiving his depression medication, or that he was suffering any adverse effects as a result. In fact, the court stated that it appeared that Robert had been following along with the morning portion of the proceeding. There is also no indication in the record that Robert's being upset at the hearing was attributable to his lack of medication, rather than the nature of the proceeding itself. Robert was clearly upset at the end of the morning session with the proceeding itself, as evidenced by his statement that he was "sick of this bullshit." He made this statement after listening to the Department present its case-in-chief, during which testimony disadvantageous to Robert was received by the court. In addition, Robert's own attorney indicated that Robert's refusal to return was in part due to the stress he was feeling from the CHIPS proceedings. Moreover, the procedural history of this case is replete with insincere attempts by Robert to delay the proceeding. As observed by the circuit court:

> The first thing that we have to recognize is the fact that he is now being represented by his third attorney. I have bent over backwards to accommodate his complaints as to

> counsel; his physical complaints as to the hearing situation … we also have to be mindful of his feigned heart attacks in the past; his ability to understand the bailiff's once we get outside the eyes of the Court;[6] his attempts to manipulate this matter to slow it down and bring it to a halt ….

In short, the court did not believe that the reason Robert refused to attend the afternoon session was due to the interruption in his depression medication and instead determined that Robert's actions were part of an ongoing pattern of behavior designed to disrupt the TPR proceedings. That is a credibility determination that we must accept. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Even if we were not compelled to adopt the circuit court's assessment of Robert's credibility, however, the record amply supports the court's finding that Robert's lack of participation in the dispositional hearing was his own choice.

¶22 Robert also argues that the record does not support the circuit court's determination that he knowingly, intelligently, and voluntarily waived his right to participate in the proceeding. Robert claims that the court's finding that he waived his right to participate in the proceeding is contrary to his assertion that he did not wish to waive his right to be present at the proceeding. Robert was advised by the court, through counsel, that if he did not return to the proceeding, his lack of presence would be construed as a waiver of his right to participate. His stated wish that his right to be present not be waived is overshadowed by the clear intent of his actions in response to the court's warning. As discussed above, the record demonstrates that his actions were designed to disrupt the proceedings.

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[6] This reference is to Robert's claim that he has a significant hearing impairment.

Accordingly, we conclude that Robert's waiver was knowing, intelligent and voluntary.[7]

¶23 Moreover, Robert does not explain why the particular circumstances of this case constituted a due process denial. He states that as a result of the court's decision to proceed with the hearing in his absence, he lost his opportunity to personally present his case-in-chief. We note that the court permitted Robert to reopen the record to present additional evidence; however, nearly all of that evidence was found to be inadmissible by the court. Further, to the extent he suggests that he would have testified personally, Robert does not explain what testimony he would have given that would have affected the proceedings. Because Robert does not develop this argument, we need not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address inadequately developed arguments).

CONCLUSION

¶24 For the reasons discussed above, we conclude that the circuit court properly granted the Department's motion for partial summary judgment, and that it properly proceeded with the dispositional hearing in Robert's absence. Accordingly, the judgments and orders terminating Robert's parental rights to Avia, Essence and Caprice are affirmed.

[7] Robert also argues that there was no urgent need for the court to complete the dispositional hearing at that time. Robert cites no legal authority supporting his claim that the court had an obligation to do so. Moreover, Robert's interests were not the only interests at stake. *See* ***Brown County v. Shannon R.***, 2005 WI 160, ¶60, 286 Wis. 2d 278, 706 N.W.2d 269 ("The State has an urgent interest in a termination of parental rights proceeding to protect the welfare of the children.").

By the Court.—Judgments and orders affirmed.

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