COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 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. 2009AP1947
2009AP1948

Cir. Ct. Nos. 2008TP27
2008TP28

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

Appeal No. 2009AP1947

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARCIA A.,

RESPONDENT-APPELLANT.

Appeal No. 2009AP1948

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARCIA A.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Marcia A. appeals orders terminating her parental rights to her children, Ariana A. (born 6/29/98) and Javani L. (born 12/7/05). She argues that the trial court erred in terminating her parental rights when it: (1) gave undue weight to the adoptive parent's testimony that she would maintain a relationship between Marcia and the children; and (2) inappropriately considered matters extraneous to the decision to terminate. I affirm.

BACKGROUND

¶2 On July 7, 2006, the Bureau of Milwaukee Child Welfare ("BMCW") removed Ariana, an eight-year-old child, and Javani, a seven-month-old child, from Marcia's care.[2] The children were removed after an investigation by BMCW, which it initiated because Ariana arrived at daycare with

[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.

[2] For the most part, Marcia was raising the children by herself at that time, although she did have some contact with the children's father, Antonio L. Antonio's parental rights were also terminated but are not the subject of this appeal.

a swollen nose and black eyes, claiming that her mother had pushed her. After being removed from Marcia's home, the children were placed with their maternal grandparents, where they remained until January 2008, when they were moved to the home of their maternal great aunt and great uncle, Linda and Ed K.

¶3 On the same day that Ariana's injuries were reported by a daycare worker, an initial assessment worker, Dawn Nelson, investigated the referral. Nelson first met with Ariana in an enclosed quiet room and then took her to the Children's Hospital of Wisconsin to determine the extent of her injuries. During the trial, Nelson testified that she found Ariana to be very articulate and intelligent, and able to answer questions thoroughly. Nelson further testified that Ariana told her the injuries occurred when her mother grabbed her by her shoulders and pushed her to the floor, preventing her from using her hands to shield her face. Dr. Martha Stevens, the doctor who treated Ariana at Children's Hospital, testified that Ariana's injuries were consistent with her account of what occurred. In particular, Dr. Stevens noted markings on Ariana's underarms that were not consistent with an accidental trip and fall but that were consistent with something or someone exerting force to that area of the body.

¶4 During the course of the investigation into Ariana's injuries, the West Allis police were called to the hospital. West Allis Police Officer Brian Saftig testified that he had an opportunity to interview Marcia, and she informed him that Ariana had tripped and fell into a highchair. Marcia was charged with child abuse (a felony), although she eventually pled to and was convicted of disorderly conduct (a misdemeanor). Marcia was placed on probation for one year, with conditions, and she successfully completed probation. Despite her conviction, throughout the trial Marcia continually stated that she did nothing to

cause Ariana's injuries and that her only mistake was sending Ariana to daycare that morning.

¶5 After removing the children from Marcia's home, BMCW assigned a case manager, Coral Choinski, to work with Marcia and help her reunify with her children. Choinski offered several services to Marcia, including: home management, housing assistance, parent aide services, individual therapy, family therapy, parenting and nurturing classes, and a referral for a psychological evaluation.

¶6 From the time Ariana's injuries were first reported, Marcia was hostile and belligerent toward BMCW workers and refused to acknowledge that her behavior led to the children's removal, for example: she made derogatory comments and yelled profanities at her case workers; she failed to actively participate in therapy sessions; she made sarcastic remarks throughout her psychiatric evaluation; and she invalidated standardized tests by responding in a random manner rather than fully reading questions and cooperating with testing.

¶7 Despite Marcia's efforts to thwart the system, doctors were able to offer several diagnoses. Dr. Suzanne Lisowski, who attempted to perform Marcia's psychological evaluation, testified that Marcia suffered from Oppositional Defiant Disorder and a personality disorder with narcissistic and paranoid personality features. Michael Marlett, Marcia's therapist from October 2006 until August 2007, believed Marcia's biggest mental health concern was depression and that the single greatest stressor in her life was the absence of her children.

¶8 Following the fact-finding hearing, the jury found grounds to terminate Marcia's parental rights, with two jurors dissenting on the question that

asked whether Marcia would complete the conditions of return within nine months. The trial court entered a judgment on the verdicts and found Marcia to be unfit. The trial court acknowledged that the issue of whether Marcia would be able to complete the conditions in the next nine months was a very difficult question. The court then expressed its frustration with Marcia, stating:

> I have not dealt with this file before. I have not dealt with this family before. I'll say Miss A[.] that I was somewhat frustrated, and I think that the jury was somewhat frustrated, I think that if you had or had been able to – I'm more concerned about that second part, showed even a modicum of respect for the process and importantly modicum of respect for the concerns that the systems [sic] has for your children's safety and for your relationship with your children; I think this jury would have struggled much harder than they did. I feel badly about that.
>
> I mean your decision to turn this into a power struggle and I say that recognizing some concerns on my part, that there is argument that can be made that rather than trying to negate that attitude that at the point it was engaged, but your decision to turn this into a power struggle is very sad and very unfavorable to me. All that said where this plays out I don't know. This is going to be an inordinately difficult dispositional decision.

¶9 The trial court adjourned and reconvened on December 4, 2008 for the initial dispositional hearing. The trial court heard testimony from Kathleen Mewes, the current social worker on the case, that Marcia had started therapy with a new therapist but had only attended one session before demanding a new therapist. Mewes referred Marcia to a new therapist who Marcia had seen only once, but with whom she had been cooperative.

¶10 In addition, Mewes testified about her experiences with the children and her interactions with the prospective adoptive parents, Linda and Ed. Mewes testified that during one particular visit with Ariana, after Linda and Ed had

brought the children from Indiana to Milwaukee to visit with their maternal grandmother, she asked Ariana whether she was happy living with Linda and Ed. Mewes testified that Ariana looked towards a back bedroom, where Marcia was located, before answering. Mewes stated that Ariana then leaned over and whispered that she liked living with Linda and Ed. Mewes testified that she interpreted Ariana's actions to mean that she was still fearful of Marcia. At this point during the trial, Marcia became upset and began yelling at Mewes.

¶11 Mewes also testified that she spoke with Linda and that Linda had stated that she believed it was important that Marcia remain a part of the children's lives. Mewes testified that Linda allowed the children to have weekly phone contact with Marcia and brought the children to Milwaukee to see Marcia.

¶12 Linda also testified during the dispositional hearing, expressing her and her husband's desire to adopt both Ariana and Javani. She also testified that the children talked with Marcia on the phone whenever they wanted, that she and her husband would drive the children to Milwaukee to visit Marcia, and that she and her husband had very recently invited Marcia to spend the weekend with them and the children in Indiana. Linda stated that she would continue to allow the children to have contact with Marcia because she "would never want to break [Ariana's] relationship with her mother. … [It's] so vital to a little girl."

¶13 The trial court also heard testimony from Dr. Kenneth Sherry concerning the psychological evaluation that he had completed of Marcia in November 2008. Dr. Sherry testified that Marcia was guarded and defensive with him, but that he was able to diagnose her with a personality disorder with narcissistic tendencies. The trial court also heard testimony from Marcia's new

therapist, Wade Koski, who testified that he had seen improvement in Marcia's attitude during her three appointments since November 2008.

¶14 At the conclusion of the hearing, the trial court made several preliminary remarks to Marcia before concluding that it needed several days to make a formal written decision in the matter. In particular, the trial court noted a family member of its own who, like Marcia, had a child removed from her custody. The court further indicated that it was sympathetic to the stress Marcia was going through, but that in the court's relative's case, she accepted responsibility and was willing to do whatever was necessary to get her child back. The trial court expressed great concern that Marcia was not able to do the same. The trial court also mentioned its frustration with Marcia's behavior during the dispositional hearing: yelling at witnesses, sleeping on the table, and refusing to acknowledge that she had problems that need to be addressed.

¶15 On March 4, 2009, the trial court issued a written letter to the parties explaining its reasons in favor of termination. After considering each of the factors set forth in WIS. STAT. § 48.426(3) (2007-08), the trial court stated that although a substantial relationship existed between Marcia and the children, the need for permanency through adoption outweighed the value and strength of that relationship. For the reasons set forth in its letter, the trial court subsequently entered orders terminating Marcia's parental rights to Ariana and Javani on March 9, 2009. Marcia appeals.

DISCUSSION

¶16 When examining a trial court's decision to terminate a person's parental rights, great deference is accorded to the trial court's decision, and it will only be overturned based on an erroneous exercise of the trial court's discretion.

In re Brandon S.S., 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). In reviewing a discretionary determination, the record is examined "to determine if the [trial] court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach." ***Brandon Apparel Group, Inc. v. Pearson Prop., Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544.

I. The trial court did not give undue weight to the adoptive parent's testimony that she would maintain a relationship between the children and their mother.

¶17 Marcia first argues that the trial court gave undue weight to Linda's testimony that she and her husband would continue to allow Marcia visitation and phone calls with Ariana and Javani. In other words, Marcia contends that the trial court did not place enough emphasis on the value of her relationship with her children. In response, the State and guardian *ad litem* argue that the trial court acted within its discretion. I affirm.

¶18 When deciding whether to terminate an individual's parental rights a trial court must make its findings on the record, give consideration to the standards and factors found in WIS. STAT. § 48.426(3) related to the child's best interests, and explain the basis for its disposition. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶¶29-30, 255 Wis. 2d 170, 648 N.W.2d 402. Section 48.426(3) requires the court to consider, but not be limited to, the following factors: (a) the likelihood of the child's adoption after termination; (b) the age and health of the child; (c) whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever those relationships; (d) the wishes of the child; (e) the duration of the separation of the

parent from the child; and (f) whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination.

¶19 Here, the trial court was particularly thorough in its examination of the WIS. STAT. § 48.426(3) factors, issuing the following written decision, in pertinent part, setting forth its thoughts as to each factor:

> Subsections a and f [and d][3]
>
> The children will be adopted into the loving, safe, structured, nurturing home of their great aunt and uncle. They have been there for a little more than a year and credible testimony indicates that they want it to be their permanent home. All indications are that they receive extraordinary love, attention and structure in that home. The only negative that is argued is the age of the [adoptive parents] which does not dissuade me that this is an appropriate placement and plan for these children.
>
> Subsection[s] b and e
>
> The children have been placed outside the parental home for nearly three years---virtually all of Javani's life and a significant part of Ariana's life. They were removed due to a significant instance of physical abuse of Ariana. They are physically healthy children, but desperately in need of permanence and stability in a safe, nurturing structured environment---one that [Linda and Ed] provide and [Marcia] has no capacity to provide.
>
> Subsection f
>
> Perhaps more than any other, this factor dictates termination. As repeatedly noted, they need permanence and stability in a safe, nurturing structured environment. Three years removed [from] the initial intervention, [Marcia] has demonstrated virtually no progress addressing

[3] The trial court did not explicitly state that it was considering WIS. STAT. § 46.426(3)(d)—"[t]he wishes of the child"—in its written decision. However, the trial court's statement that "credible testimony indicates that [Ariana and Javani] want [Linda and Ed's home] to be their permanent home" indicates that the court did take the children's wishes into consideration.

> anger issues---clearly the triggering cause of the abuse of Ariana three years ago---even repeatedly demonstrating a lack of progress in this area in the courtroom---and an intractable immaturity and inability to prioritize the needs of her children over her own real or perceived needs. The level of instability she demonstrates in employment, relationship and residence is beyond notable and clearly indicates a continuing incapacity to provide structure, safety and nurturance for her children.
>
> Subsection c
>
> I have acknowledged and re-acknowledge here that the children, particularly Ariana, recognize and value their relationship with their mother. As also noted above, I was predisposed toward a disposition that would not have severed the legal ties between [Marcia] and her children while still assuring permanence and stability in [Linda and Ed's] home. [Marcia]'s own conduct has clearly and unequivocally convinced me that plan is not viable for the achievement of the primary goal of permanence and stability in a loving, supportive, nurturing home.
>
> [Linda and Ed] have demonstrated unwavering commitment to protecting that valued relationship in the children's lives in an appropriate context---from the repeated instances of bringing the children to Wisconsin to see their mother to installing the computer/video feed. I have no doubt that once vested with the ultimate authority to determine what, if any, continued relationship should be allowed that they will do so in a manner consistent with the children's best interests and sensitive to the wishes---but cognizant of the behavior---of their birth mother.

¶20 Marcia's argument on appeal, that the trial court abused its discretion by giving undue weight to Linda's statement that she would continue to nurture a maternal relationship between Marcia and the children, is without merit. The trial court properly considered the substantial relationship that existed between Marcia and the children under WIS. STAT. § 48.426(3)(c). The trial court acknowledged the "value" of that relationship, particularly to Ariana who was older and had a more established relationship with Marcia. But the trial court then went on and considered the import of that relationship in comparison to the other

§ 48.426(3) factors and reasonably concluded that those other factors outweighed the value of Marcia's relationship with both Ariana and Javani.

¶21 The trial court may also, in its discretion, "afford due weight to an adoptive parent's stated intent to continue visitation with family members." ***State v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475. The trial court properly exercised that discretion here. There was an abundance of evidence on the record supporting Linda's testimony that she understood the value of Marcia's relationship with the children and that she had been and would continue to make reasonable efforts to nurture that relationship: traveling with the children to see Marcia in Milwaukee, inviting Marcia to their home in Indiana, setting up a video/computer feed, and allowing regular phone calls.

¶22 After thoughtfully considering Marcia's relationship with the children, Linda's testimony that she would honor that relationship insofar as it remains in the best interest of the children, and the other factors set forth in WIS. STAT. § 48.426(3), the trial court properly exercised its discretion and determined that it was in the best interest of Ariana and Javani to terminate Marcia's parental rights.

II. The trial court did not inappropriately consider matters extraneous to the decision to terminate Marcia's parental rights.

¶23 Marcia next asserts that the trial court, when making its decision to terminate her parental rights, inappropriately took into consideration: (1) Marcia's repeated outbursts during the dispositional hearing; and (2) the trial court's personal experience assisting with a family member facing the termination of her parental rights. I find no merit to these arguments and affirm the trial court.

¶24 With respect to Marcia's outbursts during the dispositional hearing, while the trial court certainly did mention and take note of Marcia's behavior during the hearing, the trial court's written decision demonstrates that Marcia's disruptions were only one of many factors the trial court considered in deciding to terminate Marcia's parental rights. Further, to the extent that Marcia's behavior in court demonstrated her immaturity and aggression issues, it was not improper for the court to consider that behavior and its effects on Ariana and Javani. Such behaviors were appropriately considered within the rubric of WIS. STAT. § 48.426(3).

¶25 Marcia next argues that the trial court judge improperly considered and compared her to a relative of the trial court who had faced the removal of her children from her home. At the end of the dispositional hearing, in an attempt to explain to Marcia its concerns with her behavior and attitude, the trial court mentioned a relative of its own, that while dealing with some particularly difficult stressors in her own life, struck her child. Social workers and police intervened, and the relative immediately took responsibility for her actions. She "danced on the head of a pin" with the support of her family to get her children back. The trial court then turned to Marcia and stated:

> And I don't know why you, three years from this -- removed from this, I don't understand that and can't do this. I will tell you that when people, when one person in a room of one hundred people stands in a corner and says: I'm just fine. And you are all out of your minds under these circumstances that is incomprehensible to me. I just can't get my arms around that. Your position all the way along has been the worker is crazy. You are just fine. Give me my kids back.
>
> And I, you know, the other thing that and I have to backup a little bit, [Marcia's attorney has been] pretty effective today. This case, at the conclusion of the

> fact-finding hearing no way, no how, absolutely not a termination of parental rights.
>
> And then we got to the last hearing and you are yelling at witnesses, sleeping on the desk and I'm thinking to myself how are we going to do anything else but terminate her parental rights in this case because we're all crazy and she is just fin[e] and there is no basis for our concerns whatsoever.

¶26 The trial court's follow-up to the relative's story demonstrates that the court did not intend for its relative's experiences to become "a yardstick against which Marcia's conduct was measured," as Marcia contends, nor did the story become such a measure. Instead, the story was meant to demonstrate to Marcia how unproductive her behaviors were and how those behaviors were frustrating her ability to regain custody of her children. The trial court's written decision amply demonstrates that the trial court properly considered all of the statutory factors and did not improperly take into consideration its relative's experience or compare Marcia to its relative when determining whether to terminate Marcia's parental rights.

By the Court.—Judgment affirmed.

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