COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3238 **Cir. Ct. No. 01 TP 113**

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

IN THE INTEREST OF CODY A.W., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LINDA A.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

¶1 FINE, J. Linda A.W. appeals from an order terminating her parental rights to Cody A.W. She claims that: 1) the trial court should not have terminated Linda A.W.'s parental rights to Cody; 2) there was insufficient evidence to sustain the jury's finding that Cody was in continuing need for

protection and services under WIS. STAT. § 48.415(2), which was a predicate to the termination of Linda A.W.'s rights to Cody; and 3) the trial court denied her due process of law. We affirm.

I.

¶2 Cody was born on January 26, 1997. He has Huntington's Disease, a fatal degenerative disease. According to the testimony of a neurologist specializing in Huntington's Disease, Cody has the "highest" level of indicators of the disease "that's ever been reported." The neurologist told the trial court that Cody's prognosis was "grim":

> We don't expect pediatric onset Huntington['s] Disease individuals to grow up right at all because of [the disease's] interference with their brain development[,] which is not completed. The child already has seizures, extremely ataxia [loss of muscle coordination], clumsiness, can't walk very well and is proceeding to have retardation or dementia, and that it would be a surprise if the child reached puberty.

Cody's foster mother described Cody's condition at the time of the trial:

> Currently Cody is completely dependent upon our care. He cannot feed himself. He cannot walk unassisted, and in fact it's become very difficult assisted to walk [*sic*]. He is wheelchair bound. We got the wheelchair about three weeks ago.
>
> When eating, he can only eat pureed foods and thickened liquids. He is unable to handle any kind of solid foods without a lot of assistance and constant monitoring.
>
> For the most part his care is one-on-one, 24 hours a day.

¶3 Cody's mother, Linda A.W., also suffers from Huntington's Disease and has severe mental and physical problems. Initially, she and Cody were placed in mutual foster care, with the foster parent supervising Linda A.W.'s care for

Cody. Cody and Linda A.W. lived in the foster home from July 1998 to May 1999, when Linda A.W. was moved to a nursing home because her mental and physical conditions deteriorated to the extent that she could not be left unsupervised with Cody. The social-service case manager for both Linda A.W. and Cody testified that by May of 1999, Linda A.W. would "often fall," and was "forgetful." She told the trial court that she believed that it was "substantially likely" that Linda A.W. would not be able to live independently within the year from the date of the trial. Indeed, a registered nurse testified that at the time of trial, Linda A.W.'s condition had degenerated so much that she ranged from "borderline extensive to [needing] total assistance with all activity of daily living, which includes bathing [and] dressing." The nurse told the trial court that Linda A.W. had "difficulty swallowing," and was also "on a pureed diet." The nursing-home nurse, opined that Linda A.W. could not be trained to care for a child with Huntington's Disease.

¶4 Linda A.W.'s sister, who was also Cody's guardian, testified that "a normal child of the age of four has more comprehension" than did Linda A.W., noting that when she visited Linda A.W. they could no longer talk; "[s]he will grin after about ten minutes, let me know she recognizes me." Linda A.W.'s sister also testified that she did not believe she could care for Cody and, as a consequence, wanted to be relieved of her responsibilities as Cody's guardian: "I have a couple injuries that may result in having operations on one or both of these areas in my back[,] which could pose as, I guess, a problem with me making, I guess, decisions upon my nephew's behalf."

¶5 Linda A.W. did not appear at the trial; her advocacy counsel waived her appearances because of her condition.

¶6 After a trial, a jury determined that termination of Linda A.W.'s parental rights to Cody was appropriate, finding: 1) that Cody had "been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law"; 2) that the Bureau of Milwaukee Child Welfare made "a reasonable effort to provide services to [Linda A.W.] contained in the court orders pertaining to Cody"; 3) that Linda A.W. "failed to meet the conditions established for the safe return of Cody" to Linda A.W.'s home; and 4) that there was a "substantial likelihood that [Linda A.W.] will not meet these conditions within the twelve-month period following the conclusion" of the trial. These findings were requisite for the trial court to consider whether termination of Linda A.W.'s parental rights to Cody was in Cody's best interests. WIS. STAT. § 48.415(2). The trial court determined that termination of Linda A.W.'s parental rights to Cody was in his best interests.

II.

¶7 As noted, Linda A.W. contests the trial court's order on three grounds. We discuss each in turn.

A. *Decision to terminate Linda A.W.'s parental rights to Cody.*

¶8 The decision to terminate a person's parental rights to a child is vested within the trial court's discretion, provided that the statutory grounds to termination are satisfied. ***Brandon S. S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). 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. ***Brandon S. S.***, 179 Wis. 2d at 150, 507 N.W.2d at 107 ("The

exercise of discretion requires a rational thought process based on examination of the facts and application of the relevant law."). We review *de novo* whether the trial court has applied the correct legal standard. ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

¶9 The "prevailing factor" that a trial court must consider in deciding whether to terminate parental rights is whether the "best interests of the child" will be served by termination. WIS. STAT. § 48.426(2). Among the components of "best interests" are:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The 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.
>
> (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 these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

¶10 In rendering its oral decision, the trial court made the following findings of fact:

- Cody "does not know" Linda A.W.;
- Linda A.W. never asked for visits with Cody;

- Cody's visiting with Linda A.W. at the nursing home would be "detrimental to his medically compromised immune system," and that it was not "worth the risk of infecting this child with possible diseases to accommodate an incompetent mother [for] whom the visit would have no value";

- To force visits with Linda A.W. on Cody even outside the nursing-home environment would "introduce a whole set of circumstances that would be confusing to him with no foreseeable upside"; and

- The foster parents with whom Cody lived have "bonded" with him, and he with them. "They are the people committed to his well-being, know him on a day-to-day basis. They respond to his needs, knows them [*sic*]." The trial court opined: "[T]hey're doing a fantastic job."

Linda A.W. does not challenge these findings.

¶11 In considering specifically the enumerated factors in WIS. STAT. § 48.426(3), the trial court found:

- There was no possibility of adoption;

- Cody's health was "a critical factor," that if he was "not dying from Huntington's disease, we wouldn't be here talking about this," and that Cody "never lived in [Linda A.W.]'s care without assistance";

- Cody had "no active knowledge of" Linda A.W.;

- Although Cody had a "limited relationship" with Linda A.W.'s sister, placement with her would not be practicable;

- Cody had no "relationship" with Linda A.W., and a "limited relationship" with Linda A.W.'s sister, but did not "appreciate them";

- Cody was unable to express a meaningful preference; and

- The factor under § 48.426(3)(e), the "duration of the separation of the parent from the child," was "likely

> not really relevant" and Linda A.W. "is unable to parent him in any event."

Linda A.W. does not challenge these findings either.

¶12 After making these findings and observations, the trial court presciently focused on what it appropriately saw as the "key factor"—namely: "Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the result of prior placements." WIS. STAT. § 48.426(3)(f). The trial court made the following findings in connection with this factor:

- Cody's only prior placements were "really only the foster home arrangement and the arrangement with" Linda A.W.'s sister;
- Cody's "[c]urrent placement is the right placement" for him;
- There was "no likelihood that Cody will have a future placement"; and
- The current foster family is "committed to him, come what may."

Linda A.W. also does not challenge these findings.

¶13 The plan for Cody presented to the trial court for approval in conjunction with the termination of Linda A.W.'s parental rights encompassed a "sustaining care" placement with the foster family under WIS. STAT. § 48.428, which, among other things, permits an adoption-like arrangement with a foster family if the trial court finds that adoption is "unlikely" or that "adoption is not in the best interest of the child." WIS. STAT. § 48.428(1). An order of sustaining-care placement must also transfer legal custody, as material to this case, to either

the state Department of Health and Family Services or to an appropriate "county department." WIS. STAT. § 48.428(2)(a).

¶14 Following the jury's verdict, the trial court entered an order terminating Linda A.W.'s parental rights to Cody. The order also transferred Cody's legal custody to, and vested guardianship in, the Bureau of Milwaukee Child Welfare. The trial court also approved a stipulation between the Bureau of Milwaukee Child Welfare and the foster family authorizing the foster family to make end-of-life decisions for Cody under WIS. STAT. § 155.01(5). In its oral decision, the trial court observed that the "sustaining care agreement in short gets us as close to the adoption that we would like to have as we can get given the financial impediment [to adoption of Cody by the foster family] to having [the foster family] taking on the financial responsibility for this child's illness."

¶15 In an essentially undeveloped argument, Linda A.W. contends that the trial court should not have terminated her parental rights to Cody because termination would not lead to a "more stable relationship" for him or improve his "health condition." Asserting that "[t]he only probable reason to terminate the parental rights of Linda A.W. would be to allow someone else to make the end-of-life decisions for the child." This, she contends, is not authorized by law. We disagree.

¶16 First, insofar as the trial court's decision to terminate Linda A.W.'s parental rights to Cody is concerned, its findings of fact and analysis reveals a cogent weighing of all of the applicable factors. Accordingly, it did not erroneously exercise its discretion.

¶17 Second, the explication of rights and responsibilities granted by WIS. STAT. § 48.428(3) to sustaining parents *vis a vis* the health-care needs of children

placed with them is specifically not limited to the routine matters set out in the subsections to (3) ("*Subject to the authority of the guardian and legal custodian of the child* and to any treatment or *dispositional plans for the child established by the court*, the sustaining parent has the rights and responsibilities necessary for the day-to-day care of the child, including *but not limited to*:") (all emphases added).[1] This broad grant of authority reflects legislative awareness both that unusual circumstances arise and that they often require solutions that might not have been foreseen.

¶18 Here, Linda A.W.'s sister did not want to continue as Cody's guardian. Additionally, the Bureau of Milwaukee Child Welfare, which, under ordinary circumstances, would, as Cody's guardian, most likely have had authority to make end-of-life decisions for Cody if certain conditions were met, *see* ***Lenz v.***

[1] WISCONSIN STAT. § 48.428(3) provides:

> **(3)** Subject to the authority of the guardian and legal custodian of the child and to any treatment or dispositional plans for the child established by the court, the sustaining parent has the rights and responsibilities necessary for the day-to-day care of the child, including but not limited to:
>
> (a) The authority to consent to routine and emergency health care for the child.
>
> (b) The authority to sign the child's application for a license under s. 343.15.
>
> (c) The authority to approve the child's participation in school and youth group activities.
>
> (d) The authority to travel out of state with the child and consent to the child's travel out of state.
>
> (e) The authority to act as the child's parent under subch. V of ch. 115 and s. 118.125.

L.E. Phillips Career Dev. Ctr., 167 Wis. 2d 53, 83–85 482 N.W.2d 60, 71–72 (1992); ***Spahn v. Eisenberg***, 210 Wis. 2d 557, 560, 566, 563 N.W.2d 485, 486, 489 (1997), faced a potential conflict of interest in connection with its receipt of federal money on Cody's behalf.[2] The Bureau also recognized that it would be in Cody's best interest "if his immediate caretakers are authorized" to make end-of-life decisions for him, considering the precarious condition of Cody's health. In view of the trial court's unassailed findings that Cody's foster parents love Cody and are committed to his welfare, we cannot say that it erroneously exercised its discretion in permitting them to make end-of-life decisions for Cody *in lieu* of the Bureau as, in essence, Cody's surrogate guardians for that purpose, rather than merely recommending to others what those decisions should be.[3]

B. *Sufficiency of evidence to sustain trial court's finding that Cody continued to need protection and services that Linda A.W. could not supply.*

¶19 In a largely undeveloped argument, albeit relying on an out-of-state case that injected an element of intent into whether a person's parental rights should be terminated with respect to a child for whom the person cannot care,

[2] We express no view whether the Milwaukee Bureau of Child Welfare or any other guardian would have the authority to make end-of-life decisions for someone who has not, while competent, executed a Power of Attorney for Health Care. *See* WIS. STAT. §§ 155.60 and 880.33(3). Linda A.W. has not challenged the premise of the assumption that the Bureau would have had that authority if it had not transferred it to Cody's sustaining parents. *See* ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issue not argued is waived).

[3] The one case upon which Linda A.W. relies for her contention that the trial court erred in vesting the sustaining parents with the guardian's apparent authority to make end-of-life decisions, ***King v. First National Bank of Kenosha,*** 39 Wis. 2d 80, 86–89, 158 N.W.2d 337, 340–341 (1968), is inapposite. The question there was whether a bank, as guardian of an incompetent's estate, providently relied on representations made to it by the guardian of the incompetent's person in connection with expenditures that allegedly benefited the guardian of the person and not her ward. Sadly, Linda A.W. quotes language from the case out of context.

Linda A.W. contends that the evidence to support the termination of her rights to Cody was insufficient because "no showing was made that she intentionally or neglectfully failed to meet the conditions established for [Cody]'s return in that her physical illness was not due to any culpable act on her part." We disagree.

¶20 As noted, the focus of the termination-of-parental-rights procedure in Wisconsin is on the best interests of the child, WIS. STAT. § 48.426(2), subject to the right of a parent who is "fit" to care for his or her child, WIS. STAT. § 48.424(4). There is no doubt from this record that Linda A.W. is not capable of caring for Cody, or even providing to him the most minimal of services. As such, she is "unfit"—no intent to harm or neglect is needed. *See* WIS. STAT. § 48.424(4) (parent deemed "unfit" if grounds for termination exist); ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 673, 599 N.W.2d 90, 97 (Ct. App. 1999). Children are not chattel, to be possessed by a birth parent irrespective of the consequences for them. ***Id.***, 228 Wis. 2d at 672–673, 599 N.W.2d at 97. Linda A.W.'s sufficiency-of-the-evidence contention is without merit.

C. *Notice to Linda A.W. of the termination of her sister's guardianship to Cody*.

¶21 In another largely undeveloped argument, Linda A.W. contends that she was denied due process of law because she had insufficient notice that her sister was going to resign her guardianship of Cody once Linda A.W.'s parental rights to Cody were terminated. Linda A.W. contends that the trial court should have held a separate hearing in connection with the sister's decision to resign the guardianship. She gives WIS. STAT. § 880.17 as purported authority for this

proposition.[4] This provision, however, merely permits a hearing, if requested, for the appointment of a successor guardian once the original guardian either resigns, dies, or is removed by the court. No hearing is required before the trial court may accept a guardian's resignation. Additionally, the extensive termination-of-parental rights proceedings provided ample evidentiary foundation for the trial court's appointment of the Bureau of Milwaukee Child Welfare as the successor guardian to Cody in place of Linda A.W.'s sister. Merely labeling a contention as one of constitutional dimension does not make it so. ***State v. Schlise***, 86 Wis. 2d 26, 29, 271 N.W.2d 619, 620 (1978). Linda A.W.'s claim that she was denied due process is without merit.

By the Court.—Order affirmed.

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[4] WISCONSIN STAT. § 880.17 provides:

> **Successor guardian. (1)** APPOINTMENT. When a guardian dies, is removed by order of the court, or resigns and the resignation is accepted by the court, the court, on its own motion or upon petition of any interested person, may appoint a competent and suitable person as a successor guardian. The court may, upon request of any interested person or on its own motion, direct that a petition for appointment of a successor guardian be heard in the same manner and subject to the same requirements as provided under this chapter for an original appointment of a guardian.
>
> **(2)** NOTICE. If the appointmet under sub. (1) is made without hearing, the successor guardian shall provide notice to the ward and all interested persons of the appointment, the right to counsel and the right to petition for reconsideration of the successor guardianship. The notice shall be served personally or by mail not later than 10 days after the appointment.

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