COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1733 **Cir. Ct. No. 2009TP106**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LADONNA E.,

RESPONDENT-APPELLANT,

KENNETH E.,

RESPONDENT.

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

¶1 FINE, J. LaDonna E. appeals the circuit court's order terminating her parental rights to Kenneth E., III.[1] She contends that the circuit court erroneously exercised its discretion in terminating her parental rights so the child could be adopted by her aunt rather than dismissing the petition and transferring guardianship to the aunt. *See* WIS. STAT. § 48.977. She does not argue that she should now get custody of her son. We affirm.

I.

¶2 Kenneth E., III, was born in July of 2006. In December of 2006, he was removed from LaDonna E.'s care. In June of 2007, he was found to be a child in need of protection or services. *See* WIS. STAT. § 48.345. The order was extended in May of 2008, *see* WIS. STAT. § 48.365, and was due to expire in May of 2010. Filing of the petition in April of 2009 tolled the order's expiration. *See* WIS. STAT. § 48.368 ("If a petition for termination of parental rights is filed … during the year in which … an extension order under s. 48.365 … is in effect, the … extension order … shall remain in effect until all proceedings related to the filing of the petition or an appeal are concluded."). The petition seeking to terminate LaDonna E.'s parental rights alleged that the boy was a child in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). LaDonna E. was born in February of 1989.

[1] The circuit court also terminated the father's parental rights to Kenneth E., III. This appeal only concerns the order insofar as it terminated the mother's parental rights. A decision on the father's appeal, appeal number 2010AP1520, is issued herewith. In her reply brief, LaDonna E. conditionally adopts the father's appellate arguments if we should accept them. Although an appellant may not raise new issues in a reply brief, *see* ***Richman v. Security Sav. & Loan Ass'n***, 57 Wis. 2d 358, 361, 204 N.W.2d 511, 513 (1973), given our decision in the father's appeal, LaDonna E.'s new contention is moot.

¶3 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427. LaDonna E. defaulted on the first phase, and does not challenge the default. Although present at the disposition phase, she did not testify.

¶4 The boy's case worker testified in support of the default prove-up that LaDonna E. had not satisfied the conditions that were established by the court order for the return of the boy to her custody even though the Bureau of Milwaukee Child Welfare had made reasonable efforts to help her do so. Specifically, the worker told the circuit court that she "personally referred [LaDonna E.] for a number of services that would allow her to enhance her protective capacities and help her meet those conditions of return" but that other than completing a "Parenting Class" she was not "cooperating with any Court-ordered conditions." Further, LaDonna E. did not have "a suitable residence" for the boy, having "a history of being transient and not having suitable, stable housing." Additionally LaDonna E. "continually dropped positive for THC." She also had mental-health problems, which the case worker described as "symptom of Depression," but only took "her medication infrequently."

¶5 LaDonna E.'s interaction with the boy was also problematic. The case manager testified that LaDonna E. "was unable to have successful visits with" the boy, and that at her "last supervised visit" some six or seven months before the hearing at which the case worker was testifying, "she started to yell at

[the boy] and threatened to spank his butt in the bathroom. And the Supervisor had to step in and ask [LaDonna E.] to be escorted out."

¶6 At the disposition hearing in March of 2010, the circuit court determined that it was in the boy's best interest to have "stability and permanence" in his life, and that thus termination was in the boy's best interests because it would permit LaDonna E.'s aunt, with whom the boy had been living since early January of 2008, to adopt him. LaDonna E. had wanted her aunt to be appointed guardian instead. Although the aunt's testimony at the disposition hearing is less than clear as to her understanding of what a guardianship rather than an adoption would entail, it was evident from her testimony that she wanted her relationship with the boy to be permanent and that she wanted to adopt him. As she said during the hearing, "it's not about me, [the boy's mother], or Kenneth's father; it's about little Kenny. That he needs to be … stable." LaDonna E.'s sole contention on appeal is that by "favor[ing] adoption," the circuit court erroneously exercised its discretion. As we discuss below, we disagree.

II.

¶7 A circuit court's decision whether to terminate a person's parental rights to his or her biological children is vested in the circuit court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993) ("A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court. A circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion."); *see also* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 620, 610 N.W.2d 475, 481 ("The ultimate determination of

whether to terminate parental rights is discretionary with the circuit court."). Whether a birth-parent's parental rights to his or her child should be terminated turns on what is in that child's best interests. *See* WIS. STAT. §§ 48.01(1) ("[T]he best interests of the child or unborn child shall always be of paramount consideration."); 48.426(2) ("The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter."). Thus, the focus at the disposition phase is on the child and not on the parent. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999).

¶8 WISCONSIN STAT. § 48.426(3) sets the non-exclusive factors that a circuit court should consider, if appropriate, in determining whether termination is in the child's best interest:

> In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (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.

In its written decision explaining why it believed that termination of LaDonna E.'s parental rights to the boy was in the boy's best interests, the circuit court opined that anything short of termination would leave the boy "in an adult tug of war over his custody" because the circuit court had "little to no faith in his birth parent's willingness to abide [by the aunt's] authority as guardian and to support and nurture Kenny's relationship with her in that context." The circuit court also explained that despite tension between the aunt and LaDonna E., it had "every faith in [the aunt's] expressed desire to maintain Kenny's relationship with his birth parents (and siblings) contingent upon their appropriate behavior."

¶9 The circuit court noted that "Kenny will be adopted." *See* WIS. STAT. § 48.426(3)(a). It also recognized that the boy was too young to express a preference but, based on the testimony it heard during the disposition phase (where it was undisputed that LaDonna E.'s aunt had bonded with the boy and that he calls her, according to her testimony, "[m]ommy"), that adoption would "formalize[] what is the reality in his mind; [the aunt] is and should remain his 'mother.'" *See* § 48.426(3)(d). The circuit court thus concluded, as we have seen, that termination was required because it was the boy's best chance to have "stability and permanence." In light of all this, it is abundantly clear that the circuit court sensitively and consistent with the law addressed all of the applicable factors. It did not, by any stretch of the imagination, erroneously exercise its discretion in rejecting the attempt to reduce the aunt's role to that of a mere guardian.

By the Court.—Order affirmed.

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