COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2876 **Cir. Ct. No. 2008TP331**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GABRIEL S.,

RESPONDENT-APPELLANT,

DEIDRA T.,

RESPONDENT.

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

¶1 CURLEY, P.J.[1] Gabriel S. appeals the order terminating his parental rights to Gracious S. He argues that the trial court erroneously exercised its discretion when it found him unfit, pursuant to WIS. STAT. § 48.415(2) (2009-10), because Gracious continued to be a child in need of protection or services. Gabriel S. also contends that the trial court erred when it failed to "properly address each of the six 'best interests'" factors enumerated in WIS. STAT. § 48.426(3) when it found that it was in Gracious's best interests to have his parental rights terminated.[2] This court disagrees with both contentions and affirms.

I. BACKGROUND.

¶2 Gracious S. was born on August 20, 2006, to Deidra T. and Gabriel S., who were married at the time, but separated shortly after her birth. Gracious and her two brothers (both named Gabriel, only one of whom is Gabriel S.'s child) continued to live with their mother. Gracious and her brother Gabriel T. remained in Deidra T.'s custody, and Gabriel S. Jr. began living with his father, Gabriel S. after a trial court ruled against placing the children in foster care. Several months later, Deidra T. was charged with child abuse after Gabriel,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The order terminating Gabriel S.'s right to Gracious contains a typographical error. It currently reads "the parental rights of Deidra T. and Gracious S." It should reflect the full name of Gabriel S. On remand, the clerk is directed to prepare an order containing the corrected name of Gabriel S. Deidra T. is not part of this appeal. Another child of Deidra T. was included in the petition. Gabriel S. is not the father of that child.

Gracious's half-brother, was found to have injuries consistent with child abuse. As a result, Gracious and her half-brother were placed in foster care.

¶3 Following the criminal charges, a CHIPS petition was filed, followed by a dispositional order dated September 7, 2007.[3] Gracious and her half-brother were found to be children in need of protection or services and the children remained in foster care. The dispositional order for Gracious was extended in 2008 until September 7, 2009. This new dispositional order contained several conditions that Gabriel S. needed to meet in order for Gracious to be placed in his care. Among the conditions Gabriel S. was required to fulfill were: having regular and successful visits with Gracious; having a safe, suitable and stable home; showing that he was interested in Gracious, including showing that he could care for and supervise her properly; having successful, extended visits with his children; and having the desire and ability to take care of his child on a full-time basis. Gabriel S. was unable to meet these conditions and a petition for termination of Gabriel S.'s parental rights to Gracious was filed on October 13, 2008.

¶4 The TPR case moved slowly through the courts. There were various adjournments caused by the failure of Gabriel S. to appear in court and to appear for depositions, and, in some instances, adjournments were by stipulation of the parties. Eventually, both parents waived their right to a jury trial and a court trial was held on March 15-19, 2010. Following the taking of testimony and arguments of counsel, the trial court issued a written decision finding Gabriel S. unfit. Beginning in June 2010, the trial court held a dispositional hearing, and in the

[3] CHIPS is an acronym standing for "child in need of protection or services."

written decision that followed, found that it was in Gracious's best interest to terminate Gabriel S.'s parental rights. This appeal follows.

II. ANALYSIS.

¶5 There are two phases in an action to terminate parental rights. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶10 n. 10, 293 Wis. 2d 530, 716 N.W.2d 845. First, the court determines whether grounds exist to terminate the parent's rights. ***Id.*** In this phase, "'the parent's rights are paramount.'" ***Id.*** (citation omitted). If the court finds grounds for termination, the parent is determined to be unfit. ***Id.*** The court then proceeds to the dispositional phase where it determines whether it is in the child's best interest to terminate parental rights. ***Id.***

¶6 Whether circumstances warrant termination of parental rights is within the circuit court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, this court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. *See* ***Rock County DSS v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "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." ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993) (citations omitted). Therefore, "[a] circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion." ***Id.*** Furthermore, a trial court's finding of fact will not be set aside unless against the great weight and clear preponderance of the evidence.

Onalaska Elec. Heating, Inc. v. Schaller, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

¶7 The trial court's decision does not constitute an erroneous exercise of discretion where the court made findings on the record, based its decision on the standards and factors found in WIS. STAT. § 48.426, and explained the basis for its disposition. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶8 Gabriel S. first contends that the trial court erroneously exercised its discretion when finding him unfit because it was Deidra T.'s fault that Gracious was taken into protective custody, and the crux of the State's case was limited to his failure to not be "sufficiently aggressive in seeking to wrest his child from the clutches of the child welfare authorities."[4] This court disagrees.

¶9 In the trial court's written decision finding that grounds had been proven to support the State's request that Gabriel S. be found unfit, the trial court specifically addressed Gabriel S.'s attorney's argument that Gabriel S. had nothing to do with the circumstances that led to the detention of the children, an argument that is being repeated here. The trial court wrote that this argument was "utter baloney." The trial court went on to point out that:

[4] In Gabriel's reply brief, he argues for the first time that condition Q found in the dispositional order dated September 7, 2007, which required him to "have successful extended visits with your child[ren], and show that you have the desire and ability to take care of your child[ren] on a full-time basis" does not apply to him because the box checked on the form applied only to the mother. However, he fails to note that the dispositional order dated June 26, 2008, the one in effect when the termination of parental rights suit was filed, does apply to him as the box checked after this condition reads "all parents."

> Mr. S[.] has not demonstrated and is substantially unlikely to demonstrate an ability and willingness to safely and appropriately parent Gracious on a daily basis. First and foremost, his lack of commitment to the responsibilities of parenting Gracious is patent. During all of 2007 and 2008, he has never requested or actively sought placement of his daughter while willingly taking custody of his son. Although he is the presumed father of Gracious, he eschews any responsibility for her at the time of child welfare intervention (and, as noted above, before) until DNA testing is completed. His attendance at visitations with his daughter was politely described as inconsistent until very recently. Only with the very active urging of [an aide] has he recently made even minimal inquiry as to the medical and other needs of his daughter; she had been in care for well in excess of two years at that time. I generally avoid saying offensive things to parents in my court, however some level of blunt truthfulness is warranted. By all appearances, Gracious has been an afterthought in Mr. S[.]'s life.
>
> ….
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> His daughter has been the responsibility of the child welfare system for nearly three years. He significantly contributed to the circumstances that lead to child welfare involvement. At no time—both at critical junctures and less critical junctures—has he ever demonstrated a commitment and ability to provide day to day care for her. He is clearly overwhelmed by the needs of the child presently in his care. Without an overwhelming commitment to his responsibilities to her—one that has not been forthcoming up to this very moment—he will not be able to safely and appropriately parent her in the future. The grounds are established to a reasonable certainty by clear, satisfactory and convincing evidence.

¶10 It is clear from the written order that the trial court rejected Gabriel S.'s testimony concerning his long-standing desire to have Gracious live with him. Instead, the trial court believed the State's witnesses who testified that Gabriel S. failed to consistently visit with Gracious, despite the fact that for most of the time he was free to retrieve her from day care or the foster parent's home. This trait of failing to follow through also could be seen in his care of his son, Gabriel Jr. School records reflected that Gabriel Jr. was tardy over forty times

during the school year and absent more than that many times. Gabriel S. also failed to follow through with an appointment with a doctor who was treating Gabriel Jr. for pneumonia.

¶11 Other witnesses explained how various services were offered by the Child Welfare Bureau to Gabriel S., which proved to be unsuccessful. The home management workers' assistance was discontinued because Gabriel S. was uncooperative. The case worker also was concerned that Gabriel S. was too dependent on her for Gracious's care. She testified that when Gabriel S.'s visitation was being supervised, he fell asleep during a visitation with Gracious. Also, testimony was introduced that despite having professional help with his parenting skills, Gabriel S. clung to his old and inappropriate discipline styles with his children.

¶12 Gabriel S. was also unable to provide a safe and stable home for his children. He moved frequently and often lived with various family members. One of the caseworkers also expressed concern that Gabriel S. was smoking marijuana, as she smelled it in the home and observed that Gabriel S.'s eyes were glassy. The trial court also heard from witnesses that Gracious did not want to visit with Gabriel S. and her behavior deteriorated over time.

¶13 In sum, the trial court heard that the Bureau provided enormous resources to Gabriel S. in the hopes that Gracious could be placed in his care, but he failed to meet the minimal conditions for her return. In the end, the trial court found it was Gabriel S.'s inactions, rather than his actions, that led the trial court to determine that Gabriel S. was an unfit parent. In doing so, the trial court properly exercised its discretion.

¶14 Gabriel S. next claims that the trial court erroneously exercised its discretion by failing to properly address each of the six "best interests" factors found in WIS. STAT. § 48.426(3). Specifically, he argues that the trial court failed to address whether "the child had substantial relationships with either her father, Gabriel S., or other paternal family members, and whether it would be harmful to the child to sever those relationships."

¶15 As noted, after the trial court has found a parent unfit the trial court must then determine whether the best interests of the child require termination of the parent's parental rights. *See* WIS. STAT. § 48.426(2). The standard of review is whether the trial court erroneously exercised its discretion in determining that it is in the best interests of the child to have the parental rights terminated. *See* ***David S.***, 179 Wis. 2d at 150.

¶16 A trial court's consideration of the child's best interests is guided by WIS. STAT. § 48.426(3), which provides:

> FACTORS. 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.

¶17 Gabriel S. complains that the trial court failed to address factor (c) and, as a result, this court should overturn the trial court's decision to terminate Gabriel S.'s parental rights. To be sure, the trial court commented on the relationship that Gracious had with her father. The trial court wrote:

> I would only reiterate my views expressed in the grounds phase…. He has never demonstrated an urgency in his commitment to his responsibilities to Gracious; he has allowed her to languish in foster care and, in doing so, he has allowed Ms. B[.] to become the most significant person and the most significant relationship in her life. [Gabriel S.'s] inability to prioritize the needs of his children to this very moment is patent and the quality of care he is providing to his son is barely adequate with the significant assistance of BMCW and his mother.
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> Lastly, the wishes of the children are somewhat indiscernible. They are young; recognize in some limited fashion that they are the prize in the adult "contest" that swirls around them; Gabriel [Jr.], in particular, is reported to favor permanent placement with Ms. B[.] I am obligated to consider their wishes; their wishes are, as noted, somewhat indiscernible and, given their age and conflicted loyalties, certainly malleable. I take primary guidance in regard to this factor in this case and all others involving younger children, from their conduct and the quality of their interactions with their parents and Ms. B[.] While, there too, one can find some conflicting currents, as set forth a[t] the outset, without doubt, the most significant, nurturing, safe and supportive relationship in their lives is with Ms. B[.] That relationship needs to be and will be made permanent through adoption.[] Ending their relationship with her would be directly contrary to their healthy development.

(Footnote omitted.)

¶18 The trial court also addressed the relationship Gracious has with her brother Gabriel Jr. and other siblings, which will be severed by the termination. The trial court agreed that "[l]egal severance of those relationships entails some harm." However, the trial court concluded that their potential adoption by the foster mother would be in their best interests, especially since the foster mother testified she would permit the biological parents' relationships to continue.

¶19 While the trial court makes no mention of any paternal family members, as the guardian ad litem noted in her brief, "there was no evidence of any other paternal relative having a relationship with Gracious that was presented to the court. It is not error for the court to fail to address something that wasn't there." This court agrees. Had Gabriel S. believed that members of his family had a significant relationship with Gracious, it was his obligation to advise the court. Here, the trial court made findings on the record, based its decision on the standards and factors found in WIS. STAT. § 48.426, and explained the basis for its disposition. The trial court properly exercised its discretion in finding that termination was in Gracious's best interest. Accordingly, this court affirms.

By the Court.—Order affirmed.

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