COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1177 **Cir. Ct. No. 01TP000031B**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ROBERT I.N., JR., A PERSON UNDER THE AGE OF 18:

WAUPACA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER M.A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Jennifer M.A. appeals an order of the circuit court terminating her parental rights to her son, Robert I.N., Jr. Jennifer contends the circuit court erroneously exercised its discretion in terminating her parental rights because the court did not expressly evaluate on the record each factor specified in WIS. STAT. § 48.426(3) before terminating her rights. We disagree with Jennifer's arguments and affirm.

Background

¶2 The facts in this case are not disputed. Robert I.N., Jr. was born on March 14, 2001. From his birth, there were serious concerns that Jennifer could not properly care for Robert. Jennifer's IQ is 67. As an infant, Robert had difficulty eating and needed to be held and fed in a special manner. In addition to having difficulty getting his formula down, Robert also had a reflux disorder that caused him to projectile vomit. If his head were not held correctly, he could gag and possibly choke to death. Hospital staff members were concerned both about Jennifer's inability to provide basic care for Robert as well as her inability to understand how to provide the special care necessitated by his medical conditions. These medical problems cleared up within a few months of birth, but since then Robert has had chronic ear infections and has begun to exhibit autistic traits.

¶3 On March 19, 2001, Robert was first placed in foster care. On July 2, 2001, Robert was adjudged to be a child in need of protection or services (CHIPS) and to be in need of continued placement outside the home. *See* WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STAT. § 48.415(2)(a). On June 28, 2002, the court granted a one-month temporary extension and, on July 22, 2002, entered a one-year supervision order for CHIPS.

¶4 Robert has spent almost his entire life in foster care. Since April 2, 2001, Robert has resided with Kevin and Brenda Petterson, who are interested in adopting him. Robert has not had any contact with Jennifer since August 2001. During this time, Jennifer has been unable to meet the conditions of the permanency plan.

¶5 On August 19, 2002, Waupaca County petitioned to have the parental rights of both Robert's father and Jennifer terminated. The County alleged that grounds for termination existed under WIS. STAT. § 48.415(1) and (2). On November 27, 2002, Robert's father voluntarily consented to the termination of his parental rights. On December 5, 2002, a fact-finding hearing was held to determine whether grounds for the termination of Jennifer's parental rights existed. At that hearing, there was testimony that Jennifer had an IQ of 67 and that parenting would be extremely difficult for Jennifer due to her deficient cognitive skills. There was also testimony that Jennifer did not comply with the visitation scheduling requirements and that after August 2001 visitation stopped altogether.

¶6 On December 6, 2002, the jury returned its verdict, finding grounds to terminate Jennifer's parental rights. On January 7, 2003, the dispositional hearing was held, and the written order terminating Jennifer's parental rights was entered on January 8, 2003.

Discussion

¶7 Jennifer argues that the circuit court erroneously exercised its discretion in terminating her parental rights because the court never evaluated the factors listed in WIS. STAT. § 48.426(3) and, in failing to do so, did not apply the proper standard. Jennifer contends the record must reflect that the court has adequately considered each of the six factors listed in subsec. (3). She also seems to contend that the court here failed to consider those factors because it did not make an explicit, on-the-record evaluation of each of them.

¶8 The circuit court's ultimate decision to terminate parental rights will be upheld unless there is an erroneous exercise of discretion. ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). Application of the correct standard of law to the facts at hand is necessary to a proper exercise of discretion. ***Sallie T. v. Milwaukee County DHHS***, 219 Wis. 2d 296, 305, 581 N.W.2d 182 (1998). Because this requires interpretation of a statute, our review is *de novo*. ***Id.*** WISCONSIN STAT. § 48.426 reads:

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. 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.
>
> **(3)** 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.

¶9 Jennifer cites to ***State v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, as support for her assertion that the court must expressly address each of the WIS. STAT. § 48.426(3) factors on the record. The relevant portion of ***Margaret H.*** reads: "While it is within the province of the circuit court to determine where the best interests of the child lie, the record should reflect adequate consideration of and weight to each factor." ***Margaret H***., 234 Wis. 2d 606, ¶35.

¶10 We need not address whether a circuit court must discuss each of the six factors on the record. When an appellate court is faced with inadequate findings, it may "review the record anew and affirm if a preponderance of the evidence clearly supports the judgment." ***Minguey v. Brookens***, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981). Using this methodology, we affirm the circuit court. We do this even though the supreme court has expressed a preference for remand, *see* ***id.***, because the record so clearly supports the circuit court's decision and remand would be pointless.

¶11 As to paragraph (a) of WIS. STAT. § 48.426(3), "[t]he likelihood of the child's adoption after termination," there was sufficient evidence before the circuit court that Kevin and Brenda Petterson, the couple with whom Robert has been living since he was two weeks old, were interested in formally adopting Robert.

¶12 As to paragraph (b), "[t]he 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," again, this issue was more than adequately addressed. Robert was twenty-one months old at the time of the disposition and had chronic ear infections and was exhibiting autistic traits. He was five days old when first placed in foster care and had a reflux disorder and problems taking his formula at that time.

¶13 As to paragraph (c), "[w]hether 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," there was evidence that Robert had not seen Jennifer since August 2001 and that it was very unlikely that he would even recognize Jennifer if he were to see her.

¶14 As to paragraph (d), "[t]he wishes of the child," the court was clearly aware of Robert's age and thus aware of the inapplicability of this factor, as Robert was far too young to comprehend the termination proceedings.

¶15 As to paragraph (e), "[t]he duration of the separation of the parent from the child," again, there was sufficient evidence that Robert had never lived in Jennifer's home, that he had been in foster care since he was five days old, and that he had not even seen Jennifer since August 2001.

¶16 As to paragraph (f), "[w]hether 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," there was sufficient evidence before the circuit court that Robert had been living with the Pettersons since he was two weeks old, that they wished to adopt him, and that DHFS was working towards this adoption.

¶17 Accordingly, we affirm the circuit court. The record clearly contains sufficient evidence as to each of the six statutory factors.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4 (2001-02).