COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-2300
03-2301

Cir. Ct. Nos. 02TP000413
02TP000415

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

NO. 03-2300
CIR. CT. NO. 02TP000413

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARIA S.,

RESPONDENT-APPELLANT.

NO. 03-2301
CIR. CT. NO. 02TP000415

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARIA S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

¶1 CURLEY J.[1] Maria S. appeals from the orders terminating her parental rights to two of her children, Timothy G. and Isabella S.[2] Maria S. contends that: (1) there was insufficient evidence to prove that there was a substantial likelihood that she would not meet the court-ordered conditions for the safe return of her children within twelve months under § 48.415(2) (2001-02);[3] and (2) the trial court erroneously exercised its discretion in terminating her parental rights to Timothy and Isabella. Because there was sufficient evidence to establish that there was a substantial likelihood that she would not meet the court-

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

[2] The original petition sought to terminate Maria S.'s parental rights to four children. Apparently, one child was subsequently dismissed from the petition. On September 25, 2003, this court consolidated the appeals concerning Maria S.'s parental rights to Timothy and Isabella. Another appeal, concerning Maria S.'s parental rights to the fourth child, Nadia S., has been separately decided by this court. *See* ***State v. Maria S.***, No. 03-2302-NM, unpublished slip op. (WI App Nov. 17, 2003). Accordingly, this appeal concerns only Timothy and Isabella, and as such, the background, analysis, and decision will be limited thereto.

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

ordered conditions for the safe return of her children, and the trial court properly exercised its discretion in terminating her parental rights, this court affirms.[4]

I. BACKGROUND.

¶2 Timothy was born on May 6, 1989. In June of 1999, while Maria S. was pregnant with Isabella, the Bureau of Milwaukee Child Welfare (BMCW) contacted Maria S. and offered several different services to her. She tested positive for both cocaine and marijuana and failed to follow through with the offered services. Shortly thereafter, she was incarcerated for failing to cooperate with her probation agent. As a result, Timothy was taken into protective custody on August 17, 1999. While she was incarcerated, a social worker met with Maria S. and advised her of the services she would need to participate in, upon release, in order to keep Isabella. On September 21, 1999, shortly after Maria's release, Isabella was born. Maria S. failed to consistently participate in any of the recommended programs or services. Several months later, when a family member brought Isabella to the doctor after she had been ill for several days, a social worker discovered that Maria S.'s whereabouts had been unknown to the family for most of December. Isabella was taken into protective custody in the beginning of January 2000.

¶3 Timothy and Isabella were subsequently found to be children in need of protection or services, and the court accordingly entered a dispositional order placing them outside of the parental home in March 2000. The dispositional order was extended annually, and on June 4, 2002, a petition was filed seeking the

[4] The guardian *ad litem* has also submitted a brief in this case. In it, she urges this court to affirm the orders of the trial court.

termination of Maria S.'s parental rights.[5] The petition alleged that Maria S. failed to assume parental responsibility for Isabella, pursuant to WIS. STAT. § 48.415(6), and that Timothy and Isabella remained in continuing need of protection or services and it was unlikely that Maria S. would meet the conditions established for their return within twelve months, pursuant to Wis. Stat. § 48.415(2). In January 2003, a jury found that there was sufficient evidence to establish that it was substantially unlikely that Maria S. would meet the conditions for the return of the children within twelve months.[6] A dispositional hearing was held in March 2003, and the trial court ordered the termination of Maria S.'s parental rights to Timothy and Isabella.

II. ANALYSIS.

A. There was sufficient evidence to establish that there was a substantial likelihood that Maria S. would not meet the court-ordered conditions for the safe return of her children within twelve months.

¶4 When reviewing the sufficiency of the evidence, "[a]ppellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d

[5] The petition also sought to terminate the parental rights of Isabella's adjudicated father, Albert S., Timothy's alleged father, Timothy G., and any unknown father of Timothy. The trial court ordered the termination of Timothy's father's parental rights, and he has not appealed. On the other hand, Albert S.'s parental rights have not been terminated. The jury did not find that grounds existed to terminate his parental rights, and he was accordingly dismissed from the petition. He is, however, presently incarcerated. Thus, this appeal concerns Maria S.'s parental rights only, and does not concern either father.

[6] Although the jury ultimately concluded that the WIS. STAT. § 48.415(2) ground existed for the termination of Maria S.'s parental rights to Isabella and Timothy, it should be noted that there were two dissenting jurors. Additionally, the jury determined that the WIS. STAT. § 48.415(6) ground for the termination of Maria S.'s parental rights to Isabella had not been established. Only one ground for termination need be established.

659. Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." ***Id.***, ¶39 (quoting ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.*** Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted). Indeed, an appellate court gives deference to a trial court's findings because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

¶5 The jury determined that there was sufficient evidence to establish WIS. STAT. § 48.415(2) as a ground for the termination of her parental rights, in that the BMCW made reasonable efforts to provide Maria S. with the court-ordered services,

> [t]hat [both Timothy and Isabella had] been outside the home for a cumulative total period of 6 months or longer[,] … that [Maria S.] has failed to meet the conditions established for the safe return of the [children] to the home and there [was] a substantial likelihood that [she would] not meet these conditions within the 12-month period following the fact-finding hearing[.]

WIS. STAT. § 48.415(2)(a)3. The court-ordered conditions required Maria S. to: (1) stay in touch and cooperate with her social worker; (2) maintain a safe and suitable home; (3) have regular and successful visits with the children; (4) if the order limits the visits, change the reasons for the limits; (5) show interest in the children; (6) restrain from interfering with the children's placement or services;

(7) complete the recommended psychological evaluation and treatment; (8) cooperate with the child's therapist when asked; (9) complete recommended AODA programs; (10) document six months of clean urinalyses; (11) show that she can provide the appropriate supervision and understands the special needs of the children; (12) have successful, extended visitation with the children; and (13) show that she has the desire and ability to care for the children on a full-time basis.

¶6 Maria S. contends that evidence was introduced at trial indicating that she "had been sober for four months, had obtained a sponsor who believed she was very motivated, had secured an apartment, was working two jobs, and was attending child nurturing classes." (Record citations omitted.) She argues that, in regard to the court-ordered conditions, she made an effort to maintain contact with her case manager by calling when she was unable to make her appointment, secured an apartment and two jobs in order to maintain a stable home, had successful, regular visits before the no-contact order was entered, showed an interest in her children by attending each of her court appearances, participated in drug treatment, and had three months of clean urine screens. Maria S. notes that at one point during their deliberations, eight jurors had apparently concluded that there was a substantial likelihood that she would meet the conditions, and insists that:

> [t]he jury's intense deliberation, coupled with the evidence, logically leads to the conclusion that there *was* a substantial likelihood [she] *would* meet those conditions within 12 months and that there was insufficient evidence for a jury to have decided that she would have been unable to do so.

(Emphasis in brief.)

¶7 Yet, the jury also heard ample evidence regarding: (1) her long history of drug abuse, even while pregnant; (2) her failure to complete multiple drug treatment programs; (3) her apparent inability to hold a job due to her addiction to drugs; (4) her fairly "transient" lifestyle, which included over ten different addresses, not including those of the "various friends" she stayed with at times, over the course of the more than three years that her children were in foster care; (5) her lack of involvement in Timothy and Isabella's medical care and education while they were in foster care; (6) the one to two month periods during which she had no contact with her social worker; (7) unsupervised visits during which the children were spending time with other relatives or friends instead of Maria S.; (8) her failure to follow up with the therapy programs recommended after a psychological evaluation; (9) her failure to successfully complete a parenting class; and (10) her frequent reliance on W-2 checks and friends for rent money.

¶8 While it appears that Maria S. had been sober for several months at the time of the trial, the jury was also presented with evidence of her past relapses following several periods of sobriety. Further, although she was allegedly working two jobs at the start of the trial, she also testified that she had only been doing so for about a month and that she had not worked for over a year prior to that. And, while it does appear that she had secured an apartment prior to the start of the trial, the jury was also presented with evidence indicating that she had only lived there for approximately one month, and was only able to do so because of a friend's financial help. Thus, while it does appear that Maria S. arguably may have been attempting to turn her life around, it was reasonable for the jury to conclude that it was substantially unlikely that she would meet the court-ordered

conditions within twelve months, and there was credible evidence to support that conclusion.

B. The trial court properly exercised its discretion in terminating Maria S.'s parental rights.

¶9 Provided the statutory grounds for termination are satisfied, the decision to terminate parental rights is within the province of the trial court's discretion. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). "[T]he trial court must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child." ***Mrs. R. v. Mr. and Mrs. B.***, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981) (citation omitted).

> 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.

David S. v. Laura S., 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). "A circuit court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and an application of the correct standard of law." ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402. WISCONSIN STAT. § 48.426 states:

> **Standards and factors. (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.

¶10 Referring to her argument that there was insufficient evidence "to support the finding that there was a substantial likelihood that [she] would have been unable to meet the conditions … within [twelve] months[,]" Maria S. insists that "the [trial] court erred in concluding that [she] had not come close to meeting the conditions of the continuing CHIPS order and should not have terminated [her] parental rights[.]" She also argues that "[a] court may consider an adoptive parent's promise to continue the relationship [with the biological family], but is not bound to hinge its determination on that *legally unenforceable promise*." (Emphasis in brief; citation omitted.) Maria S. contends that the court placed emphasis on the foster mother's legally unenforceable promise, did not recognize that it was made only in respect to Timothy, and is it unclear whether the foster mother will allow Maria to see Isabella. She also notes that "Timothy made it clear that he wanted to go home with his mother if he could."

¶11 During the dispositional hearing, the trial court heard additional testimony from Maria S., two social workers, and the foster mother. After considering the testimony and hearing argument from the State, Maria S., and the guardian *ad litem*, the trial court addressed Maria:

> Since [the jury returned its verdict] you've had sort of your last opportunity to show the Court that even though they found that [grounds exist to terminate], you believe it's in the children's best interest not to terminate your rights in spite of that fact. Part of the evidence that has come out regarding your ability – and I'm not talking about your willingness but your ability – to meet the needs of your children and therefore show me it's in their best interest for you to be their parent, part of the evidence that's come in has really been distressing.
>
> If there's any time in your life where making appointments ordered by the court was important, more important than a dentist appointment, more important than anything else, it's right now. Urinalysis, therapy, group sessions, home visits to show the worker that you've got a stable home. I don't know how you could not have focused on the importance of those events for today. Somehow you've – your life overwhelmed you. You said you just couldn't do it. Either the job was too much or you needed sleep or something got in the way that you couldn't meet these very basic, important obligations. So that's how you come before me.

The court then went on to consider the best interests of each child.

¶12 In regard to Isabella, the court acknowledged that since the father's rights had not been terminated, and thus there was not a likelihood of adoption, the situation was "a very knotty problem." Yet, after considering the stability of her current placement with the foster mother and Timothy, the fact that her current placement is the only home she has ever known, her relationship with the foster mother, its belief that Maria S. had not "moved very close to being able to show that [she] can provide a stable and permanent placement" for her, and its belief that the foster mother would not "sabotage or undercut" Maria S.'s contacts with

Isabella, the trial court found that it would be in Isabella's best interest for Maria S.'s parental rights to be terminated. That was reasonable. The trial court employed a rational thought process based on an examination of the facts and an application of the correct standard of law.

¶13 In regard to Timothy, the trial court noted that he lived with Maria S. for ten years, and but for her drug addiction, she "might still have that relationship going." Yet, the court indicated that during the three and a half years that Timothy was removed from her care, she failed to meet the conditions for his return. The trial court noted that "[d]uring the period of [her] addiction Timothy went on to thrive[,]" and that he is doing well socially, academically, and athletically. The trial court went on to address the issue of adoption. It noted that the foster mother wished to adopt Timothy and that:

> [i]n a perfect world or if things were better than they are in this world, he would like to be raised by his mother. He would like to be in a stable home with his mother. If that is not possible, if his mother can't provide a stable home and can't be found able to raise him as he deserves, he wishes to be adopted. I find that credible testimony and I interpret that as saying his wishes are – given all the circumstances – that he be adopted.

The court went on to conclude that it did not think that Timothy would be harmed by being adopted, and that he would be able to maintain relationships with his siblings and have contact with his mother. It also noted that he was of the age that he would be able to maintain family "relationships which are to his benefit." The court opined that the time he has spent away from his mother has "provided him with the greatest stability in his life and he is apparently thriving from it." As such, the court found that "while it is unusual and difficult," the State met its burden and concluded that the termination would be in Timothy's best interest. Again, although not an easy decision, the trial court employed a rational thought

process that considered the facts and applied the proper standard of law, and came to a reasonable result.

¶14 Finally, this court concludes that Maria S.'s apparent argument that the court placed undue weight on the foster mother's promise to allow Timothy to maintain contact with his relatives, and that it was unclear whether the foster mother intended to allow Isabella to have contact with Maria S., is unpersuasive. In ***State v. Margaret H.***, 2000 WI 42, ¶¶29-30, 234 Wis. 2d 606, 610 N.W.2d 475, the supreme court stated:

> [W]e note that WIS. STAT. § 48.426(3)(c) requires only that the circuit court examine the impact of a legal severance on the broader relationships existing between a child and his or her family. In its discretion, the court may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor.
>
> … The circuit court may within its discretion consider her good faith promise, but it should not be bound to hinge its determination on that legally unenforceable promise.

In that case, the trial court dismissed the petition for the termination of parental rights because it determined that the children would be harmed by the severance of the substantial relationship the children had with their grandmother, who was also their guardian. The court of appeals reversed the trial court signifying that there was no indication in the record that the relationship would be severed by the termination, noting the foster parent's stated intent to continue contact between the children and their birth family. The supreme court reversed the court of appeals after a lengthy exercise of statutory interpretation, and essentially concluded that § 48.426 requires an analysis of the listed factors in the determination of the best interest of the child, and that § 48.426(3)(c) "requires courts to access the harmful effect of [the legal severance resulting from a termination of parental rights] on the

emotional and psychological attachments the child has formed with his or her birth family." ***Margaret H.***, 234 Wis. 2d 606, ¶26. As the trial court considered only the "severance" factor, the supreme court remanded the case to the trial court to determine the best interests of the children.

¶15 Here, as the record makes clear and as indicated above, the trial court did not base its decision solely on the "severance" factor, and did not place undue weight on the foster mother's apparent promise to maintain contact with the biological family. The trial court concluded that neither Timothy nor Isabella would be harmed by the termination of Maria S.'s parental rights. Indeed, the court was careful to note that Timothy is of the age that he could pick up the phone and contact his birth family if he chose to do so. The trial court properly considered the WIS. STAT. § 48.426(3)(c) factor in its evaluation of the children's best interests.

¶16 Accordingly, this court affirms.

By the Court.—Orders affirmed.

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