COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-3176 **Cir. Ct. No. 04-TP-02**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO WILLIAM J.T., JR., A PERSON UNDER THE AGE OF 18:

LISA B.,

PETITIONER-RESPONDENT,

V.

WILLIAM J.T., SR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] William J.T., Sr., appeals an order terminating his parental rights to his son, William J.T., Jr. The termination petition alleged

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

abandonment and failure to assume parental responsibility. The abandonment allegation was dismissed when the jury found William, Sr. had good cause for failing to have contact with William, Jr. William, Sr.'s parental rights were terminated based on the jury's finding that he failed to assume parental responsibility. He argues (1) the court should have considered the jury's determination that William, Sr. had good cause for failing to have contact with William, Jr. when deciding whether to terminate his parental rights based on failure to assume parental responsibility; (2) the court failed to weigh all the dispositional factors, particularly whether the child had substantial relationships with William, Sr.'s family, and that Lisa B., William, Jr.'s mother, contributed to the duration of separation between William, Sr. and William, Jr.; and (3) the guardian ad litem improperly referred to William, Jr.'s best interests in her closing argument to the jury, requiring a mistrial. We disagree and affirm the order terminating William, Sr.'s parental rights.

BACKGROUND

¶2 On February 4, 2004, Lisa petitioned to terminate William, Sr.'s parental rights to their son, William, Jr., alleging abandonment and failure to assume parental responsibility. At trial, William, Sr.'s defense was that Lisa interfered with his relationship with William, Jr.

¶3 During closing arguments the guardian ad litem, Elizabeth Smith, addressed the jury. She stated,

> And my job here today is to represent the interests of [William, Jr.]. I don't represent either party. I—I've spoken with both parties but certainly I don't come before you today and assert one position of theirs or another.

> But I ask you to take the pieces of the puzzle, to put them together, and ask yourself: Does it add up that the contacts in place were significant? Were they more than incidental?

She then concluded that the facts do not show "a campaign to keep [William, Sr.] away from his child." Instead, Lisa was protecting William, Jr. "from sporadic contacts of an individual coming in and out of his life."

¶4 After the jury retired to deliberate, William, Sr. moved for a mistrial based on Smith's statements. He argued that Smith improperly invoked William, Jr.'s best interests. He contended that saying she represented the "interests" of the child is the same as saying she represented his "best interests." He argued that, as a result, "she's cloaking herself with the mantle of having some special status before the jury that neither of the parties has." The court stated it would take the matter under advisement pending the jury's verdict.

¶5 As to the issue of abandonment, the jury found that William, Sr. failed to communicate or visit with William, Jr. for a period of six months or longer. However, it also found that William, Sr. had good cause for failing to communicate or visit with his son. As a result, the court dismissed the abandonment allegation.

¶6 At the dispositional hearing, the court addressed William, Sr.'s motion for a mistrial. It concluded:

> Ms. Smith really referenced that she represented the interests of the child. She didn't argue the best interest. She was just really—as an introductory statement explaining to the jury what her role was, and that's to represent the interest of the child.
>
> The comment by Ms. Smith was close. But given the context within which it was made, the context that it was made, I'm satisfied that it did not violate the argument—or

> the prohibition against arguing welfare and best interest of the child. It was merely introductory, given the context.

Therefore, the court denied the motion.

¶7 Next, the court turned to a postverdict motion filed by William, Sr. He argued that the termination petition should be dismissed because at least one reason he did not assume parental responsibility was due to Lisa's interference. He argued that if he had good cause to fail to communicate or visit with William, Jr., resulting in dismissal of the abandonment allegation, the same should apply to the failure to assume parental responsibility allegation.

¶8 The court acknowledged the apparent inconsistency with the verdicts. It expressed a concern that a parent could prevent the other parent from contact with a child for a period of time, file a petition to terminate the other parent's rights to the child, and the other parent would not be able to use the parent's interference as a defense. However, the court ultimately noted that the statute regarding abandonment provides for a defense of good cause whereas the statute regarding failure to assume parental responsibility does not. It stated, "they are two separate theories of law and that, even though a jury found in this case as to one theory an excuse by [William, Sr.], that excuse does not carry over on the failure to assume parental responsibility." Therefore, the court denied the motion.

¶9 The court then proceeded to discuss the statutory factors concerning whether to terminate William, Sr.'s parental rights. It determined that the deciding factor was the duration of the separation of William, Sr. from William, Jr.:

> [William, Sr.] has been a convenient parent by his own choosing. This child has unfulfilled promises, has gone great many months when there was no contact from dad. When dad did have contact, it was inconsistent. The child is entitled under these circumstances to have consistency, to have stability.

Ultimately, the court concluded that "although [Lisa] did frustrate [William, Sr.'s] purpose, that frustration does not overcome the inconsistent behavior of [William, Sr.]." Thus, the court terminated William, Sr.'s parental rights to William, Jr.

DISCUSSION

¶10 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. ***Rock County DSS v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). 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 HHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

A. Application of the jury's finding of good cause regarding abandonment to failure to assume parental responsibility

¶11 WISCONSIN STAT. § 48.415(1) discusses abandonment as a ground for termination of a parent's rights. The statute provides that abandonment is not proven if a parent shows that he or she had good cause for having failed to visit or communicate. WIS. STAT. § 48.415(1)(c). However, WIS. STAT. § 48.415(6), which discusses failure to assume parental responsibility, does not provide a good cause defense.

¶12 William, Sr. contends the trial court could not ignore the jury finding on abandonment when considering failure to assume parental responsibility, even though the statute regarding failure to assume parental responsibility does not

provide a good cause defense. He argues that ignoring this finding causes an unreasonable or absurd result.

¶13 Questions of statutory construction or the application of a statute to undisputed facts are questions of law we decide independently of the circuit court. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). When we interpret and apply statutes, our aim is to discern the legislative intent, and we look first to the statutory language. ***McEvoy v. Group Health Co-op***, 213 Wis. 2d 507, 528, 570 N.W.2d 397 (1997). If the language clearly and unambiguously sets forth the legislative intent, we apply that language to the facts at hand. ***Reyes v. Greatway Ins. Co.***, 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999). When statutory language is ambiguous, we examine other construction aids, such as legislative history, context, and subject matter. ***State v. Waalen***, 130 Wis. 2d 18, 24, 386 N.W.2d 47 (1986).

¶14 William, Sr. argues WIS. STAT. § 48.415(6) is ambiguous because, while it does not specifically provide a defense, it does not specifically prohibit one either. Even if we assume that William, Sr. is correct that the statute is ambiguous, we conclude that the legislature's intent was that there not be a good cause defense to an allegation of failure to assume parental responsibility.

¶15 In ***Ann M.M. v. Rob. S.***, 176 Wis. 2d 673, 683, 500 N.W.2d 649 (1993), our supreme court concluded:

> Sections 48.415(6)(a)2 and (b), Stats., no longer require a showing that the father had the opportunity and the ability to assume parental responsibility for the child. This requirement was contained in these sections prior to 1988; however, the legislature specifically removed the requirement in 1988. Act of April 23, 1988, ch. 383, sec. 15, 1987 Wis. Laws 1431, 1433. Thus, the Wisconsin legislature has concluded that a person's parental rights may be terminated without proof that the person had the

> opportunity and ability to establish a substantial parental relationship with the child. (Footnote deleted).[2]

That the legislature omitted the defense from the section on assuming parental responsibility but not the section on abandonment evinces a clear intent that the defense exists in one case but not the other. Thus, there is no statutory defense to failure to assume parental responsibility as there is to abandonment. The court therefore did not err by refusing to apply the jury's determination regarding abandonment to failure to assume parental responsibility.

¶16 William, Sr. next argues that considering parental interference only at the dispositional phase of the proceeding was not sufficiently protective of his rights. He recognizes that a termination proceeding is a two-step process. In the fact-finding phase, "the parent's rights are paramount." ***Julie A.B.***, 255 Wis. 2d 170, ¶24. At the dispositional phase, the focus shifts to the child's interests. ***Id.***, ¶28. William, Sr. argues that because he could not present a defense of good cause for the failure to assume parental responsibility ground, his rights were not addressed at the fact-finding stage. He does not argue that the termination process is inherently insufficient. Instead, he merely argues that, "at least in this particular situation," Lisa's interference should have been addressed at the fact-finding hearing.

¶17 We note that William, Sr.'s argument is more properly addressed to the legislature than the courts. The trial court properly followed the procedure laid out by the legislature for conducting the proceedings. Furthermore, the legislature cannot be expected to address every scenario under which its law might be

[2] WISCONSIN STAT. § 48.415(a)(2) of the 1993-94 statute has been reworded and is now WIS. STAT. § 48.415(6)(a).

applied. "[T]he very nature of today's society makes it impossible for the members of the legislature to forecast 'the particular condition or set of facts to which someone now suggests applying the statute.'" ***State v. Knutson, Inc.***, 196 Wis. 2d 86, 97, 537 N.W.2d 420 (Ct. App. 1995) (quoted source omitted).

¶18 Finally, William, Sr. argues that to disallow consideration of the jury's verdict regarding good cause when considering failure to assume parental responsibility violates his due process rights. We disagree.

¶19 William, Sr.'s argument relies upon a faulty premise. At the dispositional hearing, the court followed the prescribed statutory course for determining whether to terminate William, Sr.'s parental rights. Contrary to William, Sr.'s contention, one of the factors the court considered was Lisa's interference with William, Sr.'s relationship with William, Jr. However, the court determined that other factors weighed more heavily in favor of terminating William, Sr.'s parental rights. There was no violation of William, Sr.'s due process rights. That William, Sr. does not have a defense available to him that he would like to have does not result in a violation of his constitutional rights.

B. Whether the trial court took into account the proper factors at the dispositional phase

¶20 There are several factors the circuit court should take into account when determining whether to terminate a parent's rights. *See* WIS. STAT. § 48.426(3). One of these is "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." WIS. STAT. § 48.426(3)(c). William, Sr. argues that the court failed to properly consider the relationships William, Jr. had with William, Sr.'s family in the past. He argues the court interpreted the word "has"

in the statute to mean it should take into account present relationships only. However, William, Sr. misinterprets the court's statements. The court stated:

> The statute contemplates, 48.426(3)(c), one of the factors, whether the child has—has substantial relationship with a parent or other family members. Little Billy had—and I'm emphasizing the past tense, had—a substantial relationship with [William, Sr.'s] mother and dad, siblings, and Little Billy's cousins.

The court was simply noting that William, Jr.'s contacts with William, Sr.'s family occurred primarily in the past. There is no indication the court refused to take the contacts into account because they occurred in the past.

¶21 Another factor the court is to consider is "the duration of the separation of the parent from the child." WIS. STAT. § 48.426(3)(e). William, Sr. argues the court failed to take into account Lisa's interference in his relationship with William, Jr. when it considered the duration of separation. However, as indicated, the court did take Lisa's interference into account. It specifically said that Lisa "did frustrate [William, Sr.]'s purpose, [but] that frustration does not overcome the inconsistent behavior of the father."

¶22 We note that the court provided an extremely thorough discussion of each statutory factor when determining whether to terminate William, Sr.'s parental rights. William, Sr. might disagree with the emphasis the court put on one factor or another. However, the court made findings supported by the record, based its decision on the proper statutory standards and factors, and explained the basis for its disposition. Therefore, termination of William, Sr.'s parental rights was a proper exercise of the court's discretion. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶30.

C. The guardian ad litem's statement to the jury

¶23 William, Sr. argues the guardian ad litem, Elizabeth Smith, improperly invoked William, Jr.'s best interests when she told the jury she represented William, Jr.'s interests. While William, Sr. acknowledges Smith never used the words "best interests," he contends saying she represents William, Jr.'s "interests" is essentially the same thing. He argues that, as a result of Smith's statement, the jury was led to believe she had a special status and that she was more credible because she did not represent either party. Therefore, he argues he was entitled to a mistrial. We disagree.

¶24 A guardian ad litem has a right, pursuant to WIS. STAT. § 805.10, to argue the facts to the jury at the fact-finding stage. The guardian ad litem cannot, however, invoke the best interests of the child in statements to the jury. ***Waukesha County DSS v. C.E.W.***, 124 Wis. 2d 47, 70, 368 N.W.2d 47 (1985). Instead, it is the function of the court to decide a child's best interests. WIS. STAT. § 48.424(3).

¶25 Lisa and Smith[3] argue that Smith was merely introducing herself to the jury and explaining her role in the case. WISCONSIN STAT. § 48.235(6) states: "In jury trials under this chapter, the guardian ad litem or the court may tell the jury that the guardian ad litem represents the interests of the person or unborn child for whom the guardian ad litem was appointed." We have held that such an introduction is not only informative, but is desirable. *See, e.g.,* ***D.B. v. Waukesha County HSD***, 153 Wis. 2d 761, 770, 451 N.W.2d 799 (Ct. App. 1989).

[3] Smith filed a separate brief in this case addressing only this issue.

¶26 We conclude that Smith's statement was proper. She informed the jury of her role. She then referred to the evidence in the case as pieces of a puzzle that the jury should put together to determine whether there were grounds to terminate William, Sr.'s parental right. She at no time asked the jury to consider, or implied that it should consider, William, Jr.'s best interests when deciding whether to terminate William, Sr.'s rights. She merely argued the facts of the case, as permitted by the statute, and asked to jury to draw its own conclusions from the facts. Thus, there was no error and William, Sr. was not entitled to a mistrial.

By the Court.—Order affirmed.

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