COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP2639 **Cir. Ct. No. 2010TP122**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SOPHIA S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Sophia S. appeals the trial court's order terminating her parental rights to Christopher T., Jr. Sophia S. argues that there is insufficient evidence in the record to support the trial court's finding that she is unfit on grounds of continuing CHIPS and failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(2) and (6). Sophia S. also argues that WIS. STAT. § 48.415(6) is unconstitutional on its face. For the reasons discussed below, we affirm.

Background

¶2 Sophia S. is the mother of Christopher T., Jr. Before Christopher was born in June 2009, the Dane County Department of Human Services removed two other sons from her care and custody in 2007 due to allegations of child abuse and neglect. At the time of Christopher's birth, these sons were still in foster care. Five days after he was born, Christopher was removed to foster care, and at the time of the termination of parental rights proceedings, had never been out of foster care since his initial removal.

¶3 The Department filed a petition for termination of Sophia's parental rights to Christopher in November 2010. The Department filed an amended petition for termination of Sophia's parental rights to the two older boys in December 2010. The cases of the three boys were consolidated in January 2011.

¶4 The petitions seeking to terminate Sophia's parental rights listed several grounds for termination. As to Christopher, the petition alleged that he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

continued to be in need of protection or services (CHIPS), pursuant to WIS. STAT. § 48.415(2), and that despite reasonable efforts by the Department to provide appropriate services to Sophia, she had failed to meet the conditions established for Christopher's return. According to the petition, Sophia had also failed to assume parental responsibility for Christopher as defined by WIS. STAT. § 48.415(6).

¶5 A comparison of the two petitions reveal substantial similarities. Relating to CHIPS, the following paragraphs were either identical or substantially identical:

- Sophia attended less than half of the scheduled visits with all three sons;
- Sophia failed to timely sign releases;
- Sophia failed to attend parenting classes or anger management classes and mental health referrals by the Department, requirements set forth in the original court orders on CHIPS;
- Sophia failed to establish a stable home, living transiently with friends and others;
- Sophia failed to provide the Department with any verifiable information regarding her jobs and income;
- Sophia failed or refused to take the Department ordered urinalysis tests and the results were therefore deemed positive; and

- Sophia has significant money judgments against her, as well as another case pending, which impacted her ability in the future to maintain safe, suitable and stable housing.

Both petitions also conclude that, based on Sophia's above behavior and lack of progress, "there is a substantial likelihood that [Sophia] will not meet these conditions within the nine month period following the fact-finding hearing on this petition."

¶6 At the December 14, 2010 hearing, Sophia appeared by telephone, Sophia's counsel entered a denial on behalf of Sophia and requested a jury trial for the two older boys. Counsel also anticipated requesting a jury trial on the grounds phase with respect to Christopher, pending counsel's appointment to the case.

¶7 At a pretrial hearing held on December 22, 2010, Sophia again appeared by telephone and her counsel appeared in person. The court ordered briefing on whether the petitions for all three children should be consolidated for trial. At the January 26, 2011 pretrial hearing, Sophia again appeared by telephone. The court ordered Sophia to appear in person at the next hearing, scheduled for February 16, 2011, or face the possibility of default on motion by the County. Sophia personally assured the court that she would appear in person. However, on February 16, Sophia, due to an issue regarding bed bugs, appeared by telephone rather than in person. At this hearing, the court again ordered Sophia to appear in person at the next hearing, set for March 9. The court informed Sophia that if she again did not appear in person, she would be subject to being found in default. She again personally acknowledged the court's order.

¶8 At the March 9, 2011 hearing, Sophia did not appear at all; her counsel appeared in person. The hearing commenced one hour later than

scheduled. The County then moved for a finding of default, based upon Sophia's failure to obey the court's multiple orders to appear in person. Sophia's counsel objected, noting that the weather had delayed attorneys in getting to court on time, with their reliable cars. The court and Sophia's attorney attempted to contact her through multiple telephone numbers, but were unable to reach Sophia. The court then permitted the County to proceed on the default and began the fact-finding hearing. The court also stated that if it did enter a default on grounds, it would entertain a motion for reconsideration of the default should Sophia have some good reason for not appearing. The court then began the fact-finding hearing as to all three sons, with Sophia's counsel present.

¶9 The County called only one witness, Department Social Worker Kate Gravel. Gravel testified that she had worked on the family's case (all three boys) since 2007. She verified that she was the custodian of the records and that the department maintained only one "family" file, so that all the information as to Sophia and her children was included in the one file. After reviewing the amended petition for the two older sons, specifically paragraphs one through twenty-three, Gravel testified as follows:

> A I'm looking at the Amended Petition for Termination of Parental Rights for [M.S.] and [D.S.].
>
> Q And looking at the allegations in that petition, is the nature of the allegations being made with regard to Christopher T[.], Junior substantially similar as it relates to the mother's conduct?
>
> A Yes.
>
> ….
>
> Q And is all the information in those paragraphs true and correct?
>
> A Yes.

> Q And to the extent, either in your testimony, or in the content of this exhibit that professional opinions have been expressed, are those expressed to a reasonable degree of professional probability?
>
> A Yes.

The County then concluded its direct examination of Gravel and moved into the record as Exhibit 1 the amended petition for termination of parental rights for M.S. and D.S.. The Exhibit was received into evidence. Sophia's counsel had the opportunity to cross-examine Gravel, but chose not to do so. A counsel for a purported father of one of the older boys entered the courtroom at this point and the court summarized Gravel's testimony for her:

> And Ms. Bosben, it's appropriate you are here, because it's your turn to ask Ms. Gravel questions if you want to ask any. This is relative to a default being sought against [Sophia]. And just to briefly summarize her testimony, she's confirmed the matters set out in the various petitions as true and correct. That's the essence of it. No one else has asked her any questions.

¶10 Sophia's counsel then again requested that the court hold open the fact-finding hearing and not find Sophia in default. The court, unwilling to speculate as to the reasons for Sophia's failure to appear, found that the County had established "*prima facia* [sic] grounds for default" and that "the matters that are set out in the petitions do establish *prima facia* [sic] grounds as well for grounds, termination of parental rights grounds, specifically, as to [Sophia's] failure to assume parental responsibility and continuing CHIPS." The trial court then found Sophia in default and found her to be unfit. The court reiterated its willingness to entertain a motion for reconsideration of the default finding upon a showing of good cause by Sophia.

¶11 Sophia's counsel attended the next hearing in this case, on April 4, 2011. At this hearing, the court informed counsel that Sophia had contacted the

court's office on March 9 and had been told to contact her attorney. Sophia had also contacted the court on April 4, and the court staff informed her of the date and time of this hearing. However, at the time of the hearing, Sophia had not appeared, either in person or by telephone. Neither Sophia's counsel nor Social Worker Gravel had been able to reach Sophia on the three telephone numbers Sophia had previously provided. After unsuccessfully attempting to reach Sophia by telephone after the start of the hearing, the court moved the proceedings forward. In so doing, the court again stated that it would entertain a request from Sophia for reconsideration of the default finding. To facilitate scheduling the trial and dispositional hearings, the court on its own motion then "un-consolidated" the cases.

¶12 At the April 12, 2011 pretrial hearing, Sophia's counsel was again present; Sophia did not appear at all. At the court's July 15, 2011 oral ruling on the County's summary judgment motion relating to Christopher's father's TPR, Sophia did appear (telephonically as she was incarcerated), along with her counsel (in person). Sophia made no motion or other request at this hearing to have the court reconsider its default determination on grounds. Neither did Sophia explain the reason for her failure to appear at either the March 9 or April 4, 2011 hearings.

¶13 Christopher's dispositional hearing was held on July 28, 2011. Sophia was incarcerated and appeared by telephone; her counsel appeared in person. Social Worker Gravel testified for the County. Gravel noted that Sophia had had no contact with the Department at all from March to June 2011, and her last visit with Christopher was in January 2011. Gravel noted that Christopher had been out of the home continuously since he was five days old. Sophia presented no evidence or argument at this hearing. She also did not seek reconsideration of the court's default finding or explain her failure to appear at the March 9 or April

4, 2011 hearings. The trial court concluded that terminating Sophia's rights was in Christopher's best interest. A written order terminating Sophia's parental rights was entered on July 28, 2011. Sophia appeals. Additional facts, as necessary, are set forth in the discussion section.

Discussion

¶14 Termination of parental rights proceedings consist of two phases. At the first, or "grounds," phase, the court holds a fact-finding hearing to determine "[w]hether grounds exist for the termination of parental rights." WIS. STAT. § 48.424(1)(a). At this time, "'[t]he petitioner must prove the allegations [supporting grounds for termination] in the petition for termination by clear and convincing evidence.'" ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 786 (citation and emphasis omitted). At the grounds phase, "the parent's rights are paramount." *See* ***id.*** If the trial court determines that grounds exist to find the parent unfit, the proceeding advances to the dispositional phase. WIS. STAT. § 48.424(4). At the dispositional phase, the trial court's focus is on the best interest of the child and the court makes a determination as to placement. ***Evelyn C.R.***, 246 Wis. 2d, ¶23. The parent has the right to present evidence at both phases of the proceeding. ***Id.***, ¶¶22-23.

¶15 The decision to terminate an individual's parental rights affects some of a parent's most fundamental human rights. ***Id.***, ¶20. Accordingly, heightened legal safeguards against an erroneous decision are required. ***Id.***, ¶21. One such safeguard is the requirement that the petitioner prove, by clear and convincing evidence that the termination is appropriate. ***Id.*** This standard is applicable to both stages of the proceedings. ***Id.***, ¶¶22-23.

¶16 Whether to terminate a parent's rights is left to the sound discretion of the circuit court. ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. We review a circuit court's decision whether to terminate a parent's rights for an erroneous exercise of discretion. ***Rock County DSS v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand." ***Margaret H.***, 234 Wis. 2d 606, ¶32.

¶17 A trial court has both the inherent and statutory authority to sanction a party for failing to obey a court order. *See* WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03. Under this authority, a trial court "may enter a default judgment against a party that fails to comply with a court order." ***Evelyn C.R.***, 246 Wis. 2d 1, ¶17 (citations omitted). Whether to enter a default judgment is also a matter within the sound discretion of the trial court. ***Id.***, ¶18.

¶18 When reviewing a challenge to the sufficiency of the evidence to support the trial court's findings, we apply a highly deferential standard of review. ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). We uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 389-90. Moreover, "the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Id.*** at 389.

¶19 Sophia makes several arguments on appeal relating to the court's default judgment as to grounds for terminating her parental rights. As to its finding of continuing CHIPS, Sophia argues that because the County had the social worker testify at the fact-finding hearing as to the amended petition for the two older boys, but never submitted the petition as to Christopher, there was

insufficient evidence for the court to find, by clear and convincing evidence, that there were grounds for termination of Sophia's parental rights. In other words, Sophia argues that the evidence was insufficient to support the court's finding of unfitness because the petition for termination as to Christopher was not admitted into evidence and no testimony was taken regarding the facts specifically relating to Christopher. According to Sophia, this was tantamount to asking the court to grant judgment on the pleadings with respect to grounds, which, in her view, is the equivalent of seeking summary judgment.

¶20 In its response, the County makes four arguments[2]: (1) Sophia never preserved the issue of insufficient evidence (admission into evidence of Christopher's petition at the default/fact-finding hearing) as to grounds in the first phase of the TPR proceeding; (2) Sophia never filed an answer, therefore the court was permitted to take all the allegations in the petition as true; (3) the exhibit (amended petition for the two older sons) used at the grounds hearing was sufficient to address all three cases, as they were consolidated; and (4) the testimony and evidence presented at the grounds and dispositional hearings were ample to support the default under applicable Wisconsin law.

¶21 Sophia responds that: (1) she adequately preserved her objection to the entry of default; (2) she had no obligation to file an answer to contest the allegations in a TPR petition; (3) the County has cited no authority that relieves it

[2] The County also discussed at length the purpose of termination of parental rights proceedings and a child's need for closure and permanence, noting that appeals only extend the time that children are without this permanence. In her reply, Sophia characterizes this discussion as the County implying that she had no right to appeal. We trust that the County understands the right of parents to appeal termination of their parental rights decisions, and that such appeals follow an expedited appeal process strictly adhered to by this court.

from proving all elements of the grounds; (4) the County never entered Christopher's CHIPS order into evidence, thereby failing to prove an element of continuing CHIPS; and (5) the court's error was not harmless, distinguishing Sophia from ***Evelyn C.R.***

¶22 While we do not agree entirely with the County's arguments, we conclude from our review of the record as a whole that the trial court did not err in entering the default and finding grounds of continuing CHIPS and failure to assume parental responsibility and thereby, finding Sophia unfit. As discussed below, there was sufficient evidence in the record at the conclusion of the default/fact-finding hearing for the court to find that the County had proven, by clear and convincing evidence, the grounds of continuing CHIPS and failure to assume parental responsibility.

¶23 We summarily address four arguments Sophia makes in response to the County's arguments. First, we know of no authority that requires a parent such as Sophia to object in circuit court to the sufficiency of the evidence in order to preserve the issue for appeal. Certainly the County has not presented any authority. Second, nowhere in WIS. STAT. ch. 48, or on the summons delivered to Sophia, is found the requirement that Sophia answer the petition in twenty days as argued by the County. From our reading of the statutory scheme, a parent whose parental rights are being terminated may wait until the initial hearing to enter an admission or a denial to the petition. WIS. STAT. § 48.422(1). Third, contrary to Sophia's belief, the County does not seek relief from proving all elements to establish grounds for terminating her parental rights. As we will discuss, the County has presented ample evidence that meets all of the elements to establish grounds for both continuing CHIPS and failure to assume parental responsibilities. Finally, we reject Sophia's assertion that the County failed to prove an element of

continuing CHIPS by not entering into evidence Christopher's CHIPS order. As we will see, the petition alleges grounds for termination of Sophia's parental rights to Christopher pursuant to WIS. STAT. § 48.415(2), continuing CHIPS. Sophia provides no authority, statutory or case law, that requires admitting the CHIPS order into evidence to satisfy the elements of grounds for continuing CHIPS for terminating a parent's rights. We now turn to consider Sophia's primary argument, namely, that there was insufficient evidence to support the court's findings on grounds with respect to continuing CHIPS and failure to assume parental responsibilities.

¶24 Sophia first argues the evidence was insufficient because the petition relating to Christopher was not admitted into evidence. As we noted, the cases of the three sons were consolidated prior to the default/fact-finding hearing. Sophia's counsel appeared in person at all of the in-court hearings. Because the court was proceeding on a default in all three cases based upon Sophia's failures to appear in person at the February 16 and March 9, 2011 hearings as ordered by the court, it was appropriate for the court to consider grounds at this hearing for Sophia's actions relating to all three boys. Although Social Worker Gravel did not testify from Christopher's petition, she did testify from the amended petition for the two other boys, which, in all significant and meaningful respects, mirrored the allegations set forth in the petition to terminate Sophia's parental rights to Christopher. We see no problem here. The petition relating to Christopher was part of the court's record and Gravel testified that the grounds set forth in that petition were substantially similar to the grounds set forth in the amended petition for the two other boys. Sophia provides no authority for the proposition that this was an inappropriate method of providing evidence to establish grounds for terminating a parent's right where the grounds are similar for all three children.

Moreover, Sophia points to no authority requiring admitting the petition into evidence as the only method for establishing grounds. As we explained, Gravel testified from the amended petition and her testimony was sufficient to establish grounds.

¶25 As for the factual basis to establish a prima facie case for grounds to terminate Sophia's parental rights to Christopher, Social Worker Gravel testified that she had worked on the three cases for years, including from Christopher's birth, and that the Department maintained one consolidated case file for the family, for which Gravel was the custodian. Gravel carefully reviewed the amended petition and stated that the grounds set forth in the petition were true and correct. She also testified that the allegations set forth in the amended petition regarding Sophia's conduct in relation to the older two boys were substantially similar in relation to Christopher. In response to a direct question from the County, Gravel specifically noted that the information contained in the amended petition for the older brothers was "substantially similar" to that in Christopher's petition and that the opinions rendered in the amended petition was to a reasonable degree of professional probability. Sophia's counsel was given the opportunity to cross-examine Gravel, but chose not to do so. Sophia presented no evidence at all at the fact-finding hearing. As we explained, both petitions were in the court's record, and available to the court for its review, prior to it entering the default and finding grounds to terminate Sophia's parental rights. We note that Sophia does not argue that the court's findings were clearly erroneous.

¶26 Additionally, in summarizing Gravel's testimony to a late-arriving attorney, the court specifically stated that it considered Gravel's testimony as "confirm[ing] the matters set out in the *various petitions* as true and correct." (Emphasis added.) This court's review of the petitions confirms that the two

petitions were very similar, and in some cases the paragraphs were identical. In entering a default finding and finding that grounds existed to find Sophia unfit, the court specifically referred to both petitions, stating:

> [T]he matters that are set out in the **petitions** do establish *prima facia* [sic] grounds as well for grounds, termination of parental rights grounds, specifically, as to [Sophia's] failure to assume parental responsibility and continuing CHIPS. So I will find her in default. I will find those two grounds to exist, and I will find her to be unfit."

(Bolding and underlining added.) Based on our review of the record, we conclude that the trial court properly considered the record and evidence before it and that there was sufficient evidence for the court's decision at the fact-finding phase to find Sophia unfit.

¶27 Sophia attempts to distinguish her case from ***Evelyn C.R.***, where the supreme court concluded that the trial court erred in granting the default on grounds without taking testimony, but that it was harmless error because testimony was taken at the dispositional hearing. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶36. Sophia claims that because the trial court, at the urging of the County, confirmed the default prior to taking testimony at the dispositional hearing, any evidence presented at the dispositional hearing could not cure any error by the court in finding default and grounds. Accordingly, she argues, because there was insufficient evidence in the record to find grounds at the default/fact-finding hearing, and this error was affirmed prior to the taking of any additional evidence at the dispositional hearing, the error was not harmless. The County argues that even if this court finds that the evidence at the default/fact-finding hearing was not sufficient, that this was cured by the evidence and testimony presented at the dispositional hearing.

¶28 This case is distinguishable from ***Evelyn C.R.*** In ***Evelyn C.R.***, the trial court entered a finding of default without taking any testimony. ***Id.***, 246 Wis. 2d 1, ¶¶9, 24. Here, however, Social Worker Gravel provided ample testimony to establish a prima facie case for grounds to terminate Sophia's parental rights on both grounds alleged in the petition pertaining to Christopher. Thus, there is no need to consider the evidence presented at the dispositional hearing to determine whether grounds exist to terminate Sophia's parental rights.

¶29 Of consequence is the fact that the trial court, at multiple hearings, stated that it would entertain a motion to reconsider the default if Sophia wished to request such reconsideration. Although Sophia appeared by counsel at various later hearings, and was herself present by telephone at two subsequent hearings, including the dispositional hearing, at no time did Sophia seek reconsideration from the trial court of its default decision, nor did Sophia testify at the dispositional hearing, or call or cross-examine any witnesses. Additionally, in her briefs to this court, Sophia never provides any information as to why she did not appear in person at the March 9 or April 4, 2011 hearings or why she did not seek reconsideration of the court's default finding and findings as to grounds for termination at any time after the March 9 hearing.

¶30 Sophia next makes a facial challenge to the constitutionality of WIS. STAT. § 48.415(6), arguing that it is void for vagueness.[3] The County responds

[3] In reviewing the briefing and record in this case, we note that the only notice provided to this court of Sophia's notice to the State Attorney General as required by WIS. STAT. § 806.04(11) was by a copy of Sophia's one sentence letter to Assistant Attorney General Gregory Weber sent to the clerk of courts. It is routine that appellants seeking to challenge the constitutionality of a statute point out in their briefing to this court where in the record they have demonstrated that they have provided the requisite notice to the State of their challenge. No mention was made at all of fulfilling the notice requirement in either Sophia's opening or reply brief.

that Sophia's challenge: (1) is moot as she was also found unfit under continuing CHIPS, and that only one ground is necessary to satisfy WIS. STAT. § 48.415(2); (2) is forfeited because she did not raise it with the trial court; and (3) fails as a matter of law because (a) Sophia improperly shifts the burden of proving the unconstitutionality of the statute onto the Department, and (b) Sophia's conduct demonstrates that she did not assume parental responsibility. Sophia replies that her vagueness challenge is not forfeited because it goes to the court's subject matter jurisdiction, citing ***State v. Bush***, 2005 WI 103, ¶¶14-19, 283 Wis. 2d 90, 699 N.W.2d 80, that it is not moot because she contests the validity of the continuing CHIPS grounds as well, that she has met her burden of demonstrating that §48.415(6) is vague and therefore, facially unconstitutional, and finally, that she is not required to prove the statute is void as applied.

¶31 We agree with Sophia that she did not forfeit her ability to challenge the facial constitutionality of WIS. STAT. § 48.415(6) by not first raising it to the trial court. Where the challenge is a facial challenge to the constitutionality of a law, it goes to the heart of subject matter jurisdiction and will be considered even if not first raised in the circuit court. ***Bush***, 283 Wis. 2d 90, ¶19 & n.8; *see also* ***State v. Campbell***, 2006 WI 99, ¶45, 294 Wis. 2d 100, 718 N.W.2d 659 ("if a statute is unconstitutional on its face, any judgment premised upon that statute is void"). However, as discussed above, the trial court found, and we have affirmed, that Sophia was unfit on two grounds: continuing CHIPS and failure to assume parental responsibility. Because WIS. STAT. § 48.415 requires a finding on only one ground to determine that a parent is unfit, this is dispositive of Sophia's

challenge to the termination of her parental rights[4] and we will not address her constitutional challenge. *See* ***State v. Jipson***, 2003 WI App 222, ¶17 n.5, 267 Wis. 2d 467, 671 N.W.2d 18 ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.") (quoting ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938)).

Conclusion

¶32 As set forth above, we conclude that the trial court did not err when it entered default as to grounds for Sophia S.'s repeated failure to appear in person at the termination of parental rights proceedings for Christopher T., Jr. We further conclude that the evidence presented at the default/fact-finding hearing, along with the record in this case, was sufficient for the court to conclude that the grounds of continuing CHIPS and failure to assume parental responsibility existed, warranting finding Sophia S. unfit. Finally, we decline to address Sophia S.'s challenge to the constitutionality of WIS. STAT. § 48.415(6) for the reasons stated above.

By the Court.—Order affirmed.

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

[4] In her appeal, Sophia has not challenged the trial court's finding that termination of her parental rights was in Christopher's best interest. *See* WIS. STAT. § 48.424(4); ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶23, 246 Wis. 2d 1, 629 N.W.2d 786.