COURT OF APPEALS
DECISION
DATED AND RELEASED

May 22, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 97-0421 and 97-0422

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

No. 97-0421

IN RE THE TERMINATION OF PARENTAL RIGHTS OF DEVINN C., A PERSON UNDER THE AGE OF 18:
DEVINN C.,

PETITIONER-RESPONDENT,

V.

SHELLY S.,

RESPONDENT-APPELLANT,

SCOTT C.,

RESPONDENT.

No. 97-0422

IN RE THE TERMINATION OF PARENTAL RIGHTS OF ELANIE C., A PERSON UNDER THE AGE OF 18:
ELANIE C.,

PETITIONER-RESPONDENT,

V.

SHELLY S.,

RESPONDENT-APPELLANT,

SCOTT C.,

RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

ROGGENSACK, J. Shelly S. appeals the termination of her parental rights to her two children. She ascribes error to the circuit court's injunction halting her visitation with the children issued one month before trial and its refusal to admit certain post-petition evidence. She also maintains that § 48.415(2), STATS., is unconstitutional as applied to her. We conclude there was no abuse of discretion in issuing the injunction and that the error in refusing to admit the post-petition evidence was harmless error. We also conclude that § 48.415(2) is constitutional as applied. Therefore, we affirm the judgment of the circuit court.[1]

BACKGROUND

Shelly and Scott C.,[2] her former husband, had two children. Elanie C. was born on the 21st day of October 1992 and Devinn C. was born on the 13th day of November of 1993. From the beginning, Shelly and Scott had difficulty maintaining a stable home for their children. They had thirteen places of residence

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

[2] Scott C., the father of Devinn and Elanie, does not appeal the termination of his parental rights.

during the year preceding the initial finding that Devinn and Elanie were children in need of protection and services (CHIPS). The initial dispositional order, entered on November 1, 1994, and all subsequent orders which extended the placement of the children out of the home, warned Scott and Shelly that the termination of their parental rights was a possibility if they did not make substantial progress toward meeting the conditions necessary for the return of the children. The court ordered conditions, toward which substantial progress was required in order to obtain the return of the children, were to:

> (1) Meet with the social worker as scheduled. They will keep the worker informed as to their residence.
>
> (2) Have frequent and regular visitation with Elanie and Devinn, initially supervised and to become unsupervised when deemed appropriate by the social worker.
>
> (3) Sign releases of information for providers as requested by the social worker.
>
> (4) Successfully complete the 13 week nurturing class at Family Resource Center beginning in January 1995, to learn and be able to demonstrate the basic skills in the following areas:
>
> > (a) Child safety.
> >
> > (b) Normal child development and realistic expectations based on child's age and ability.
> >
> > (c) Appropriate discipline, excluding verbal and physical punishment.
> >
> > (d) Nurturing in both verbal and physical interactions with their child.
> >
> > (e) Establish and maintain a daily routine of activities for the child, such as regular meals, nap, and bedtime.
> >
> > (f) Nutrition.
> >
> > (g) Appropriate hygiene.

> (5) Work with the parent skills trainer to practice and incorporate the skills listed in number four into visitation in the home setting with Elanie and Devinn.
>
> (6) Successfully complete a developmental disabilities assessment in treatment plan with the long-term unit of the Human Services Department to determine whether services are necessary for them.
>
> (7) Maintain a stable place of residence either alone or with relatives who are child oriented. Any individual acting in a parental role may be required to undergo evaluations as deemed appropriate by the department.
>
> (8) Successfully complete a full psychological evaluation and follow through with the treatment recommendations.

The November 1, 1994 dispositional order was extended by an order dated October 17, 1995, with Elanie and Devinn remaining outside of the home, throughout the duration of the order. Shelly and Scott did sign the releases which were requested under subsection (3) of the initial dispositional order, but aside from complying with that provision, they failed to make substantial progress toward any of the other requirements necessary for the return of their children. For example, parenting classes were never attended so the requisite skills of subsection (4) were not developed. Visitation with the children was not consistent. In the month of November, 1994, Shelly had four visits with the children; in December, seven visits; in January, five visits were arranged, but Shelly attended only two; in February of 1995, she visited with the children four times and then moved to Louisiana, leaving the children in Wisconsin. During the seventeen months that she resided in Louisiana, she had only one visit with the children. She did make twenty-three telephone calls to them during those seventeen months, but the telephone calls were not effective relationship builders for the children, who were approximately two and three years of age. Essentially,

the calls consisted of the children saying, "Hi" and "Bye", because they were too young to carry on a conversation on the telephone.

On June 24, 1996, when Shelly returned to once again take residence in La Crosse County, visitation was arranged for July 1, 1996. However, Shelly failed to attend the scheduled visitation. Thereafter, on July 5, 1996, the guardian ad litem filed a petition to terminate her parental rights and those of Scott.

On August 26, 1996, the court held a hearing on the guardian ad litem's request for an injunction to prevent visitation until the trial, scheduled to commence on September 25th, was concluded. The court granted the requested injunction, except it did allow Shelly and Scott to continue to make telephone calls to their children, and to the care providers for their children, if they so chose.

On September 25 and 26, 1996, a jury trial was held. There, the guardian ad litem objected to the introduction of evidence of Shelly and Scott's efforts toward meeting the conditions set in the dispositional order, which efforts had occurred after filing of the petition to terminate their parental rights. Shelly made an offer of proof that she had obtained an apartment, had made inquiries about parenting classes, had attended classes for her high school diploma and had begun working at Burger King, one or two weeks prior to the trial. Even though Shelly did not actually attend any parenting classes after the petition was filed on July 5th, classes which she was ordered to begin January 1, 1995, the court did permit her to testify that she had made inquiries about where such classes might be provided during 1996. The jury did not hear that she had obtained an apartment and had begun working at Burger King, one or two weeks before the trial. However, evidence was provided to the jury that Shelly had been living with her mother in La Crosse and had worked at Burger King in Louisiana.

The court[3] and the jury made the following findings in the special verdict:

> (1) [That] Elanie and Devinn … [had] been adjudged to be in need of protection or services and placed outside the home of their parents for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law.
>
> (2) [That] the La Crosse County Department of Human Services made a diligent effort to provide the services ordered by the Court.
>
> (3) [That] Shelly … failed to demonstrate substantial progress toward meeting the conditions established for the return of Elanie and Devinn … to Shelly['s] … home.
>
> (4) [That] there is a substantial likelihood that Shelly … [would] not meet those conditions in the next twelve months.[4]

On October 16, 1996, at the dispositional hearing subsequent to the jury trial, the court reviewed the jury's findings and made additional findings and conclusions relative to the termination of Shelly's parental rights. The trial court found that there was a substantial likelihood that Shelly would not meet the conditions for the return of her children within the twelve-month period following the fact-finding hearing. The court also found that Shelly had not seen the children since November of 1995, and that there had been only one visit between March 1, 1995 and August 26, 1996, when the injunction was issued. Based on the lack of contact between these very young children and their parents, the court found that there was not a substantial parent-child relationship. The court further

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[3] Finding (1) was made by the trial court. Findings (2)-(4) were made by the jury.

[4] The same findings were made relative to Scott, but are not included here as he does not appeal.

found that the children would be able to enter into a more stable and permanent family relationship if the parental rights of Shelly and Scott were terminated and that it would not be harmful to the children to separate Shelly and Scott from them.

The court then concluded that the children were in continuing need of protection and services pursuant to § 48.415(2), STATS.; that Shelly and Scott were unfit parents, and that their unfitness was so egregious, by clear and convincing evidence, as to warrant the termination of their parental rights. And finally, the court concluded that based on the recommendations of the guardian ad litem, the La Crosse County Human Services Department and the State Department of Health and Social Services, and the entire proceedings, it was in the best interests of the children to terminate the parental rights of Scott and Shelly.

In reaching its conclusions, the court carefully considered the lack of effort, on behalf of both parents, to meet the needs of their children; to maintain a stable home environment for themselves, into which the children might be transferred; the repeated warnings given to Shelly and Scott and the diligent efforts which had been made by La Crosse County Social Services as it attempted to facilitate the return of the children. The circuit court also considered the court ordered psychological profiles of the parents.

On appeal, Shelly asserts error on three theories: (1) that the August 26, 1996 injunction, which prevented visitation for the month immediately preceding trial, was an abuse of discretion; (2) that the refusal to admit evidence relative to Shelly's post-petition efforts to make substantial progress toward meeting the conditions necessary to obtain the return of her children, was an abuse

of discretion; and (3) that § 48.415(2), STATS., is unconstitutional, either facially or as applied.

DISCUSSION

Standard of Review.

To grant or to deny an injunction is discretionary with the trial court. We will not reverse a discretionary decision unless discretion was erroneously exercised. ***Pure Milk Products Coop v. National Farmers Org.***, 90 Wis.2d 781, 800, 280 N.W.2d 691, 700 (1979). Likewise, the exclusion of certain evidence from trial is a discretionary determination which will not be reversed if there is a reasonable basis in the record for the trial court's determination. ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 584 (1989). And, if evidence has been erroneously excluded, we will independently determine whether that error was harmless error. *See* ***State v. Patricia A.M.***, 176 Wis.2d 542, 557, 500 N.W.2d 289, 295 (1993).

We will not reverse a factual determination made by a jury or the trial court unless it is clearly erroneous. Section 805.17(2), STATS. However, the application of constitutional principals to the facts as found is a question of law which we decide without deference to the trial court's ruling. ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

Injunction.

The exercise of discretion must be demonstrably made, based on the facts appearing in the record and on the application of the applicable law. ***State v. Seigel***, 163 Wis.2d 871, 889, 472 N.W.2d 584, 591 (Ct. App. 1991). Section 48.42(1m), STATS., establishes the authority for the court to issue an order

enjoining visitation during the pendency of a petition to terminate parental rights. It states in relevant part:

> (1m) VISITATION OR CONTACT RIGHTS. (a) If the petition filed under sub. (1) includes a statement of the grounds for involuntary termination of parental rights under sub. (1)(c)2., the petitioner may, at the time the petition under sub. (1) is filed, also petition the court for a temporary order and an injunction prohibiting the person who parental rights are sought to be terminated from visiting or contacting the child who is the subject of the petition under sub. (1). Any petition under this paragraph shall allege facts sufficient to show that prohibiting visitation or contact would be in the best interests of the child.
>
> …
>
> (c) Notwithstanding any other order under s. 48.355(3), the court may grant an injunction prohibiting the respondent from visiting or contacting the child if the court determines that the prohibition would be in the best interests of the child. An injunction under this subsection is effective according to its terms but may not remain in effect beyond the date the court dismisses the petition for termination of parental rights under s. 48.427(2) or issues an order terminating parental rights under s. 48.427(3).

Shelly argues that prohibiting her from visiting her children in the month immediately preceding trial prevented her from making substantial progress toward meeting the conditions necessary to the return of the children. She asserts that granting the injunction was an abuse of discretion because the court based its decision on her lack of contact with the children since their placement out of the home and not on any new evidence which had come into existence subsequent to the filing of the petition to terminate her parental rights. Shelly offers no statutory or common law authority for the alleged requirement that an injunction issued under § 48.42(1m), STATS., must be based on occurrences subsequent to the filing of the petition to terminate parental rights.

Here, a petition to preclude visitation through the pendency of the trial was filed on August 1, 1996, by the guardian ad litem. It was heard and granted on August 26, 1996, except for permitting continuing telephone calls between the parents and the children. That order was based on testimony sufficient[5] to support the court's findings that allowing a reinstitution of visitation in the month before trial, after there had been only one visit by Shelly in the nineteen-month period from March 1, 1995 to August 26, 1996, would be harmful to the children and would not promote their best interests.

The court's factual findings and exercise of its discretion based on those facts and the law relative to whether it should issue an injunction show a clear exercise of judicial discretion well stated on the record. Therefore, we conclude the court did not err in granting the requested injunction.

Evidentiary Ruling.

All relevant evidence is admissible unless it is unfairly prejudicial. ***Patricia A.M.***, 176 Wis.2d at 550; 500 N.W.2d at 292. One of the determinations § 48.415(2), STATS., required to be made at trial was whether it was likely that in the twelve-month period subsequent to trial Shelly would make substantial progress toward meeting the conditions established for the return of Devinn and Elanie to her home.

[5] Ms. Dehning, a social worker who was the only witness at the motion hearing, testified that the children were often fearful of people with whom they were unfamiliar. Because Shelly had visited the children so infrequently, she was not familiar to them. Dehning opined that it would not be in Devinn and Elanie's best interests to have visitation with Shelly in the month prior to trial.

Shelly complains that it was prejudicial error to preclude her from presenting testimony about her current residence and about her recent employment in La Crosse at Burger King. She asserts that ***S.D.S. v. Rock County Dept. of Social Services,*** 152 Wis.2d 345, 448 N.W.2d 282 (Ct. App. 1989), requires this court to conclude that the trial court's evidentiary ruling which prohibited Shelly from introducing this evidence was prejudicial error.

In ***S.D.S.***, Rock County Social Services petitioned to terminate the parental rights of the mother of three children and the father of one of the three. The petitions to terminate alleged that each child was in continuing need of protection and services within the meaning of § 48.415(2), STATS. As part of the proceedings, the trial court had issued a pretrial order, which among other things, prevented the department and the parents from introducing any evidence concerning events which occurred after the termination petitions were filed. In concluding that such a pretrial order was in error, this court stated, "(t)he trial court must admit evidence of post-filing events on facts relevant to the 'substantial likelihood' element in § 48.415(2)(c). The post-filing facts may either support or be against termination." ***S.D.S.***, 152 Wis.2d at 359, 448 N.W.2d at 288.

We agree with Shelly that she did have a right to present evidence which was relevant to whether there was a substantial likelihood that she would be able to comply with the requisite conditions for the return of her children, even though those facts may have occurred subsequent to the filing of the petition to terminate her parental rights. We also agree the offer of proof shows the evidence was relevant. Therefore, it was error to refuse to admit the proffered testimony.

We next examine whether the error in restricting testimony was prejudicial or harmless error. An error is harmless if there is no reasonable

possibility that it contributed to the result reached at trial. *See* ***Patricia A.M.,*** 176 Wis.2d at 556, 500 N.W.2d at 295. A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. ***Id.***

The testimony at trial showed that Shelly had a history of only one visit with her children in the nineteen-month period prior to August 26, 1996, when the court by order prevented further visitation. During the majority of that time, she had lived in Louisiana. However, the testimony also showed that when she returned to La Crosse County and a visit was arranged, she failed to attend that visitation. The testimony also showed that she had been unable to maintain a stable residence; that she had failed to maintain regular employment; that she had never attended any parenting classes, even though they were ordered in November of 1994 and made available from January 1, 1995 forward. It also showed that she had not participated in a psychological evaluation or made any efforts towards counseling during the approximately twenty-four months when the children were outside of her home. The record further showed repeated and continuing contacts between the La Crosse County Department of Human Services and Shelly wherein it attempted to motivate Shelly to participate in the services that were available, so she could improve her parenting skills and have the children returned to her. All of the department's efforts were to no avail because Shelly simply did not participate. And finally, the record showed that when the children were initially determined to be in need of protection and services, Shelly's parenting skills were so poor that Devinn and Elanie were not being fed properly; were dirty and poorly cared for; and at one and two years of age, respectively, were showing signs of psychological, as well as physical, damage. Given the overwhelming evidence of Shelly's lack of interest in these two children for more than twenty-four months, and her lack of effort to comply with the reasonable orders of the court necessary

for the return of the children to her, we conclude that it is not possible that the court's failure to admit post-petition evidence of Shelly's efforts during the two and one-half months which elapsed between the filing of the petition and the trial would have affected the jury's or the court's finding that it was unlikely that she would make substantial progress toward the conditions necessary for the return of her children in the twelve-month period subsequent to the fact-finding hearing. Therefore, we conclude the error was harmless error.

Constitutionality of Section 48.415, STATS.

Parents have a constitutionally protected right to the care, custody and management of their children. ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982); ***Walworth County Dep't of Human Services v. Elizabeth W.***, 189 Wis.2d 432, 436, 525 N.W.2d 384, 385 (Ct. App. 1994). Therefore, state intervention to terminate parental rights must take place in proceedings which meet the requisites of the Due Process Clause of the Fourteenth Amendment. ***Id.*** at 436-37, 525 N.W.2d at 385-86. As part of that due process guarantee, the parents must be given notice of the type of events that, if continued, could lead to the termination of parental rights. *See* ***Patricia A.P.***, 195 Wis.2d at 863, 537 N.W.2d at 50.

The proceedings to terminate Shelly's parental rights were brought pursuant to § 48.415(2), STATS., which states that grounds for involuntary termination of parental rights include:

> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving all of the following:
>
> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345 … containing the notice required by s. 48.356(2) ….

> (b)1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.
>
> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet those conditions within the 12-month period following the fact-finding hearing under s. 48.424.

Shelly next claims that § 48.415(2), STATS., is unconstitutional, facially, and as applied to her because it does not require a finding that her conduct was "culpable conduct." She does not allege she did not have adequate notice of the conditions toward which she must progress in order to obtain the return of her children. Nor does she argue that the court ordered conditions were in any way unfair. Therefore, we take her argument to mean that because the "willful refusal" standard[6] is not required under § 48.415(2)(c), Shelly would have us conclude the statute is unconstitutional. That is, that intentional conduct is required before constitutionally protected parental rights may be terminated. In support of her argument, she cites the supreme court's decision ***B.L.J. v. Polk County Dep't of Social Services***, 163 Wis.2d 90, 470 N.W.2d 914 (1991).

[6] 1993 Act 395, § 25 amended the grounds for involuntary termination of parental rights based on a continuing need of protection and services by requiring a showing that the parent has failed to make substantial progress toward meeting the conditions necessary for the return of the child to the parent, rather than requiring a showing that the parent "willfully refused" to meet those conditions.

In ***B.L.J.***, the constitutionality of § 48.424(2), STATS., was challenged and held to be constitutional as applied. ***B.L.J.*** arose out of the petition to terminate the rights of the mother, B.L.J., to her son, K.D.J., based upon her continued alcoholism and failure to change her conduct as required for the return of her child. The trial court concluded that she was an unfit parent; that the child was an adoptable child; and that adoption was in his best interest. Underlying these findings was an initial dispositional order entered June 7, 1983, which placed the child in foster care until the mother completed inpatient alcoholism treatment. B.L.J. completed the treatment and the child was then returned to her. When K.D.J. was returned, the return was conditioned on B.L.J.'s abstaining from alcohol or other drugs. However, three months later K.D.J. was again placed in foster care because B.L.J. was hospitalized following an automobile accident in which she was cited for operating a motor vehicle while under the influence. K.D.J. was returned to foster care, and for brief periods of time returned to B.L.J., over a period of two years. However, three years after the automobile accident, K.D.J. was again returned to foster care and continued in that placement because of B.L.J.'s repeated failures to comply with court ordered conditions. Finally, Polk County petitioned for the involuntary termination of B.L.J.'s parental rights and a jury trial was held.

In addition to the facts noted above, there was repeated testimony at trial about how often B.L.J. was warned that her continued failure to abide by the court's requirement that she abstain from the use of alcohol or drugs could result in the loss of her parental rights. B.L.J. continued to ignore these orders. However, there was no finding that she "willfully" ignored the orders. The jury found sufficient facts to warrant termination of parental rights. The trial court then parsed the statute concluding that even if the court accepts the facts as found by

the jury, whether those factual findings warrant the termination of parental rights is a matter for the exercise of discretion by the trial court. The trial court concluded it must evaluate the jury's findings, and even though the grounds for termination may be present, the court, itself, must conclude whether the quantity, quality and persuasiveness of the evidence should result in the termination of parental rights. In supporting the trial court's evaluation of the evidence and its reasoning, the supreme court stated:

> Merely because she did not physically abuse the child or neglect him during the intervals when she had physical custody, or visited him while he was in foster care, does not negate her other deficiencies as a parent. Those other deficiencies resulted in the child's frequent placements in foster care.
>
> Even at the time of the hearing, she was not in any program to try and correct her deficiencies as a parent.

Id. at 105-06, 470 N.W.2d at 921. In applying the statute in a constitutional way to the mother in ***B.L.J.***, the supreme court affirmed the trial court's focus on the child's need for stability and permanency.

The same sound reasoning and key issues were the focus of the circuit court in this case as well. It reviewed the jury's findings and made additional findings of its own. It found that Shelly was an unfit parent and that her unfitness was so "egregious" as to warrant the termination of her parental rights. It also paid careful attention to the needs of these two young children for a permanent, stable home. There is nothing in ***B.L.J.*** which we read to require that parental conduct must be intentionally harmful to the child, before parental rights may be terminated. Rather, the decision centers on B.L.J.'s inability to make substantial progress toward changing those parts of her behavior which were necessary to the return of her child.

Those are the same factors that the circuit court relied on here. Shelly had repeated notice of the type of conduct which could lead to the termination of her parental rights, yet for two years she did virtually nothing to get her children back. Children are not like books to be placed on a shelf and later taken down and dusted off when the parent decides she has an interest. They have constant needs for care and nurturing that do not wait to be met while a parent is disinterested in parenting. We conclude that § 48.415(2), STATS., was constitutionally applied by the circuit court when it terminated Shelly's parental rights to Elanie and Devinn.

CONCLUSION

Because we find no error in the restraining order which restricted visitation one month before trial for a parent who had visited her children only once during the nineteen months preceding; that the refusal to admit certain post-petition evidence at trial was error, but harmless error; and that § 48.415(2), STATS., was constitutionally applied during the termination of parental rights proceedings, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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