COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 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. 97-0716, 97-0717 and 97-0718

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

Case No. 97-0716

IN RE THE TERMINATION OF PARENTAL RIGHTS OF STEPHANIE J., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TERESITA J.,

RESPONDENT-APPELLANT.

Case No. 97-0717

IN RE THE TERMINATION OF PARENTAL RIGHTS OF SESALIE J., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TERESITA J.,

RESPONDENT-APPELLANT.

Case No. 97-0718

IN RE THE TERMINATION OF PARENTAL RIGHTS OF STANLEY J., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TERESITA J.,

RESPONDENT-APPELLANT.

APPEALS from judgments of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed.*

DEININGER, J.[1] Teresita J. appeals judgments terminating her parental rights to her three children.[2] She claims that her rights under the Due Process Clause were violated because the termination proceeding was "fundamentally unfair," and that the trial court erroneously exercised its discretion in terminating her parental rights to the three children. We conclude that there is no support in the record for Teresita's claim of fundamental unfairness, and

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

[2] The proceedings for each of the three children were commenced with separate petitions and were assigned separate case numbers in the trial court. All trial court proceedings, however, were conducted concurrently, and we ordered the appeals consolidated.

further that the trial court properly exercised its discretion in granting the termination. Accordingly, we affirm.

BACKGROUND

On April 24, 1996, an assistant Dane County corporation counsel filed petitions seeking the termination of parental rights of both parents of Stephanie (age eleven), Sesalie (six) and Stanley J. (nine).[3] Teresita failed to appear for the first two court proceedings, and the court entered a finding by default that grounds existed under § 48.415(2), STATS., 1993-94, for the termination of her parental rights to all three children.[4] Thereafter, Teresita

[3] The children's father, Stanley J., appeared pro se at most of the hearings on the petitions and also opposed the termination of his rights. He has not joined in this appeal.

[4] Section 48.415(2), STATS., 1993-94, states:

> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services may be established by a showing of all of the following:
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> (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, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356 (2) ….
>
> (b) 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 one year or longer pursuant to such orders or, if the child had not attained the age of 3 years at the time of the initial order placing the child outside of the home, 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 these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

obtained counsel and moved to vacate the finding of grounds for the termination. The court denied this motion and proceeded to a dispositional hearing. Teresita does not appeal the order denying her motion to set aside the finding and her late request for a fact-finding hearing on the grounds for termination.

At the dispositional hearing, the court heard testimony from two social workers and from Teresita. The court also reviewed written reports from the social workers and other treatment personnel who had supervised and treated the children during the four years that they were in foster care pursuant to §§ 48.13 and 48.345, STATS., (disposition of children adjudged in need of protection or services (CHIPS)). A number of other exhibits were also introduced, including copies of correspondence from social workers and treatment personnel to Teresita, as well as records of her supervision while on probation in an unrelated criminal matter. At a subsequent court proceeding, the court received the oral recommendation of the guardian ad litem, who strongly favored a termination with respect to all three children. The court then gave an oral decision granting the petitions, which was followed by the written judgments terminating parental rights from which Teresita appeals. Additional facts will be stated in the analysis which follows.

ANALYSIS

a. Standard of Review

Whether the proceedings complied with constitutional standards for due process and "fundamental fairness" is a question of law which we determine de novo. *Cf.* ***Joni B. v. State***, 202 Wis.2d 1, 12, 549 N.W.2d 411, 415 (1996). After a finding that grounds for a termination of parental rights exist, a court's decision to grant the termination is an exercise of discretion, ***Interest of K.D.J.***,

163 Wis.2d 90, 103-04, 470 N.W.2d 914, 920 (1991), which we will uphold if the record demonstrates that the court has examined the relevant facts, applied a proper standard of law, and employed a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***In re Paternity of B.W.S.***, 131 Wis.2d 301, 315, 388 N.W.2d 615, 622 (1986).

b. "Fundamental Fairness" of the Termination Proceeding

Teresita's three children had been placed outside her home for approximately four years prior to the TPR petition. For most of that time, they were placed in a foster home in Dane County, while Teresita continued to reside in Milwaukee. She claims this circumstance renders the termination "arbitrary and unfair" because her poverty made it "difficult" for Teresita to maintain contact with her children.

The County notes, correctly, that this issue is raised for the first time on this appeal. While we choose not to declare that Teresita has waived her due process claim,[5] as the County urges us to do, we note that the record is devoid of any support for the claim. We agree with the guardian ad litem that the record does not establish Teresita's poverty, that poverty in any way prevented her from maintaining contact with the children, or that the out-of-county placement of the children was a major obstacle for her.

[5] "Consideration of a constitutional issue raised for the first time on appeal is discretionary with this court and will be done if 'it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue and if there are not factual issues that need resolution.'" ***Interest of Baby Girl K.***, 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983) (quoted source omitted).

Teresita acknowledged that she had agreed to the original placement of the children in Madison with a specific foster parent. She also testified that she was employed at various jobs during much of the time that the children were in foster care, that she had two boyfriends "that took very good care of me" during periods when she was not employed, and further, that "I didn't have to work, I worked because I wanted to work, I wasn't on welfare." In response to a question whether it was "difficult for [her] to see the children at this distance," Teresita replied, "I've seen them though."

The record also reflects that Dane County offered to assist with transportation arrangements, but that Teresita did not avail herself of this assistance. In short, the record falls far short of providing any support for Teresita's claim that her due process rights were violated because she was unable to see her children while in foster placements because of poverty.

The record, however, does provide ample support for findings under § 48.415(2)(c), STATS., that Teresita had "failed to demonstrate substantial progress toward meeting the conditions established for the return of [her children] to the home" and that "there is a substantial likelihood that [she] will not meet these conditions within the 12-month period" following the fact-finding. The more recent CHIPS dispositional orders regarding the children had established a number of conditions for the return of the children to Teresita's care: maintenance of a safe, stable and adequate residence; cooperation with social workers and service providers; regular visits with the children, demonstrating appropriate conduct and discipline with them; participation in alcohol and other drug abuse treatment and individual and family therapy; cooperation with probation conditions and no further law violations; and positive recommendations from treatment personnel for reunification.

The record shows that Teresita made little or no progress during the CHIPS dispositions in meeting any, let alone all, of these conditions. Her residences changed frequently and she was out of contact with probation and social services personnel for extended periods. Her contacts with the children's treatment personnel and her own participation in counseling and therapy was, at best, sporadic. She was jailed at least twice for probation violations and tested positive for either marijuana or cocaine on several occasions. Teresita's nine documented visits with the children since 1994 were far fewer than the weekly or biweekly visits offered; and her behavior and discipline during the visits was highly inappropriate. All treatment and assessment personnel familiar with the family recommended against a return of the children to Teresita's care.

We agree with Teresita that the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that proceedings to terminate her parental rights must be "'fundamentally fair.'" *See* ***Joni B. v. State***, 202 Wis.2d 1, 12-18, 549 N.W.2d 411, 415-16 (1996) (quoted source omitted). Our review of the record leads us to conclude that the proceedings in this case were so.

c. Trial Court's Exercise of Discretion

After it has been determined that grounds for the termination of parental rights exists, the circuit court must determine a final disposition for the child or children. Section 48.427, STATS. Options available to the court include dismissing the petition "if it finds that the evidence does not warrant the termination of parental rights," § 48.427(2), or the entry of an order terminating parental rights. Section 48.427(3). The standard to be applied in making this determination is that "[t]he best interests of the child shall be the prevailing factor

considered by the court." Section 48.426(2), STATS. Among the factors the court must consider in determining the best interest of the child are:

> (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.

Section 48.426(3).

In order to properly review the trial court's exercise of discretion, we have read the transcript of the dispositional hearing and reviewed the exhibits presented for the court's consideration. We have also reviewed the transcripts of the court proceedings prior to the disposition, the pleadings and other matters set forth in the record. We conclude that the trial court examined the relevant facts, applied the proper standard of law, and set forth its reasoning process on the record, concluding that a termination was in the best interests of the children, a conclusion that a reasonable judge could reach. The trial court's judgments terminating Teresita's rights was thus a proper exercise of discretion. *See* ***Interest of Brandon S.S.***, 179 Wis.2d 114, 149-50, 507 N.W.2d 94, 107 (1993).

There was evidence in the record in the form of correspondence from the State Department of Health and Social Services, Adoption and Consultation Section, indicating that it was likely that each of the children would be adopted, either by their present foster parent or other prospective adoptive parents. The County's written report, as well as testimony at the hearing, provided the court with ample information regarding the ages and health of each of the children, the present status of relationships between the children and their parents, and the wishes of each of the children. The court specifically noted these factors, as well as the four-year duration of the separation of the children from their mother. The court also concluded that the children are able and would in fact, enter into more stable and permanent family relationships if a termination were granted.

The court summarized its review of the record as follows:

> It is a record that gives little room for any decision except termination for both of these parents. It is a paper record which is rather overwhelming. It is a record that indicates that the Department has consistently attempted to set forward things that could be done to change the course and direction that this case was going, and for whatever reason, some of which are on the record, it wasn't done.
>
> The best interests of each of these children is now served by terminating the parental rights of each of their natural parents.

Our own review of the record confirms the reasonableness of the trial court's conclusions.

Teresita claims that the trial court applied the wrong legal standard when it included a finding in the written termination judgment that the "Dane County Department of Human Services has made a reasonable effort" to prevent

the removal of the children from their parents' care. Teresita notes that the ground on which the termination was based, § 48.415(2), STATS., requires that an agency make a "diligent effort" to provide court ordered services, and she argues that "diligent effort" is more than simply a "reasonable effort." *See* § 48.415(2)(b)1.

The issue of "diligent effort" by the agency, however, is a matter to be contested at fact-finding. As previously noted, Teresita originally defaulted on the petition and does not appeal the trial court's order denying her motion to reopen. It is true that a trial court, in deciding whether to terminate a parent's rights, must consider the "quantity, quality and persuasiveness of the evidence" in the record to support a termination. ***Interest of K.D.J.***, 163 Wis.2d 90, 104, 470 N.W.2d 914, 920 (1991). We are convinced that the trial court did so. The court's oral decision, as well as its written findings, show that the court concluded that the grounds under § 48.415(2), STATS., had been established by the testimony and exhibits in the record, notwithstanding Teresita's initial default on the petition. The specific written finding with respect to "reasonable effort" does not indicate that the court applied a wrong standard. That finding was included at the specific request of the State Department of Health and Social Services.[6]

Because we conclude that Teresita has not shown that the termination proceeding violated her right to a fundamentally fair process, and that the court did not erroneously exercise its discretion in terminating her parental rights, we affirm the judgments of termination.

[6] In its letter of May 13, 1995, to the trial court, the Department stated "for federal eligibility reasons, it is important that the dispositional order contain the following language: … That reasonable efforts have been made to prevent the removal of the children from the home or, if applicable, that reasonable efforts have been made to make it possible for the children to return to their home."

By the Court.—Judgments affirmed.

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

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