COURT OF APPEALS DECISION DATED AND FILED

July 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1214

Cir. Ct. No. 2003TP000778

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CYNTHIA M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 FINE, J. Cynthia M. appeals an order terminating her parental rights to Angela K. She challenges the jury's findings that she failed to assume

parental responsibility for Angela, *see* WIS. STAT. § 48.415(6), and that she abandoned the child, *see* § 48.415(1)(a)2, as well as the trial court's conclusion that termination was in Angela's best interests. She also seeks a new trial in the interests of justice. *See* WIS. STAT. § 752.35. We affirm.

I.

¶2 Angela was born on May 2, 1995. In September of 1996, Cynthia M., suffering from schizophrenia, voluntarily admitted herself to Sinai Samaritan hospital for what she testified was "depression" and "problems with getting stable with the medications" she was taking. At that point, Angela went to live with Barbara B., Cynthia M.'s aunt, and she stayed with Barbara B. under court-ordered placements since then even though Cynthia M. left the hospital after "two or three days."

¶3 From Angela's birth in May of 1995 until Cynthia M.'s brief voluntary hospitalization in September of 1996, Angela spent significant time away from Cynthia M. The following are brief excerpts from Cynthia M.'s testimony:

> A … She stayed with my Mom for a period of one month, I believe.
>
> Q Which month was that?
>
> A I don't remember. That was a long time ago.
>
> Q There was also a time in which you took Angela to live with a former foster parent of yours. Is that right?
>
> A Yes.
>
> ….
>
> Q How long did Angela stay with that person?
>
> A About two to three weeks.

> Q Why was that?
>
> A Because I was having problems with depression, I could not get ahold of my mother who would normally watch her.

Further, Jennifer S., who was Barbara B.'s daughter, testified that she would take Angela to live with her during that time for "[o]ne to two weekends a month."

¶4 Cynthia M. also testified that she needed help from her mother and brothers and from Jennifer S. to care for Angela because, as Cynthia M. told the jury, she "was having problems with depression." Jennifer S. testified that she was concerned about Cynthia M.'s ability to care for Angela because of Cynthia M.'s "mental status" and "[h]er ability to handle everyday activities," and related that Cynthia M. called her one evening to say that she was, as phrased by Jennifer S., "hearing voices, and the voices were telling her to throw Angela over the viaduct bridge which is close to their home." Jennifer S. also testified that it appeared to her that Cynthia M. and Angela's biological father, with whom Cynthia M. was then living, were not exercising appropriate parental responsibilities, and told the jury about one time when she saw Angela crawling alone in a common hallway at the top of a flight of stairs with no evident supervision.

¶5 Barbara B. testified that when Angela came to live with her in September of 1996, she was not a healthy, robust child, but, rather, "was thin," "very withdrawn," and "very lethargic," and that she had a "[v]ery severe" rash, for which Barbara B. had to get prescription medication. According to Barbara B., the rash lasted some "four to six weeks, before it was really cleared up." She described for the jury Angela's state when she first came to live with her:

> A … If I would have allowed her to, probably for the first six months, she would have laid on the bed or on the floor and stared.
>
> Q You mean you had difficulty getting her to move?
>
> A I-- I didn't have difficulty getting her to move, as long as I would give her external stimulation.
>
> Q Otherwise she would not move on her own?
>
> A She would somewhat. But if-- She would actually have preferred just to lay in a bed or on the floor.

Further, according to Barbara B., Angela "was not talking or really verbalizing. She was not walking" and "was deathly afraid of getting into a bathtub."

> Q How could you tell that?
>
> A Because she would just scream. I mean, frightfully scream, not angrily.
>
> And so I would have to bathe her in the sink, probably for six months, before I slowly could get her to go into a tub.

¶6 Angela lived with Barbara B. until the time of trial, and, indeed, Barbara B. will, if the termination order is upheld, adopt Angela. Although Cynthia M. disputed much of it, there was substantial evidence that she did very little to try to get Angela back. Indeed, she conceded that between mid-April of 2003 and the end of September of 2003 she never saw Angela. She claimed that she spoke with Angela on the telephone three times during that period, but her memory about that was, admittedly, clouded. Although she blamed Barbara B. and Jennifer S. for thwarting her attempts to keep in contact with Angela, the women denied that, and the jury was, of course, free to believe them and not Cynthia M. There was also substantial evidence by the social-service workers responsible for Angela that she had bonded not with Cynthia M. but with Barbara B., in whose home Angela was thriving.

II.

¶7 We give significant deference to jury verdicts on appeal, and may not overturn them "'if there is any credible evidence'" that supports what the jury has found, giving to jury verdicts every reasonable supporting inference. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 449, 655 N.W.2d 752, 761 (quoted source omitted). We analyze the jury's findings in this light.

A. *Assumption of Parental Responsibility*.

¶8 WISCONSIN STAT. § 48.415(6) provides:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

The evidence, in a light most favorable to the jury's finding, establishes that although Angela lived with Cynthia M. with various interruptions from her birth in May of 1995 until September of 1996, Cynthia M.'s parenting during that time fell below what § 48.415(6)(b) recognizes is something to which every child is entitled, "daily supervision, education, protection and care." Thus, as noted, Angela was not healthy when she started to live with Barbara B. in September of

1996. Mere temporal and geographical confluence between a biological parent and his or her child does not prevent a jury from determining that the biological parent did not give to the child requisite parental care. *See* ***Quinsanna D.***, 2002 WI App 318, ¶32, 259 Wis. 2d at 450, 655 N.W.2d at 762. And this is true even though the biological parent may have been prevented by circumstances, here, mental illness, from providing that care. *Cf.* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 684, 500 N.W.2d 649, 654 (1993) ("[T]he 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."). Under our standard of review, the jury's finding that Cynthia M. failed to assume parental responsibility for Angela is supported by the evidence and, accordingly, must stand.

B. *Abandonment*.

¶9 WISCONSIN STAT. § 48.415(1) provides, as material here:

> (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.[1]

---

[1] WISCONSIN STAT. § 48.415(1)(c) provides:

> Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:

(continued)

(Footnote added.) In light of Cynthia M.'s concession that she did not see Angela for some five consecutive months in 2003, and the jury's right to not believe her testimony that Barbara B. and Jennifer S. thwarted her efforts to maintain contact with Angela, the jury's finding of abandonment, as with its finding that Cynthia M. failed to assume parental responsibility for the little girl, is supported by the evidence, and, under our standard of review, must stand.

> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

Other than her assertions that Barbara B. and Jennifer S. prevented her from seeing Angela, which the jury was free to disbelieve, Cynthia M. does not otherwise contend on appeal either that she falls within § 48.415(1)(c)'s safe harbor, or that notice requirements in § 48.415(1)(a)2 were not complied with.

III.

¶10 Once a jury finds that there are grounds to terminate a person's parental rights to his or her children, the trial court must decide whether termination is in the children's best interests. WIS. STAT. §§ 48.424(1) and (4); 48.426(2). As the trial court recognized, a parent whose action or inaction results in a finding that there are grounds to terminate his or her parental rights has no special claim to the children in the best-interests phase. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999).

¶11 Whether circumstances warrant termination of parental rights is within the trial court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. ***Brandon S.S.***, 179 Wis. 2d at 150, 507 N.W.2d at 107. We review *de novo* whether the trial court has applied the correct legal standard. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

¶12 WISCONSIN STAT. § 48.426(3) provides:

> In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent 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.

Cynthia M. does not argue that the trial court did not consider the appropriate factors in concluding that termination was in Angela's best interests. Rather, she argues that the trial court erred in focusing on Angela's need for "permanence" even if that meant that Barbara B., the putative adoptive mother, would not let Cynthia M. see Angela. But the legislature has specifically commanded that if there are grounds to terminate a person's parental rights, the child's best interests is the "pole star" of the ultimate termination decision, § 48.426(2); *see* ***Sheboygan County Dep't of Health & Human Servs. v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 188, 648 N.W.2d 402, 410, and that permanence for the child is a critical consideration, *see* WIS. STAT. § 48.01(1)(a) ("The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family."). The trial court thoughtfully considered the appropriate factors, noting that Angela has bonded and thrived with Barbara B., with whom Angela indicated she wanted to live, and that she would get with Barbara B. the stable life she both wanted and needed. Cynthia M. has not even come close to showing that it erroneously exercised its discretion.

IV.

¶13 In a largely undeveloped argument, Cynthia M. seeks a new trial under WIS. STAT. § 752.35 "in the interest of justice," and, other than pointing out the trial court's discomfort in having to make ultimate credibility determinations adverse to Cynthia M., summarizes the contentions she made in connection with her arguments that there was insufficient evidence to support the jury's verdict and that the trial court erroneously exercised its discretion in concluding that termination was in Angela's best interests. We have, however, already rejected these contentions, and thus we reject her call for a new trial as well. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).

By the Court.—Order affirmed.

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