COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2534 **Cir. Ct. No. 2004TP478**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

VERONICA J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Veronica J. appeals from an order terminating her parental rights to Damontta J.J.-W. after the trial court granted

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

(continued)

partial summary judgment to the State based on a previous termination of parental rights that resulted from a default judgment under WIS. STAT. § 48.415(10) (2003-04).[2] Veronica alleges that the trial court should not have granted partial summary judgment because her previous termination of parental rights was by default. She contends that, as a result, she was not found to be an unfit parent by a fact-finding hearing, thereby resulting in a violation of her due process rights in the instant case. Because the trial court did not err in granting partial summary judgment, this court affirms.

BACKGROUND

¶2 Damontta was born on April 7, 2002. He was placed into foster care on May 5, 2004. On June 2, 2004, the court entered a dispositional order, finding Damontta to be in need of protection or services and establishing conditions which Veronica needed to satisfy in order to have her son returned to her care. Since then, Damontta has lived outside Veronica's home.

¶3 On October 13, 2004, the State filed a petition to terminate Veronica's parental rights to Damontta. The petition was based on the previous

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All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Prior involuntary termination of parental rights to another child is a sufficient ground to establish termination of parental rights. *See* WIS. STAT. § 48.415(10) ("Prior involuntary termination of parental rights to another child, which shall be established by proving all of the following: (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13 (2), (3) or (10). (b) That, within 3 years prior to the date the court adjudged the child who is the subject of the petition to be in need of protection or services as specified in par. (a), a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.")

involuntary termination of Veronica's rights to another child, Whitney J. In the previous case, Veronica's rights to Whitney were terminated based on a default judgment entered after she failed to appear at two hearings. No fact-finding hearing was held.

¶4 On November 29, 2004, the State filed a motion for partial summary judgment. The State alleged that no genuine issue of material fact existed as to WIS. STAT. § 48.415(10) and that Veronica had a prior involuntary termination in the three-year period prior to Damontta's placement outside the parental home. On December 22, 2004, Veronica filed a brief opposing the partial summary judgment. She admitted that the prior parental termination occurred, but argued that because she did not have an evidentiary hearing in her previous case, using it as a basis to terminate her parental rights in the instant case violates due process. The trial court granted the State's motion for partial summary judgment. The trial court stated that there was no genuine issue of material fact because Veronica conceded that there was a previous involuntary termination and Damontta was found to be in need of protection or services within three years of the prior termination of parental rights case.

¶5 After granting the partial summary judgment on the grounds phase of the proceeding, the trial court conducted a dispositional hearing. At the conclusion of that hearing, the trial court found that it was in the best interests of Damontta to grant the petition seeking to terminate Veronica's parental rights. An order was entered to that effect. Veronica now appeals.

DISCUSSION

¶6 Veronica claims the trial court erred in granting partial summary judgment on the grounds phase of the termination petition. Specifically, she

asserts that the basis for the summary judgment was a previous default termination, rather than a termination following a full hearing. Accordingly, she asserts that she was never found to be unfit in the previous termination, and that using the previous termination based on default violated her due process rights. This court is not persuaded by her arguments.

¶7 Our review of summary judgment decisions is well known and need not be repeated here. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980); WIS. STAT. § 802.08. Our review is independent from the trial court. ***Id.*** Further, our supreme court recently held that summary judgment may be used during the grounds phase of a termination of parental rights proceeding. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶33-44, 271 Wis. 2d 1, 678 N.W.2d 856.

¶8 In granting partial summary judgment, the trial court explained:

> There is a request to have a partial summary judgment based on the recent case. And the law is fairly clear as far as I am concerned that I can address the issue of summary judgment in a TPR case and need to follow the tenets of 802.08. The allegation here is that of 48.415(10) prior involuntary termination of parental rights to another child. [Veronica's counsel] has conceded that the child who is the subject of this petition had been adjudged to be in need of protection or services pursuant to statute.
>
> And as to (b) that within the three years prior to that date the Court adjudged the child, who is subject of the petition of being in need of protection or services, and the Court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more grounds specified in this case.
>
> Based on the fact that [Veronica's counsel] has indicated there is no genuine issue of facts as to that, the Court will grant summary judgment as to the first phase of these proceedings.

¶9 The trial court's decision must be upheld. There are no material issues of fact in dispute as to whether grounds exist under WIS. STAT. § 48.415(10) for termination. It is undisputed that Damontta, the subject of the termination petition, has been adjudged to be a child in need of protection or services ("CHIPS"). It is also undisputed that within three years of Damontta's adjudication as a CHIPS, Veronica's parental rights were terminated to another child. There are no disputes of facts on these statutory factors, as Veronica concedes.

¶10 Instead, she argues that summary judgment was inappropriate because there was no fact-finding hearing in the previous default termination and there was no finding that she was unfit in the previous default termination. Veronica is incorrect. Although the previous termination petition was granted on the basis of Veronica's failure to appear for two hearings, the trial court did make a finding that she was unfit to parent the child. That finding is contained within the order granting the default termination petition.[3] In addition, the fact that the trial court made this finding without a jury does not result in a violation of due process or other constitutional infirmity.

¶11 Our supreme court rejected similar arguments in ***Kelley H.*** The court explained that in certain circumstances, grounds for unfitness can be determined solely based on "official documentary evidence, such as court orders

[3] In her reply brief, Veronica challenges the finding of unfitness on the basis that her attorney in that case did not participate in the dispositional hearing or contest the State's case. Veronica's failure to contest disposition does not alter the trial court's finding that she was unfit. She had the right to contest disposition in the previous case. For whatever reason, she chose not to. Veronica cannot now complain that the trial court's finding was infirm because of her failures.

or judgments of conviction." ***Id.***, ¶37. In those circumstances, when there are no issues of disputed facts, a fact-finding hearing is not constitutionally (or statutorily) required. ***Id.***, ¶41. In reaching this conclusion, the court assessed the three-factor test: "the private interest affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting the use of the challenged procedure." ***Id.***, ¶40 (citing ***Santosky v. Kramer***, 455 U.S. 745, 754 (1982).

¶12 Although the first factor is unquestionably strong in TPR proceedings, the "remaining two factors … weigh heavily against a conclusion that a jury trial is constitutionally required in TPR cases." ***Kelley H.***, 271 Wis. 2d 1, ¶41. The same analysis is applicable in Veronica's case. There were no disputed issues of material fact. She conceded both statutory factors for a finding of unfitness pursuant to WIS. STAT. § 48.415(10). "[D]ue process does not mandate a jury trial in the unfitness phase of a TPR case." ***Kelley H.***, ¶44. The right to a jury trial in a TPR case is *statutory* rather than constitutional and, as such, subject to the code of civil procedure, including the summary judgment statute. ***Id.*** In the instant case, the trial court applied the correct standards in rendering the partial summary judgment in this case and, therefore, this court will not reverse that determination. Veronica's due process rights were not violated.

¶13 This court agrees with the supreme court's assessment (in ***Kelley H.***) of the low risk of error in applying WIS. STAT. § 802.08 to the grounds phase of TPR proceedings. The supreme court stated:

> The risk of error in applying partial summary judgment at the grounds phase of a TPR proceeding where the facts of unfitness are undisputed is extremely low. The grounds for unfitness most likely to form the basis of a successful motion for partial summary judgment in a TPR case are those that are sustainable on proof of court order or

> judgment of conviction, the reliability of which is generally readily apparent and conceded. Furthermore, as we have noted, a finding of unfitness is only the first of two steps in the process. A finding of unfitness—whether on fact-finding by the court or jury where the facts are disputed or on partial summary judgment where the facts are undisputed—does not mandate termination of parental rights, nor does it foreclose the parent's opportunity to present evidence and argue against termination at the dispositional hearing.

Id., ¶42. In the instant case, following the partial summary judgment on the grounds phase, the trial court conducted a dispositional hearing. At that hearing, Veronica was afforded the opportunity to argue against termination of her parental rights. It was at this hearing that Veronica could rightly assert the mitigation types of arguments that she raises in this appeal. *See* ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402. Based on the foregoing, this court affirms the trial court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.