COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1488

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

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LEE J. B.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Lee J.B. appeals a judgment and order terminating his parental rights to his one-year-old daughter. He claims that he was deprived of due process because he did not receive notice that his parental rights might be terminated, and that the trial court erroneously exercised its discretion in ordering his rights terminated. We reject both claims and affirm the judgment and order terminating Lee's parental rights.

BACKGROUND

¶2 The child, S.E.W., was born out of wedlock in May 1999 to Lee and his first cousin, Michele. When the child was five weeks old, she was removed from her mother's home at the mother's request because of Michele's inability to meet the child's special needs. Michele regained custody a week later, but a week after that, the child was again placed with the child's maternal grandparents, where she remained throughout the subsequent court proceedings. The court entered a dispositional order in August 1999, finding S.E.W. to be a child in need of protection or services (CHIPS).

¶3 At the time of the CHIPS disposition, S.E.W.'s paternity had not been established, and Lee was one of three men named by Michele as potential fathers of the child. Lee was determined to be the father in a paternity judgment entered October 19, 1999. The Monroe County Department of Human Services filed a petition to terminate the parental rights (TPR) of both parents on December

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

6, 1999, based on the child's alleged incestuous parenthood.[2] On December 20, 1999, the court held a hearing on Lee's requests for visitation and for inclusion in permanency planning for the child. Citing its awareness of the pending TPR proceedings, the court deferred a final ruling on Lee's requests until the outcome of the termination proceedings were known. During the pendency of the TPR proceedings, however, the court ordered that Lee be granted two hours supervised visitation with the child every other weekend.

¶4 In the TPR proceedings, Michele and Lee were represented by separate counsel. Michele admitted that statutory grounds existed for the termination of her parental rights, but opposed the granting of the petition. *See* WIS. STAT. §§ 48.424(3) and 48.427(2). Lee "stood mute" and the court entered a denial of the petition's allegations on his behalf. The court conducted fact-finding and dispositional hearings on January 31, 2000. At the commencement of the proceedings, the court heard and denied Lee's motion to dismiss for lack of a notice and warning to Lee that his parental rights might be terminated. It concluded that Lee was not entitled to notice under WIS. STAT. § 48.356[3] because

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[2] Under WIS. STAT. § 48.415(7), "incestuous parenthood" is a ground for terminating parental rights, "which shall be established by proving that the person whose parental rights are sought to be terminated is also related, either by blood or adoption, to the child's other parent in a degree of kinship closer than 2nd cousin."

[3] WISCONSIN STAT. § 48.356 provides, in relevant part, as follows:

> (1) Whenever the court orders a child to be placed outside his or her home … or denies a parent visitation because the child … has been adjudged to be in need of protection or services … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation.
>
> (2) In addition to the notice required under sub. (1), any written order which places a child … outside the home or denies

(continued)

he was not residing with the child at the time of her removal from her home, nor had he been adjudicated the child's father at the time of the CHIPS disposition, and further, that the statutory notice and warning was not a prerequisite for a TPR petition brought under WIS. STAT. § 48.415(7).

¶5 Based on testimony provided at earlier proceedings, the court then found that grounds for termination existed under WIS. STAT. § 48.415(7), given that Lee and Michele were the children of sisters, making them first cousins.[4] In the dispositional phase of the hearing, the department presented the testimony of a pediatric neurologist who had been treating S.E.W. for seizures and a muscle condition known as hypotonia. In addition to describing the medical conditions and S.E.W.'s treatment and therapies, the physician outlined the child's special needs which her caregivers must attend to:

> [T]hey need to be observant of [S.E.W.] and be able to monitor her even during the night when she is asleep because she is at risk for more seizures. So that someone has to be able to be close that they can hear [S.E.W.] breathing…. That's probably the most important thing that they need to do. But other than other things they're required are that [S.E.W.] more than most little babies needs to lead a life of some moderation. That there has to be plenty of opportunities to nap. We don't want her sleep deprived because that makes seizures more likely to happen. She needs to be fed on a regular basis. Again any kind of minor stress makes seizures more likely to happen. They have to be very careful about giving her medicine, Tegretol. If the medicine were not given for several days, for instance, it could cause prolonged life threatening seizures. So we have to have somebody that we can depend on to give the medicine several times a day…. I

> visitation under sub. (1) shall notify the parent or parents … of the information specified under sub. (1).

[4] Although Lee objected to this finding on hearsay grounds, he does not pursue the issue on appeal.

> think that this is a fairly demanding task that we ask of these people. They're kind of on call waiting for something to happen 24 hours of each day. And I think this requires for some real dedication, some real maturity to be able to do this well.

¶6 The child's maternal step-grandmother, with whom S.E.W. had been placed since her removal from Michele's home six months earlier, also testified to the intensive supervision and care the child requires. This includes numerous daily exercises to improve S.E.W.'s muscle tone and control, around-the-clock monitoring for seizures, occasional emergency hospitalizations, constant temperature monitoring, daily record-keeping regarding S.E.W.'s condition and activities, and oral stimulation prior to all meals. She characterized the level of care S.E.W. needs as "extreme." She also verified her and her husband's willingness to adopt the child and she related her concerns regarding Michele or Lee's inability to adequately care for S.E.W.

¶7 Lee testified that he had had only limited contacts with the child since her birth, largely because of the department's unwillingness to include him in planning for the child. He said that although he and his girlfriend worked long and overlapping hours at present, that they would adjust their work hours to care for S.E.W. He testified that he had gained childcare experience from caring for several nieces and nephews of his, and that he was willing to learn whatever was required to meet S.E.W.'s special needs. He also acknowledged that he dropped out of school in the eleventh grade, had not obtained his GED, and had used drugs about a year ago.

¶8 Lee's mother testified that she would be willing to assist her son in caring for S.E.W., and that she was aware of "some" of the child's needs. Lee's girlfriend verified that that she was willing to switch jobs or shifts to help care for

S.E.W. She also acknowledged, however, that she and Lee had no current plans to marry, and that the care S.E.W. requires because of her medical needs was "very scary," but that she was "more than willing to do it."

¶9 The department's report to the court provided the information and commentary required under WIS. STAT. § 48.425 and concluded "that it is crucial that [S.E.W.] be allowed to be cared for in a permanent, healthy and well-structured home such as the home of [her maternal grandfather and step-grandmother]," and that a termination of both parents' rights to S.E.W. was in the child's best interests. The Wisconsin Department of Health and Family Services filed a letter with the court indicating that "although [S.E.W.] is definitely a special needs child, [s]he is also an adoptable child," citing the desire of her maternal grandfather and step-grandmother to adopt the child "despite her present and future medical condition." S.E.W.'s guardian ad litem acknowledged the request of the parents that they be given the opportunity to care for the child, but stated that the controlling factor at disposition was the child's interests which, under the applicable standards and factors, would be best served by a termination of parental rights.

¶10 The trial court also emphasized that the best interests of S.E.W. were the "prevailing factor" at disposition, citing WIS. STAT. § 48.426(2). After reviewing the evidence before it, the court concluded that the department had established that a termination of the rights of both parents would best serve S.E.W.'s interests. The court also issued a written "supplement" to its oral decision, which included a finding that "the evidence … showed both parents are incapable of providing the special 24-hour care that this child requires," and additional discussion of how the factors enumerated in § 48.426(3) support the

termination of their parental rights. Lee appeals the subsequently entered judgment and order terminating his rights.[5]

ANALYSIS

¶11 Whether Lee's right to due process was violated by a lack of notice or warning, prior to the department's filing the TPR petition, that his rights to S.E.W. might be terminated, is a question of law which we decide de novo. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862-63, 537 N.W.2d 47 (Ct. App. 1995). The decision to terminate parental rights once statutory grounds have been proven, however, is a matter committed to the discretion of the trial court. *See* ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 103-04, 470 N.W.2d 914 (1991). Accordingly, we will not set aside the trial court's determination that Lee's parental rights to S.E.W. should be terminated so long as the trial court applied the correct law to the relevant facts and, through a demonstrated process of reasoning, reached a result which a reasonable judge could reach. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991).

¶12 We agree with Lee that, as a parent, he has an interest at stake in these proceedings which is protected by the Due Process clauses of the United States and Wisconsin Constitutions. *See* ***Patricia A.P.***, 195 Wis. 2d at 862-63. He claims that it was "fundamentally unfair" for the department to seek to terminate his rights to S.E.W. without first providing him the notice and warning required under WIS. STAT. § 48.356 that was given to Michele when the child was removed from her home. Thus, according to Lee, he had no opportunity "to remedy the

[5] Although her rights were also terminated, Michele does not join in this appeal.

situation" inasmuch as he was "effectively shut out of the process" of planning and providing for S.E.W.'s welfare. We disagree that Lee's right to due process was violated because only Michele, and not he, was given the notice and warning required under § 48.356.

¶13 At the time that S.E.W. was removed from Michele's home, Lee had not been adjudicated the child's father, nor was he residing in a familial relationship with S.E.W. He was one of three men who might be the child's father, and that circumstance had not changed at the time of the CHIPS disposition, when the required notice and warning was given to Michele. WISCONSIN STAT. § 48.356(1) requires a court, "[w]henever the court orders a child to be placed outside his or her home," to "orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home …." (See footnote 3.) Subsection (2) of the statute, in turn, requires that "any written order which places a child … outside the home … shall notify the parent or parents" of the same information. The statute serves the purpose of warning a parent whose child is placed outside his or her home "that his or her rights to a child may be lost because of the parent's *future* conduct." ***Patricia A.P.***, 195 Wis. 2d at 863 (emphasis added).

¶14 We agree with the department that because Lee was not at the time of the CHIPS disposition adjudicated to be the father of S.E.W., and because the removal of S.E.W. from his home or her return to it was not at issue in the CHIPS proceedings, neither the statute nor the Due Process clause requires that he be given the specified notice and warning. Had the department sought to terminate Lee's parental rights on account of S.E.W.'s "continuing need of protection or services," based on the child's removal from the parental home, coupled with the

inability to meet the conditions for her return, Lee's statutory and constitutional rights to notice and warning would be a relevant consideration in these proceedings. *See* WIS. STAT. § 48.415(2); ***Patricia A.P.***, 195 Wis. 2d at 863-65. The grounds for termination relied upon here, however, were based on a past event, S.E.W.'s birth resulting from an incestuous relationship, a circumstance which Lee was powerless to remedy after the fact. Neither WIS. STAT. § 48.415(7) nor the Due Process clause require that, in the fall of 1999 when Lee was adjudicated to be S.E.W.'s father, he be notified that his rights to the child might be terminated on account of her incestuous parenthood. Such a notice would have been "superfluous." *See* ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 645, 534 N.W.2d 907 (Ct. App. 1995).[6]

¶15 Even though Lee could not remedy, after the fact, his incestuous fathering of S.E.W., he was entitled to notice of the proceedings to terminate his rights on that basis, and to the opportunity to be heard regarding why, notwithstanding the existence of grounds under WIS. STAT. § 48.415(7) for the termination of his rights, such action was not "warranted." *See* ***State v. Allen M.***, 214 Wis. 2d 302, 315-16, 571 N.W.2d 872 (Ct. App. 1997). The trial court afforded Lee that opportunity. We next consider whether it erred in ordering a termination of Lee's rights under WIS. STAT. § 48.427, and we conclude that it did not.

[6] We recognize that in ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 534 N.W.2d 907 (Ct. App. 1995), we expressly left open the question of "the applicability of WIS. STAT. § 48.356 to" WIS. STAT. § 48.415(7). *See* ***id***. at 644 n.7. We can perceive of no valid basis, however, on which to distinguish the rationale of our conclusion regarding the applicability of § 48.356 to subsection (8) from its applicability to subsection (7).

¶16 In its oral and written decisions, the trial court expressly considered and commented upon the standard and factors enumerated in WIS. STAT. § 48.426, as it was required to do. We have summarized the evidence before the court regarding S.E.W.'s special needs, the likelihood of her adoption by her current caregivers, Lee's current circumstances, and the reports and recommendations of the department and the child's guardian ad litem. The trial court correctly concluded that S.E.W.'s best interests were to be "the prevailing factor" in determining a disposition. *See* § 48.426(2). We conclude that the court applied the correct law to the relevant facts, engaged in a process of reasoning, and reached a determination which a reasonable judge could reach. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Whether this court might have come to a different conclusion on the present record is not determinative of our review of the trial court's discretion, which we conclude was not erroneously exercised. *See* ***id***.

CONCLUSION

¶17 We conclude that Lee's due process rights were not violated, and that the trial court did not erroneously exercise its discretion in terminating his parental rights. Accordingly, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

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