COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

Nos. 01-0351, 01-0352, 01-0353-NM

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

NO. 01-0351

IN THE INTEREST OF ASHLEY L.Z.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TAMMY L.W.,

RESPONDENT-APPELLANT.

NO. 01-0352

IN THE INTEREST OF CODY A.Z.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TAMMY L.W.,

RESPONDENT-APPELLANT.

NO. 01-0353-NM

**IN THE INTEREST OF SHANIA M.C.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TAMMY L.W.,

RESPONDENT-APPELLANT,

RICK C.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Tammy W. appeals the orders terminating her parental rights to her three children and orders denying her post-termination motions. She contends that the trial court erred because it failed to find that Tammy's unfitness as a parent was so egregious as to warrant termination of her parental rights. She further argues that the evidence was insufficient to warrant

[1] This is a one-judge appeals pursuant to WIS. STAT. RULE 809.23(1)(b)4.

termination of her rights to her oldest daughter. Because the record supports the court's exercise of discretion and the court made no error of law, we affirm the orders.

¶2 In a consolidated case, Rick C. appeals the order terminating his parental rights to one of Tammy's daughters, Shania M.C. His counsel filed a no merit report. We conclude that the no merit report accurately describes the record and correctly analyzes the issues; therefore, we affirm the order terminating Rick's parental rights to Shania.

I. TAMMY W.'S APPEAL

A. BACKGROUND

¶3 Tammy had three children born out of wedlock: Ashley L.Z., born in 1988, Cody A.Z., born in 1995, and Shania M.C., born in 1997. Tammy and her children had a number of referrals to the Brown County Department of Human Services dating from 1991 arising from neglect. After Tammy was jailed on a probation hold in October 1998, a referral was made to the department and the children were placed in foster care.

¶4 In June 2000, the department filed a petition for termination of parental rights (TPR) on the grounds of continuing need of protection and services, WIS. STAT. § 48.415(2).[2] The TPR petition alleged that the children were in foster care and that several conditions had been ordered for their return to

[2] All statutory references are to the 1999-2000 version unless otherwise noted.

Tammy's care. The petition further alleged that Tammy violated the conditions when she chose to quit her job and resume drinking alcohol.

¶5 After a three-day trial, the jury returned a verdict finding that according to a court order containing termination of parental rights notices, the children were in need of protection or services and had been placed outside the home for more than six months. The verdict also found that the department made reasonable efforts to provide services ordered and that Tammy had failed to meet the court-ordered conditions for the return of her children. The verdict determined that there was a substantial likelihood that Tammy would not meet the conditions within one year. Based on the verdict, the trial court found that Tammy was unfit and set a dispositional hearing.

¶6 At the dispositional hearing, the court terminated Tammy's parental rights. The court found that all three children had been placed outside their parents' care for more than two years. With respect to Ashley, the court observed:

> Ashley was basically raised by her grandparents for the first five years of her life and had no relationship with [her father]. She's twelve now. In October of 1998, she was removed from the home so approximately seven -- more than half of her life really has been without either of her parents being responsible for her day-to-day care.

¶7 The court also found that it "is basically undisputed that [all three children] are … likely to be adopted." It determined Shania and Cody never had a chance to develop a substantial parental relationship with Tammy and that the record was "replete with the fact that Shania and Cody [will] enter into a more stable and permanent relationship" after a termination of parental rights.

¶8 The court acknowledged that Ashley loves her mother very much, has developed a substantial relationship with her and wishes to live with her. The court recognized the need to balance Ashley's wishes with her need for stability. The court found that Ashley "desperately wants to be somewhere where she can go to bed at night and hug somebody and wake up in the morning and know that they're going to be [there] the next day …." It stated:

> [T]he balancing test is how do we move Ashley to a place where a twelve-year old can blossom and be a twelve-year old, that she can stop worrying about where she's going to be tomorrow or … what's happening to her mom or what's happening in her life ….

¶9 The court stated that the record shows that "clearly … Ashley is adoptable" and "I think it may come down to [that] her ability to really survive is probably predicated upon her having a stable, permanent environment. If she does not have that, she will literally be destroyed because she so desperately craves for that." The court determined that "the evidence in this record is overwhelming that it's more probable that she will enter into a stable relationship were I to terminate these parental rights than is the case under the present circumstance." The court ordered termination of parental rights to all three children.

¶10 Tammy moved to set aside the order alleging that the trial court failed to determine whether the evidence was so egregious as to warrant termination of Tammy's parental rights. The court denied Tammy's motion on the ground that it made the finding implicitly if not expressly. Tammy's appeal follows.

B. EGREGIOUSNESS

¶11 Tammy argues that the trial court erroneously exercised its discretion when it failed to determine that Tammy's unfitness was so egregious as to warrant the termination of her parental rights. Tammy relies on ***In re K.D.J.***, 163 Wis. 2d 90, 470 N.W.2d 914 (1991), for her assertion that after a jury has returned a verdict establishing grounds for termination under WIS. STAT. § 48.415, the trial court must determine whether the parent has been shown "to be so egregiously unfit" as to warrant the termination of her parental rights. Tammy asserts that such an analysis is required to meet the requirements of due process.

¶12 Whether to terminate parental rights is committed to the trial court's discretion. ***In re J.L.W.***, 102 Wis. 2d 118, 130-31, 306 N.W.2d 46 (1981). Discretionary decisions are sustained if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W. 2d 175 (1982). Here, Tammy's argument focuses on whether in exercising its discretion the court employed the correct legal standard. Tammy's contention therefore presents a question of law we review independently. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983) (Whether the facts fulfill the legal standard is a determination of law, and ordinarily the appellate court need not defer to the trial court's determination of a question of law.).

¶13 We start with examining the statutes in question. WISCONSIN STAT. § 48.415 provides the grounds for involuntary termination of parental rights.[3] If

[3] Section 48.415 provides in part:

(continued)

grounds for termination of parental rights are found by the court or jury, the court

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> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child 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, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable 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 or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe 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.
>
> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
>
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

shall make a finding that the parent is unfit. WIS. STAT. § 48.424(4). A finding of unfitness shall not, however, preclude the dismissal of a petition under WIS. STAT. § 48.427(2). "The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights." ***Id.***

¶14 ***K.D.J.*** provides:

> This means that even though the jury finds the "facts" that would constitute "grounds" for termination, the court may still dismiss the petition if the court finds either that the evidence does not sustain any one of the jury's individual findings or that even though the findings may be supported by the evidence, the evidence of unfitness is not so egregious as to warrant termination of parental rights.

Id. at 103.

> This conclusion follows from the wording of sec. 48.427(2), Stats., that the evidence "does not warrant the termination of parental rights." Thus, it seems clear that in spite of what the evidence may show, whether such evidence warrants termination, is a matter within the discretion of the court. This is so because the word "warrant" implies an overview of the evidence, the findings, and also the implication of what is in the best interest of the child.
>
> ….
>
> There are obviously degrees of unfitness and some "unfit" parents may be more or less unfit than others. It is the fact of degrees of unfitness that has caused the legislature to allow the court, in the exercise of discretion, to evaluate a "finding" of "unfitness" even though the grounds of termination may be found by a jury or the court itself.

Id. at 103-04.

¶15 Thus, ***K.D.J.*** requires the court to evaluate the evidence supporting the finding of unfitness to determine whether it warrants the termination of parental rights. The court does not commit reversible error, however, if it fails to use the specific term "egregious" when making its evaluation.

> From the comments of the circuit court it is clear that the court was convinced her unfitness was sufficiently egregious to warrant termination. There would be no point in sending this case back to the circuit court for a specific, declaration to that effect.
>
> ….
>
> The circuit court here made "unmistakable but implicit findings" of parental unfitness such as to warrant termination of parental rights.

Id. at 109.

¶16 We conclude that the trial court applied the correct legal standard when it determined that Tammy's unfitness warranted the termination of her parental rights. The court discussed the evidence of neglect that supported the jury's findings. The court pointed out the need for stability in the children's lives. It stated that Ashley's very "survival" was "probably predicated upon her having a stable, permanent environment." The court found that if she does not have one, "she will literally be destroyed …." It stated further:

> [W]hen you have children, in order for those children to be nurtured and loved and cared for, it requires enormous self-sacrifice, and the issue in front of me to these parents … look in you hearts.
>
> ….
>
> How have you sacrificed your choices, the choices you made? How did you sacrifice those choices for these children? And that's why we're here today. … It's because in your inability to forego your own wishes and desires and choices and sacrifice all that for these three beautiful little children, if you had done that, you'd never be here. But you didn't.

¶17 From the trial court's comments, it is clear that it was convinced Tammy's unfitness was sufficiently egregious to warrant termination. Its

evaluation of the record was not just of the fact that the jury had found "grounds" for termination, but that the quality, quantity and persuasiveness of the evidence warranted termination. *See* ***id.*** at 104.

¶18 In ***K.D.J.***, the court stated that to condemn a child "to go from foster home to foster home waiting for a parental relationship to come into existence for which the mother seems unwilling to take steps to make possible, is, it seems to us, 'seriously detrimental to the child.'" ***Id.*** at 113. Here, it is evident that the trial court agreed. While not using the specific term "egregious," there would be "no point in sending this case back to the circuit court for a specific declaration to that effect." *See* ***id.*** at 109.

¶19 Because the record reflects that the court's evaluation of the factors under WIS. STAT. § 48.426, along with the evidence, led it to conclude that Tammy's unfitness was such that it warranted termination of her parental rights, the court applied the correct legal standard. As a result, Tammy demonstrates no reversible error.

C. EVIDENCE OF UNFITNESS

¶20 Tammy argues, nevertheless, that the evidence is insufficient to support the termination of her parental rights to Ashley. She contends that there is no evidence showing that further contact with Ashley would, in the words of ***K.D.J.***, be "seriously detrimental" or that termination is "essential to [the child's] safety or to [the child's] welfare, in some very serious and important respect." ***Id.*** at 113.

¶21 The testimony adduced at trial and at the disposition hearing permitted the court to conclude that an unwillingness or inability on the part of

Tammy to provide a stable home life reached such a degree that she was not functioning as a parent to Ashley. There is no dispute that Ashley was left to the care of others for more than half her life. When she was living with Tammy, the record shows that she was left alone to care for the younger siblings or was left with inappropriate caretakers, such as Tammy's former boyfriend, who had a history of domestic violence and battery.

¶22 Ashley's therapist testified that Ashley wanted a stable family, "preferably her own, but she wants a family." She also testified that while Ashley preferred to return to her mother, Ashley knew that it was not possible at that time. She stated that Ashley was not wishing for an hour a week with her mom until she reaches age eighteen, "so to keep doing the one hour a week with will she or won't she go home, that is the kind of instability that is harmful to her." Ashley's therapist also characterized Ashley's relationship with her mother as one that wavers, because "at times it's like Ashley's trying to take care of her mom, you know, not that her mom has asked her to do that but that's just where Ashley is at."

¶23 Ashley was represented by separate adversary counsel through the State Public Defender's office, in addition to her guardian ad litem. The court recognized the "agonizing and difficult" decision that was before it. The court took into account Ashley's desires to return to her mother and balanced that with the expert's testimony regarding the need for stability and continuity. The court concluded that on balance the lack of stability contemplated by living with Tammy would "literally destroy" Ashley. On the record before it, the court was entitled to conclude that termination "was essential to [Ashley's] welfare in some serious and important respect." ***Id.***

¶24 Tammy argues, however, that the evidence of her bond with Ashley was undisputed, and that Ashley loved her mother and felt loyal to her. Tammy also claims that Ashley was depressed and doing poorly in school, which Tammy attributes to the termination litigation. Tammy points to evidence that Ashley is unhappy in her foster home and that it would be devastating to her to sever her relationship with Tammy. Ashley's therapist had testified that it would be best for Ashley to continue visits with her mother.

¶25 Tammy acknowledges the therapist's testimony that the stability of being adopted would put Ashley in a situation where she could overcome the pain, disruption and devastation of being away from her mother. Nonetheless, Tammy recounts her efforts at attempting to comply with the dispositional order's conditions concerning therapy, housing and visits with the children. She acknowledges her "relapse" and that, during a May of 2000 weekend visit, she left the children with allegedly inappropriate caretakers and went out to bartend. However, Tammy states that the record establishes that termination would definitely be devastating to Ashley, but the stability offered by a potential adoption is only a possibility.

¶26 Tammy's argument casts the record in the light most favorable to herself. Under the limited scope of appellate review of a discretionary decision, it is not this court's function to weigh the evidence and substitute its discretion for that of the trial court. ***In re Brandon S.S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). Because the record reveals that the trial court applied a rational thought process based on an examination of the facts and the application of correct legal standards, this court does not overturn its determination.

II. RICK C.'S APPEAL

¶27 Counsel for Rick C. has filed a no merit report concluding that there is no arguable merit to any issue that could be raised on appeal from an order terminating his parental rights to his daughter, Shania M.C. Rick has been informed of his right to respond to the report and has not responded. Upon our independent review of the record, no issues of arguable merit appear.

¶28 The petition alleges as grounds for terminating Rick's rights that Shania is in need of continuing protection and services, *see* WIS. STAT. § 48.415(2)(c); abandonment, *see* WIS. STAT. § 48.48.415(1); and failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6).

¶29 Rick appeared by telephone due to his incarceration in Oklahoma, denied the allegations of the petition and waived the time for the jury hearing. Rick had been sentenced to ten years in prison in the fall of 1999. On the date set for the fact finding hearing, Rick's attorney advised the court that Rick did not want to contest the contents of the petition. The court took brief testimony from a social worker confirming the petition's allegations and found Rick in default and unfit as a parent. The next day the court confirmed on the telephone that Rick wished to default. The no merit report correctly describes the record, and we agree with its conclusion that the court followed appropriate default procedure by taking evidence in support of the petition and confirming Rick's desire to enter a default. *See* ***Santosky v. Kramer***, 455 U.S. 745 (1982).

¶30 At the dispositional hearing, Rick appeared by telephone and made a brief statement in support of the child's mother, Tammy W. The court ordered his rights terminated. The record demonstrates that the court properly exercised its discretion when it terminated Rick's parental rights. The court considered the

factors in WIS. STAT. § 48.426(3). Based upon our review of the record, we are satisfied that the court's determination is amply supported by the record and there appears no basis for challenging the court's exercise of discretion. The record discloses no potential issues for appeal.

By the Court.—Orders affirmed.

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