COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2787 **Cir. Ct. No. 00-TP-1**

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

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

TAMMIE J. C.,

PETITIONER-RESPONDENT,

V.

ROBERT T. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lafayette County: JAMES WELKER, Judge. *Reversed.*

¶1 ROGGENSACK, J.[1] This case involves the termination of the parental rights of Robert R., to his son, Thomas R., who was born during Robert's marriage to Tammie C. We conclude that in order to terminate Robert's parental rights the circuit court must have had both personal and subject matter jurisdiction. Because the court did not have personal jurisdiction over Robert, the order terminating his parental rights to Thomas is reversed.

BACKGROUND

¶2 Robert R. and Tammie C. are the parents of Thomas R., born September 28, 1988 in Wyoming, during their marriage. Robert and Tammie were divorced on June 9, 1993, after Robert was accused of sexually assaulting his step-daughter.[2] The judgment of divorce, issued in the State of Arizona, provided "Respondent, TAMMIE …, is awarded sole care, custody and control of the parties' minor child, THOMAS …, born September 28, 1988, and Petitioner is denied any visitation at this time because the Court finds visitation would seriously endanger the child's physical, mental and emotional health."

¶3 Tammie moved from Arizona to Nebraska, where her location was known to Robert, and then to Wisconsin where she did not disclose her location to him. On January 13, 2000, Tammie filed a petition to terminate Robert's parental rights in the circuit court for Lafayette County. When she moved to Wisconsin,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[2] Robert was later convicted of a violation of the Arizona criminal code and sentenced to prison in Arizona.

she remarried, and her husband, Mark C., has petitioned the court to adopt Thomas when Robert's parental rights are terminated.

¶4 Robert, who continues to reside in Arizona, has had no in-person contact with Thomas since his incarceration; however, he has sent cards and some gifts to him. Robert has never been to the State of Wisconsin. He was timely served with the petition to terminate his parental rights. In response, he moved to dismiss based on a lack of personal jurisdiction over him by Wisconsin courts. A hearing was held on his motion to dismiss, and it was denied.[3] Robert moved for reconsideration when a different judge was assigned to the case. His motion for reconsideration was denied because the successor judge concluded that he "should not second-guess another circuit judge who has already determined this issue. It has become the law of the case, to be reversed only by an appellate court." Robert appeals the order terminating his parental rights, again raising a lack of personal jurisdiction as a basis, as well as other insufficiencies in the alleged grounds for termination.

DISCUSSION

Standard of Review.

¶5 We review *de novo* whether statutory and constitutional bases exist for personal jurisdiction over a non-resident in a termination of parental rights

[3] No transcript of this hearing has been provided to us. Because appellant is responsible for providing a complete record for his appeal, we may assume that all facts necessary to support the circuit court's denial of the motion to dismiss were presented at that hearing. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993). However, no party has argued to us that at that hearing the circuit court made, or could have made, factual findings sufficient to support personal jurisdiction over Robert. Therefore, we choose not to apply the rule from ***Fiumefreddo*** here.

proceeding. ***Paula M.S. v. Neal A.R.***, 226 Wis. 2d 79, 83, 593 N.W.2d 486, 488 (Ct. App. 1999).

Personal Jurisdiction.

¶6 The competency of the State of Wisconsin to protect minor children within its jurisdiction through a judicial determination of the status of their parents is not challenged here. Rather, Robert claims a violation of his due process rights because his fundamental liberty interest in his right to continue as the parent of Thomas has been irrevocably affected by a court that did not have personal jurisdiction over him.

1. Overview.

¶7 The relationship between a parent and his or her marital child is constitutionally protected. ***Wisconsin v. Yoder***, 406 U.S. 205, 213-15, 231-34 (1972); ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 639, 534 N.W.2d 907, 911 (Ct. App. 1995). The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides protection from state interference with parental rights. ***Quilloin v. Walcott***, 434 U.S. 246, 255 (1978). However, the amount of process that is due a parent depends on the nature of the parent/child relationship, as some parental relationships to children born outside of marriage do not rise to the level of a fundamental liberty interest. ***Id.*** at 255-56. In order to terminate a fundamental right, the state must have personal jurisdiction over the party whose fundamental right is affected. *See* ***P.C. v. C.C.***, 161 Wis. 2d 277, 297, 468 N.W.2d 190, 198 (1991). Wisconsin courts have personal jurisdiction where there is a statutory basis for it and that statutory basis comports with the requirements of due process. ***Bushelman v. Bushelman***, 2001 WI App 124, ¶7, 246 Wis. 2d 317, 629 N.W.2d 795.

¶8 The termination of a parent's rights to his marital child is more than simply a status determination about which parent has physical or legal custody. As the Wisconsin Supreme Court has stated, decrees terminating parental rights affect some of parents' most fundamental human rights and "'are among the most severe forms of state action.'" ***Evelyn C.R. v. Tykila S.***, 2001 WI 10, ¶20, 246 Wis. 2d 1, 629 N.W.2d 768 (quoting ***M.L.B. v. S.L.J.***, 519 U.S. 102, 127-28 (1996)). Termination decrees completely sever the parent's right to ever visit, communicate with or regain custody of his child. WIS. STAT. § 48.43(2). Therefore, whenever the state proceeds with a petition to terminate the parental rights of a natural parent to a child born during a lawful marriage, it must provide the parent with fundamentally fair procedures. ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982). Fundamental fairness includes an adequate basis for the exercise of personal jurisdiction. ***Bushelman***, 2001 WI App 124 at ¶7. To have an adequate basis for the exercise of personal jurisdiction, there must be contacts with Wisconsin of such quality and quantity that it is not fundamentally unfair to require the party to meet the lawsuit in Wisconsin. ***McCarthy v. McCarthy***, 146 Wis. 2d 510, 513-14, 431 N.W.2d 706, 707-08 (Ct. App. 1988).

¶9 Here, Thomas was born during the marriage of Tammie and Robert, and, prior to Tammie's and Robert's separation, Robert lived with Thomas and acted as a father to him. There is nothing in the record to indicate, nor has any party contended, that Robert's liberty interest in his parental relationship to Thomas did not rise to the level of a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. And, although Robert was incarcerated for committing a crime which may bear on the grounds for termination of his parental rights, that fact does not affect whether he had a fundamental liberty interest in his parental rights to Thomas. ***Santosky***, 455 U.S.

at 753. Accordingly, due process requires that a statute, which the court concludes is sufficient to support the exercise of personal jurisdiction over Robert, must comport with fundamental fairness as applied to him. Stated another way, it should not be fundamentally unfair for Robert to defend against an action to terminate his parental rights in Wisconsin. *See* ***Bushelman***, 2001 WI App 124 at ¶7.

2. Chapter 822.

¶10 Tammie and the guardian ad litem ask us to begin our examination of personal jurisdiction with WIS. STAT. § 801.05(2). It states in relevant part:

> **Personal jurisdiction, grounds for generally.** A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:
>
> ….
>
> **(2)** SPECIAL JURISDICTION STATUTES. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

¶11 From WIS. STAT. § 801.05(2), Tammie and the guardian ad litem assert that WIS. STAT. § 822.03(1), a portion of the Uniform Child Custody Jurisdiction Act (UCCJA), is a "special jurisdiction statute" of the type referenced in § 801.05(2), and therefore it confers personal jurisdiction over Robert. Section 822.03(1) provides in relevant part:

> **Jurisdiction. (1)** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of commencement of the proceeding ….

> (b) It is in the best interest of the child that a court of this state assume jurisdiction because … the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> ….
>
> (d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

Tammie and the guardian ad litem assert that because the Wisconsin Supreme Court has said in ***P.C.*** that a termination of parental rights proceeding is a "custody" proceeding under the UCCJA, § 822.03(1) provides a sufficient basis to exercise jurisdiction over Robert. They also cite ***Shaffer v. Heitner***, 433 U.S. 186 (1977), ***Davidson v. Davidson***, 169 Wis. 2d 546, 485 N.W.2d 450 (Ct. App. 1992), and a Harvard Law Review article[4] in support of their contention that the circuit court had personal jurisdiction over Robert. However, as will be explained below, § 822.03(1) addresses the competence of the court to proceed, vis-à-vis the relative competence of a court from another state. It does not provide a basis for personal jurisdiction, although it may provide a basis for *in rem* jurisdiction, and none of the references cited support the circuit court's exercise of personal jurisdiction here.

[4] They also refer us to 2001 A.B. 246. However, this bill does not address the question of whether a state must have personal jurisdiction to terminate parental rights if those rights rise to the level of a fundamental liberty interest. Additionally, it apparently has not yet been enacted into law, and if subsequently enacted, it applies only to actions commenced on the effective date of the law. Therefore, it has no application to the questions presented by this appeal.

¶12 For example, in ***P.C.***, the supreme court reviewed the same sections of the UCCJA that are at issue in this case. However, the court did not determine that those sections conferred personal jurisdiction over an involuntary party. Rather, the court explained that those sections determined whether the court was competent to exercise its subject matter jurisdiction over the case before it. As the supreme court instructed:

> What we are reviewing then is whether, under the UCCJA, sec. 822.03(1), Stats., it was proper for the Wisconsin circuit court, 'which is *competent* to decide child custody matters' to '*make a child custody determination*.' This 'jurisdiction' statute concerns the child's contacts with the state in which the custody determination will be made.

P.C., 161 Wis. 2d at 298, 468 N.W.2d at 198. It is true that the supreme court in ***P.C.*** said that both guardianship and termination of parental rights proceedings are types of "custody proceedings" under WIS. STAT. § 822.02(3). ***P.C.***, 161 Wis. 2d at 299-300, 468 N.W.2d at 199-200. However, the court never addressed whether personal jurisdiction was needed to terminate the parental rights to a child born during a lawful marriage or whether the termination of parental rights could be accomplished by an action *in rem*, such as is described in WIS. STAT. § 822.03(1). Instead, the court was concerned with whether it had the requisite competence, under the UCCJA, to affect custody. Therefore, nothing in ***P.C.*** should be read to conclude that personal jurisdiction is not required in order to terminate the parental rights of a natural parent, or that § 822.03(1) is a sufficient jurisdictional basis to terminate parental rights to a marital child.

¶13 Tammie's and the guardian ad litem's argument that ***Davidson*** provides precedent for the circuit court's action also misses the issue presented. ***Davidson*** addressed whether the circuit court had competence to exercise subject

matter jurisdiction in an *in rem* action to determine custody. ***Davidson***, 169 Wis. 2d at 556, 485 N.W.2d at 453. It provided only for legal custody, physical placement and visitation. ***Id.*** at n.2. Therefore, the rule of law cited by Tammie and the guardian ad litem from ***Davidson*** does not apply here where more than the custody of a child was determined.[5] In a termination of parental rights proceeding involving a marital child, a parent's fundamental liberty interest in his child is completely and finally severed. ***Davidson*** did not address whether a court without personal jurisdiction can terminate parental rights based solely on its competence to exercise subject matter jurisdiction and *in rem* jurisdiction under the UCCJA. We conclude due process requires personal jurisdiction for the termination of parental rights to a marital child, and that *in rem* jurisdiction is insufficient. *See* ***P.C.***, 161 Wis. 2d at 297, 468 N.W. at 198.

¶14 Additionally, no Wisconsin case has ever held that a court could deprive a party of a fundamental constitutional right without a fundamentally fair procedure. A fundamentally fair procedure is one which comports with the due process requirements for personal jurisdiction. ***International Shoe Co. v. Washington***, 326 U.S. 310, 316 (1945); ***Bushelman***, 2001 WI App 124 at ¶7. Due process requires a "sufficient connection" between Robert and Wisconsin to make it fair to require him to meet Tammie's action here. ***Kulko v. Superior Court***, 436 U.S. 84, 91 (1978). Robert has never been to Wisconsin; he has not availed himself of any of the services of Wisconsin; nor has he in any other way brought himself within the descriptions which could afford personal jurisdiction

[5] ***Davidson v. Davidson***, 169 Wis. 2d 546, 485 N.W.2d 450 (Ct. App. 1992), holds that the *in rem* jurisdiction obtained through notice according to the provisions of WIS. STAT. § 822.05 is a sufficient jurisdictional basis for affecting custody and periods of physical placement. ***Id.*** at 556, 485 N.W.2d at 453.

under WIS. STAT. § 801.05 or any other statute. Therefore, we conclude there is no basis in the record for Wisconsin courts to exercise personal jurisdiction over him. Accordingly, the order terminating Robert's parental rights to Thomas is reversed.[6]

CONCLUSION

¶15 In order to terminate Robert's parental rights, the circuit court must have had both personal and subject matter jurisdiction. Because we conclude that the circuit court did not have personal jurisdiction over Robert, the order terminating his parental rights to Thomas is reversed.

By the Court.—Order reversed.

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

[6] Because we have concluded that the circuit court lacked personal jurisdiction over Robert and that personal jurisdiction was necessary before the court could terminate his parental rights, we do not reach the additional bases for reversal put forth by Robert. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (concluding that only dispositive issues need be addressed on appeal).