COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1509 **Cir. Ct. No. 01-TP-14**

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

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

MARATHON COUNTY,

PETITIONER-RESPONDENT,

V.

PEGGY G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Peggy G. appeals an order terminating her parental rights to her son, Shawn G. Peggy argues that: (1) the trial court erroneously

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

exercised its discretion when it denied Peggy's motion for substitution of counsel; (2) the court lost competence by failing to enter the order terminating parental rights within ten days of the close of the evidentiary hearing as required by WIS. STAT. § 48.427(1); (3) the court used an improper legal standard in making its decision to terminate parental rights; and (4) the evidence was insufficient as a matter of law to support termination of parental rights. We disagree and affirm the order.

BACKGROUND

¶2 Peggy has four children, Amanda, Michael, Shawn and Aaron. Shawn is a child with special needs and was born in 1993. He was placed in foster care on March 24, 1999.

¶3 On April 9, 2001, the County filed a petition alleging that Amanda, Michael and Shawn were in need of protection and services, pursuant to WIS. STAT. § 48.415(2).[2] Peggy stipulated to the termination of her parental rights to Amanda and Michael on June 13, 2001.[3] She also stipulated that grounds existed for termination of her parental rights to Shawn, but did not stipulate that her parental rights to Shawn should be terminated. The dispositional hearing was scheduled for December 18, 2001.

¶4 Peggy, who is indigent, was represented by a court-appointed attorney. However, she wanted the court to appoint a different attorney. Peggy stated that her original attorney was "not a fighter" and "has not got the gung-ho

[2] Termination of parental rights of Shawn's father was previously ordered.

[3] Aaron lives with Peggy.

that I need." On December 17, 2001, the day before a scheduled dispositional hearing, the trial court heard Peggy's motion for substitution of counsel. Peggy was not present at this hearing, and the request was denied. On December 18, the court again addressed Peggy's motion and again denied it. The dispositional hearing was rescheduled for January 18, 2002, because Peggy's court-appointed attorney was not prepared to proceed.

¶5 After more delays, the dispositional hearing was held on January 28, 2002. At the hearing, several witnesses testified including Dr. David Holmes, Dr. Steven Benson, and social worker Debra Fehrman. Holmes' and Benson's testimony concerned Peggy's lack of ability to parent more than one child. Fehrman testified that although there were examples of Peggy's parenting skills improving, she could not say there was consistency in the improvement. The trial court concluded that it was in Shawn's best interest to terminate Peggy's parental rights.

DISCUSSION

I. SUBSTITUTION OF COUNSEL

¶6 Peggy argues that the trial court erroneously exercised its discretion by denying her motion for substitution of counsel. We disagree.

¶7 The Sixth Amendment right to counsel entitles an indigent defendant to a competent attorney, but not necessarily one of the defendant's choosing. ***State v. Woods***, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). The decision whether to permit substitution of counsel lies within the trial court's discretion. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). A court properly exercises discretion when it considers the facts of record under the

proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶8 A defendant must make a showing of good cause in order to obtain substitute counsel. ***C.N. v. Waukesha County Cmty. Human Servs. Dep't***, 143 Wis. 2d 603, 615, 422 N.W.2d 450 (Ct. App. 1988), *overruled on other grounds by* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). On review of a denial of a substitution request, we will consider: (1) the adequacy of the trial court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between counsel and client was so great that it likely resulted in a total lack of communication preventing an adequate defense and fair presentation of the case. ***Lomax***, 146 Wis. 2d at 359.

¶9 Here, Peggy requested a substitution of counsel on the eve of the date scheduled for the dispositional hearing. The trial court noted that the date for the hearing had been set in June 2001. The court saw two possibilities for this last minute request: either the attorney-client relationship had broken down to the point that the ordered representation was no longer possible, or Peggy was using complaints about the attorney-client relationship to delay matters. The court could not make a determination about either scenario without evidence from Peggy. However, she did not appear at the December 17 hearing.

¶10 On December 18, 2001, Peggy appeared with her court-appointed attorney and with the attorney she wanted to have appointed to represent her. The court engaged in a colloquy with Peggy. Peggy stated that the reason she wanted a substitution was that she felt her court-appointed attorney "is good, but not a fighter." She further stated that "he has not got the gung-ho that I need to protect [Shawn]."

¶11 The trial court noted that her court-appointed attorney might not want to do everything the way Peggy wanted it done, but that "it is in no way indicative of ineffectiveness. In fact, it might be much to the contrary." The court also noted that Peggy "has to realize that an attorney, in tough cases like this, brings tough news and poses tough issues and tough questions. If the next attorney I appoint does the same thing, then I suspect that we find ourselves back in the same position." The court found nothing to indicate that her court-appointed attorney could not effectively represent her.

¶12 We conclude that the trial court properly exercised its discretion. Peggy did not show good cause for substitution of counsel. The court inquired as to the reasons for the requested substitution of counsel, noted that this request was made one day before the dispositional hearing, and did not find the alleged conflict between Peggy and her court-appointed attorney was so great that it likely would result in an inability for the attorney to represent her. Therefore, the court properly denied the motion for substitution of counsel.

II. LOSS OF COMPETENCE

¶13 At the January 28, 2002, hearing, the court orally ordered Peggy's parental rights terminated. A written order was not filed until February 15, 2002, eighteen days after the oral order. Peggy argues that the trial court lost competence by failing to enter the order terminating her parental rights within ten days of the close of the evidentiary hearing as required by WIS. STAT. § 48.427(1). We disagree.

¶14 Whether a trial court has lost competency to act presents a question of law, which we review independently. ***State v. Kywanda F.***, 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996). Competency in this context means the court's power

to adjudicate the specific type of controversy before it, and the court loses competency when it fails to comply with the requirements necessary for the valid exercise of that power. ***Green County DHS v. H.N.***, 162 Wis. 2d 635, 656, n.17, 469 N.W.2d 845 (1991).

¶15 In this case, the issue is noncompliance with the statutory time limit stated in WIS. STAT. § 48.427(1), and whether the ten-day requirement is mandatory or directory. "Whether a statute is mandatory or directory is a matter of statutory construction and, as such, is a question of law which we review without deference to the trial court." ***Combined Investigative Servs., Inc. v. Scottsdale Ins. Co.***, 165 Wis. 2d 262, 273, 477 N.W.2d 82 (Ct. App. 1991). Only when a statutory time limit is mandatory does the circuit court generally lose competence to proceed if that time limit is not met. *See* ***Schoenwald v. M.C.***, 146 Wis. 2d 377, 391-92, 432 N.W.2d 588 (Ct. App. 1988); *cf.* ***Kywanda F.***, 200 Wis. 2d at 34.

¶16 WISCONSIN STAT. § 48.427(1) states that "[a]fter receiving any evidence related to the disposition, the court *shall* enter one of the dispositions specified under subs. (2) to (4) within 10 days." WIS. STAT. § 48.427(1) (1999-2000)[4] (emphasis added). In deciding whether a statute's use of the word "shall" is mandatory or directory, we consider the objectives sought to be accomplished by the statute, the statute's history, the consequences that would flow from the alternative interpretations, and whether a penalty is imposed by its violation. ***State v. Perry***, 181 Wis. 2d 43, 53-54, 510 N.W.2d 722 (Ct. App. 1993).

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶17 The objectives sought to be accomplished in termination of parental rights proceedings are set forth in WIS. STAT. § 48.01. The section begins with the cardinal purpose: "In construing this chapter, the best interests of the child … shall always be of paramount consideration." WIS. STAT. § 48.01(1). We cannot imagine how this or any other purpose is served by construing the ten-day requirement as mandatory. All of the adversarial proceedings are completed by the time the requirement is applicable. In fact, the judge has actually orally pronounced his decision, so there is no uncertainty about the result. The remaining necessity of a written order is merely an administrative matter, having no detrimental effect on anyone's rights.

¶18 There is nothing in the statute's legislative history to suggest it should be mandatory. Nor does the statute prescribe any penalty for its violation, further suggesting that it is directory.

¶19 As to the consequences that would flow from alternative interpretations, Peggy's argument would have drastic consequences. After all the contested proceedings are completed -- a jury trial with witnesses and reports, a dispositional hearing and more reports, and an oral decision by the trial court -- the whole process could be subverted because a clerk neglected to put the court's decision in writing within ten days. We view these consequences to be vastly out of proportion to any salutary effect of the time requirement.

¶20 We have been provided with no analysis to persuade us that the ten-day requirement is mandatory rather than directory. Accordingly, we conclude it is directory and that the failure to enter the written order within ten days did not deprive the court of competence.

III. IMPROPER LEGAL STANDARD

¶21 After Peggy stipulated that grounds existed for termination of her parental rights, the trial court was required to determine whether the evidence was sufficiently "egregious" to order termination. *See* ***B.L.J. v. Polk County DSS***, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991). Peggy argues that the court erred by failing to properly apply the two-part "egregiousness" analysis described in ***State v. Kelly S.***, 2001 WI App 193, 247 Wis. 2d 144, 634 N.W.2d 120.[5]

¶22 In ***Kelly S.*** we considered how to more precisely apply the egregiousness standard set forth in ***B.L.J.*** We divided the determination into a two-part, sequential test. ***Kelly S.***, 2001 WI App 193 at ¶8. First, the trial court must decide whether the parent's unfitness undermines the ability to parent. ***Id.*** at ¶9. Second, if so, the trial court must determine whether that inability is seriously detrimental to the child. ***Id.*** at ¶10. If the trial court makes unmistakable but implicit findings that the parent's actions affect the ability to parent and that continuing the parent-child relationship would seriously jeopardize the child's safety and welfare, the court has properly performed the requisite analysis. ***Id.*** at ¶12.

[5] Peggy cites the recent Wisconsin supreme court case of ***Sheboygan County DH&HS v. Julie A.B.***, 2002 WI 95, __ Wis. 2d __, 648 N.W.2d 402, arguing that its holding cannot be applied retroactively. ***Julie A.B.*** overruled a prior case applying the egregiousness standard as being the incorrect legal standard. However, we decline to decide the issue of its retroactive effect because we are satisfied that the evidence in this case supports the use of the egregiousness standard.

A. Ability to Parent

¶23 The ultimate determination whether to terminate parental rights is discretionary with the trial court. ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. Here, the trial court did not follow the precise framework of ***Kelly S.*** However, the court found that Peggy's abilities do not meet Shawn's needs and found that Peggy lacked the ability to function as a parent for Shawn. The trial court substantially relied on the professional and uncontroverted opinions of Drs. Holmes and Benson concerning the relationship between mother and child, Peggy's inability to parent more than one child and the prognosis for lack of change. The record supports these findings.

¶24 According to Holmes, Shawn had "various special needs of different sorts, which together made him a child who needed very particular and extra parenting effort, as well as very intense academic programming adjustments." Benson evaluated the attachment between Peggy and Shawn. He stated that Shawn has a pattern of weak attachments and that he does not have the type of attachment to his mother that would cause a grief response if his relationship to his mother was severed. He stated that Peggy was not able to identify examples of positive loving, compassion or security based on her family of origin. He concluded that she is not capable of parenting more than one child given her psychological profile. Although there had been some improvement in Peggy's parenting skills, he concluded that the prognosis for change was poor.

¶25 Social worker Debra Fehrman testified that although there were examples of Peggy's parenting skills improving, she could not say there was a consistency in the improvement. Fehrman was concerned about Peggy's negative

behaviors increasing when she is agitated and concerned about how this would affect the child on a daily basis.

B. Best Interest of the Child

¶26 Finding that Peggy's conduct undermines her ability to parent, the trial court must then determine whether that inability is seriously detrimental to the child. The prevailing factor that a trial court must consider in deciding whether to terminate parental rights is whether it is in the "best interests of the child." WIS. STAT. § 48.426(2); ***Margaret H.***, 2000 WI 42, at ¶¶33-34. 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 family 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.

¶27 Here, the trial court considered each of the factors. The court found that termination would not interrupt a strong relationship between Peggy and Shawn. The court was unable to consider Shawn's wishes because of his

cognitive deficits. Peggy and Shawn have been separated for an extended period of time, nearly three years at the time of the dispositional hearing. The court found that Shawn would be more likely to enter into a stable family relationship if it granted the termination of parental rights because it was unlikely that Peggy could ever meet his needs. The court also found that Shawn's relationship with his mother and his brother was not of a special nature and that he was weakly attached to each of them. The court accepted Benson's testimony that Peggy has the ability to parent only one child.

¶28 The trial court found that Peggy's limitations as a parent affected her ability to parent and that Shawn's safety and welfare would be seriously jeopardized by continuing the parent-child relationship. *See* ***Kelly S.***, 2001 WI App 193 at ¶8. Even with the resources the County expended and Peggy's willingness to work on her parenting, the record establishes that she was not able to parent Shawn. To require Shawn to wait for Peggy to develop the ability to safely and effectively parent him would be detrimental to him. He is in need of consistency and stability and the evidence showed that his mother could not provide that consistency and stability.

IV. SUFFICIENCY OF THE EVIDENCE

¶29 Peggy argues the evidence was insufficient as a matter of law to support termination of parental rights. She contends that she met all of the conditions for the return of Shawn.

¶30 There was evidence that Peggy complied with the conditions for Shawn to come home. However, compliance with the conditions set forth in a dispositional order is not dispositive of the child's best interests. ***Sallie T. v. Milwaukee County DH&HS***, 219 Wis. 2d 296, 305, 581 N.W.2d 182 (1998). The

standard that applies for termination of parental rights is what is in the best interests of the child. WIS. STAT. § 48.426(2). "[B]lind reliance upon those conditions is insufficient to truly act in the best interests of the child." ***Sallie T.***, 219 Wis. 2d at 310. The trial court cannot ignore current conditions in a child's potential home environment even if conditions for return of the child are met by the parent. This would not meet the express intent of WIS. STAT. ch. 48, to promote the best interests of the child. ***Id.*** at 311. The focus must be on the best interests of the child, not on the compliance of the parent with the conditions for return home of the child. ***Id.***

¶31 It makes no sense to refuse to terminate parental rights because conditions were met when, even with the conditions met, it is clear the parent will not be able to successfully meet her child's needs. Peggy was given the opportunity required by law to demonstrate her ability to meet Shawn's needs. The evidence as set forth in Section III of this opinion provides a clear basis for the trial court's conclusion that it is Shawn's best interest that Peggy's parental rights be terminated. He is a special needs child who requires high quality, intensive and consistent parenting. The testimony showed that, in spite of Peggy's efforts and her good intentions, she cannot provide that parenting. Therefore, we conclude that the trial court properly exercised its discretion.

By the Court.—Order affirmed.

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