COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1910 **Cir. Ct. No. 2009TP104**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DARRELL K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Reversed and remanded.*

¶1 KESSLER, J.[1] Darrell K. appeals from an order terminating his parental rights to Marquise L. He argues that the trial court violated his right to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

counsel when it allowed trial counsel to withdraw and exit the courtroom, found Darrell in default, and then proceeded to hear testimony supporting the termination of Darrell's parental rights while he was unrepresented. We agree.

BACKGROUND

¶2 Darrell K. is the biological father of Marquise L., born in September 2007. Marquise was born prematurely at twenty-four weeks and tested positive for cocaine and barbiturates at birth. Marquise suffered, and continues to suffer, from significant medical issues. He remained in the hospital for approximately four months following his birth. On January 2, 2008, Marquise was taken into protective custody after the Bureau of Milwaukee Child Welfare received neglect referrals pertaining to Marquise's mother, Angela L.[2] After Marquise was discharged from the hospital, he was placed in the foster home of Ralph G. and Jennifer H.

¶3 On June 27, 2008, Darrell was determined to be the biological father of Marquise through a paternity test. Though Darrell lived in Texas at the time of Marquise's birth, he was aware that Angela was pregnant and that the child was possibly his. He returned to Wisconsin upon learning that Angela had given birth.

¶4 On April 21, 2009, the State filed a petition to terminate Darrell's parental rights. The petition alleged two grounds for termination: (1) continuing CHIPS[3] pursuant to WIS. STAT. § 48.415(2)(a);[4] and (2) failure to assume parental

[2] The parental rights of Marquise's mother, Angela L., were terminated at the same time as Darrell's rights. The termination of Angela L.'s rights is not the subject of this appeal.

[3] CHIPS is an acronym for children in need of protection or services.

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

responsibility pursuant to WIS. STAT. § 48.415(6).[5] Darrell attended the initial hearing, stated that he wanted to contest termination of his parental rights, and was referred to the public defender's office for an attorney. On July 20, 2009, Darrell appeared with Attorney Nick Toman, who appeared for Darrell's appointed counsel, David Lang. A motion hearing date was set for September 21, 2009. Darrell did not appear at that hearing, though Attorney Lang did. The State indicated that it would seek default judgment if Darrell missed another court date. Darrell did not appear at the grounds hearing held on October 14, 2009, and Attorney Lang informed the court that he had filed a motion to withdraw as counsel. Attorney Lang stated that he had been unable to have any contact with Darrell, though he sent Darrell numerous letters and made multiple attempts at phone contact. The trial court granted the motion to withdraw and allowed Attorney Lang to leave. The court found Darrell in default for failing to appear and then heard testimony from the ongoing case manager, Michelle Bachman, who testified as to the grounds for terminating Darrell's parental rights. The trial court found that grounds existed for finding Darrell an unfit parent.

¶5 After determining that grounds existed for terminating Darrell's parental rights, the trial court set October 19, 2009, for the dispositional hearing. Darrell attended this hearing without counsel and was again referred to the public defender's office. On December 3, 2009, Darrell's new counsel, Mary Mountin, appeared in court for a motion to vacate the default judgment. Darrell did not attend this hearing and the motion was denied. The dispositional hearing began on

[5] A CHIPS dispositional order was entered on April 18, 2008, pursuant to WIS. STAT. § 48.355. The order outlined a number of conditions Darrell was to meet in order to have Marquise placed in his home.

February 15, 2010 and concluded on March 26, 2010.[6] Darrell was present with Attorney Mountin for all of the dispositional hearing dates and he testified at each hearing. On March 29, 2010, the trial court issued a letter decision terminating Darrell's parental rights.[7] This appeal follows.

DISCUSSION

¶6 At issue is whether the trial court violated Darrell's statutory right to counsel when it allowed fact-finding to occur at the grounds phase of a termination of parental rights proceeding without the presence of Darrell's counsel. Darrell asserts that because the trial court allowed his first appointed attorney to withdraw prior to fact-finding, his right to counsel pursuant to WIS. STAT. § 48.23(2) was denied. Both the State and the guardian ad litem argue that because Darrell was represented by counsel at the dispositional hearings and had the opportunity to testify, cross-examine witnesses and present evidence as to grounds at those hearings, he was not effectively deprived of his right to counsel. The State alternatively argues that if we find error, the error was harmless, as Darrell had the opportunity to cure it by participating in the dispositional phase. The guardian ad litem contends that Darrell waived his right to counsel at the grounds phase by failing to appear and also that a *per se* rule requiring a parent's right to counsel at all phases in a termination of parental rights case is inappropriate since the trial court must balance the interest of the child with the interests of the State and the parent. We disagree with both the State and the

[6] Attorney Mountin renewed the motion to vacate the default judgment at the dispositional hearings, however, the motion was denied.

[7] The merits of the trial court's order terminating Darrell's parental rights were not raised in this appeal.

guardian ad litem and conclude that Darrell's right to counsel was violated**,** the error was not harmless and that the legislature, by statute, has already balanced the rights of parents and their children in the context of involuntary termination proceedings.

I. Darrell's statutory right to counsel at the grounds phase.

¶7 Termination of parental rights proceedings consist of two phases. The first phase, the grounds phase, is a fact-finding hearing held to "determine whether grounds exist for the termination of parental rights." WIS. STAT. § 48.424(1)(a). At this time, "'[t]he petitioner must prove the allegations [supporting grounds for termination] in the petition for termination by clear and convincing evidence.'" *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 786 (citation omitted). At the grounds phase, "the parent's rights are paramount." *See* ***id.*** If grounds exist to find the parent unfit, the trial court advances to the dispositional phase. WIS. STAT. § 48.424(4). At the dispositional phase, the trial court considers the best interest of the child and makes a determination as to placement. ***Evelyn***, 246 Wis. 2d, ¶23.

¶8 Because of the critical nature of termination proceedings, WIS. STAT. § 48.23(2) provides parents with a right to counsel. The statute states:

> **RIGHTS TO COUNSEL.** Whenever a child is the subject of a proceeding involving a contested adoption or the involuntary termination of parental rights, any parent under 18 years of age who appears before the court shall be represented by counsel; but no such parent may waive counsel. Except as provided in sub. (2g), a minor parent petitioning for the voluntary termination of parental rights shall be represented by a guardian ad litem. If a proceeding involves a contested adoption or the involuntary termination of parental rights, *any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the*

> *court is satisfied such waiver is knowingly and voluntarily made.*

(Emphasis added).

¶9 The Wisconsin Supreme Court, in ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d. 1, 724 N.W.2d 623, discussed at length the unequivocal statutory right of parents to counsel at termination proceedings. In ***Shirley E.***, the mother, Shirley, failed to personally appear at her plea hearing because she resided in Michigan and could not afford to travel to Wisconsin, though she was represented by counsel at the hearing. ***Id.***, ¶9-12. She appeared by phone at the next hearing and was warned by the judge that she would be found in default if she did not personally appear at the following court date. ***Id.***, ¶12. Shirley was found in default at the following hearing for failing to appear personally. ***Id.***, ¶13. She continued to miss court dates, though her attorney attended all of them and indicated that she wanted to continue to represent Shirley as they had kept in contact. ***Id.***, ¶¶15-17. Nonetheless, the trial court relieved counsel of her duties, dismissed her from the courtroom, and held the grounds phase and dispositional phase without Shirley or her attorney. ***Id.***, ¶17 n.8, ¶18.

¶10 The Wisconsin Supreme Court ruled that the trial court erred in dismissing Shirley's attorney and in finding Shirley in default when she was unrepresented throughout the hearings. The court held "[t]he legislative goal of securing a fair procedure is not served unless a parent is given the opportunity to be heard in a meaningful time and in a meaningful manner." ***Id.***, ¶49. The trial court here, in noting that Attorney Lang was in an "impossible situation," granted his motion to withdraw and Attorney Lang left the courtroom. Darrell was found in default and the trial court proceeded to hear only the State's unchallenged evidence before finding Darrell unfit. In ***Shirley E.***, the court held that this

procedure violated a parent's statutory right to representation by stating that "[a] [trial] court [has] no power to bar the parent or parent's counsel from participation at the fact-finding stage." *See* ***id.***, ¶41.

II. Waiver.

¶11 The guardian ad litem contends that Darrell waived his right to counsel by failing to appear in court and by not cooperating with his counsel. ***Shirley E.*** rejected the argument that non-cooperation and non-attendance can constitute a waiver of counsel, stating: "If the legislature wanted the right to counsel to be contingent upon a parent's appearance in person, it could have expressly stated so." ***Id.***, ¶44. Further, the statute is clear that parents over 18 years of age may waive this statutory right to counsel *if* it is a knowing and voluntary waiver. Determination of whether a waiver is knowing or voluntary is the responsibility of a trial court to determine by "careful questioning." ***Id.***, ¶57.

¶12 It is clear from the record that Darrell never waived his right to counsel. Darrell never stated that he wished to proceed without counsel. In fact, after missing the grounds hearing, he appeared in court and was returned to the public defender's office for appointment of new counsel. There is nothing in the record that supports a finding that Darrell ever knowingly or voluntarily waived his right to counsel.

III. Representation at the dispositional phase as a cure of error at the grounds phase.

¶13 Both the State and the guardian ad litem contend that Darrell was not totally deprived of his right to counsel as he was represented at the dispositional hearings and was able to testify as to grounds during the dispositional hearings. While it is true that the factual findings made at the grounds phase were

readdressed at the dispositional phase, the statute does not permit us to substitute representation at one stage for representation at another. The statute addresses the right to counsel during *all* termination proceedings, not separately at the individual stages. Further, the language of the statute is mandatory. ("In statutory construction, the use of the word 'shall' is usually construed as mandatory, while the word 'may' is generally construed as permissive." ***State v. McKenzie***, 139 Wis. 2d 171, 176-77, 407 N.W.2d 274 (Ct. App. 1987)). Darrell's right to counsel at the grounds phase was mandatory, unless knowingly and voluntarily waived.

¶14 We cannot agree that Darrell's representation at the dispositional phase cured the error that occurred at the grounds phase. To accept the State's argument would essentially render Darrell's lack of counsel at the grounds phase a harmless error because counsel was later supplied. Our supreme court rejected that alternative in ***Shirley E.*** when it held that the "denial of the statutory right to counsel … constitutes *structural* error." ***Id.***, ¶63 (emphasis added). This error, the court continued, is a "prejudicial error per se" and undermines the "fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings." ***Id.***, ¶¶63, 64. Therefore, a harmless error analysis is inappropriate for evaluating whether a parent's right to counsel was violated by a lack of representation at one of the two critical stages in the termination proceedings.

¶15 While it may strain the allocation of limited judicial resources to conduct another grounds hearing at which Darrell is represented by counsel, the statute and case law are clear: regardless of the difficult situation in which the attorney was placed, Darrell was entitled to representation when the grounds hearing took place. Although we are sympathetic to the issues counsel and trial courts face when parents do not maintain contact with their counsel or when

parents fail to attend hearings, neither ***Shirley E.*** nor the statute permit representation at one stage of an involuntarily termination proceeding to cure the lack of representation at the other.

IV. The rights of Marquise.

¶16 Finally, the guardian ad litem argues that it is not in the child's best interest to stretch out this matter and, therefore, we must balance the best interest of the child against the right of a parent to counsel at termination proceedings. We disagree.

¶17 The entire Children's Code is intended to promote the best interest of a child. *See* WIS. STAT. § 48.01(1). One of those interests is the presumed interest of the child to remain with his or her parents. *See* § 48.01(1)(a). Hence, the statutory grounds which permit the parental bond to be legally destroyed require proof of what many would consider appalling parental misconduct. *See* WIS. STAT. § 48.415. Unless the parent(s) are afforded a fair and meaningful opportunity to fully participate in the proceedings, with counsel, during the State's attempt to establish that misconduct, and to meaningfully challenge the State's assertions with the assistance of counsel, a child's best interests in the broadest sense have not been truly protected. The existence of a two-step process in which the first step focuses on both the parent's conduct and the parent's interest in preserving parental bonds, while the second step focuses on the best interest of the child as to physical placement, reflects the legislative determination that both steps are separately necessary to promote the best interest of the child. Given the significant familial interests at stake, the best interest of the child and a parent's right to counsel go hand-in-hand.

¶18 We are cognizant that the placement planning for Marquise has been delayed by this appeal and may be further delayed by the remand and necessary hearing. However, we note that Attorney Mountin filed two motions to vacate the default judgment. Had either of those motions been granted, much of the delay which has occurred might well have been avoided.

¶19 We conclude that the trial court erred when it allowed fact-finding to occur at the grounds phase of the termination of parental rights proceeding without the presence of Darrell's counsel. We reverse and remand for a new fact-finding hearing.

By the Court.—Order reversed and remanded for further proceedings consistent with this opinion.

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