COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal Nos. 02-3169
02-3170

Cir. Ct. Nos. 01 TP 105
01 TP 106

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 02-3169
CIR. CT. NO. 01 TP 105

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TARA S.,

RESPONDENT-APPELLANT.

NO. 02-3170
CIR. CT. NO. 01 TP 106

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TARA S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Tara S. appeals from the circuit court order terminating her parental rights to two of her children, Jashuan and Jashuana. She does not challenge the jury's finding that the evidence proved her abandonment of the children under WIS. STAT. § 48.415(1)(a)2 (1999-2000) and, therefore, that the statutory grounds for termination were established.[2] She argues, however, that in ordering termination, the court erred because, she contends, it measured the best interests of the children as of the date of the termination petition rather than as of the date of the dispositional hearing. She is incorrect and, therefore, this court affirms.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] One of the "[g]rounds for involuntary termination of parental rights" shall be "abandonment," *see* WIS. STAT. § 48.415(1), which shall be established by proving that "the child has been placed, or continued in a placement, outside the parent's home by a court order" that contains the statutorily required notice informing the parent of any grounds for termination of parental rights, and of the conditions necessary for the child's return to the parental home or for the parent to be granted visitation, and "the parent has failed to visit or communicate with the child for a period of 3 months or longer," *see* WIS. STAT. §§ 48.415(1)(a)2, 48.356(2).

¶2 On March 6, 2001, the State filed a petition for termination of Tara's parental rights to Jashuan, age nine, and Jashuana, age seven. On November 2, 2001, a jury returned unanimous verdicts finding that Tara had abandoned the children and that the children were in need of continuing protection and services.

¶3 The dispositional hearing was held on February 15 and May 16, 2002; the court presented its findings and conclusions and rendered its dispositional decision on May 20, 2002. Following a detailed recitation of the facts establishing Tara's abandonment of the children and their continuing need for protection and services, the court concluded that Tara's "unfitness" was "egregious and of such strength and magnitude that it … undermined [her] ability to parent as of the date of the petition being filed." The court then went on, however, "to consider whether the inability to parent *is* seriously detrimental to the [children]." (Emphasis added.)

¶4 The court clarified that the test for termination "requires the [c]ourt to consider all the circumstances," and that, "for obvious reasons," those circumstances necessarily include the status of both the children and parent "*as of the date of the termination*." (Emphasis added.) Accordingly, the court went on to consider Tara's rehabilitative efforts and significant progress during the immediately preceding two years and "certainly at a minimum [the] period of the time that she spent in treatment at Me[]ta House and thereafter *until today*." (Emphasis added.)

¶5 The court then considered, among other things, that Tara had other children for whom she was "providing appropriate care." The court also commented that Tara "*at this point* has met all court conditions as they relate to Jashuan and Jashuana with the exception of the visitation which ha[s] been precluded by order." (Emphasis added.) And the court also considered Tara's

testimony "that she feels bonded … to both Jashuan and Jashuana" and believes that they "could be successfully integrated into her family." The court, complimenting Tara's efforts, examined the past *and* the current circumstances:

> I guess what I'm saying is that there [sic] certainly seems that [Tara] *at this point* has made a tremendous amount of progress in terms of her ability to parent … her children[,] including the children who are placed with her currently.
>
> Those issues involving … rehabilitation … need to be weighed against the effect that the unfitness and inability to parent as of March [when the petition was filed] had *and the continued effects it has on Jashuan and Jashuana*, and that's what the statute rightfully requires courts to consider[—]what is deemed to be in the best interest of the children.

(Emphasis added.)

¶6 The court then commented on the evolving circumstances of Jashuan and Jashuana from the time of the petition "*running to today's date*." (Emphasis added.) The court reviewed their lengthy history in foster care and considered that "*as of today*" they "have expressed an intent and a desire to be adopted" by the foster parents. (Emphasis added.) The court commented on the current relationships of the children with Tara and with their foster mother and their integration into her family. Nearing its conclusion, the court reiterated that "it's really that assessment in weighing *the circumstances today from the perspective of what's in the best interest of the children*." (Emphasis added.)

¶7 In a termination-of-parental-rights case, "[t]he best interests of the child is the polestar for the court in a dispositional hearing, and a failure to apply that standard is an error of law." ***Sheboygan County DHSS v. Julie A.B.***, 2002 WI 95, ¶4, 255 Wis. 2d 170, 176, 648 N.W.2d 402. *See also* WIS. STAT. § 48.426(2) ("The best interests of the child shall be the prevailing factor

considered by the court in determining the disposition."). Whether a trial court has utilized the proper legal standard governing termination of parental rights presents a question of law subject to *de novo* review. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862-63, 537 N.W.2d 47 (Ct. App. 1995). Here, the court applied the correct standard.

¶8 Tara primarily bases her appeal on a single premise; she asserts "that there is no legal precedent for using the time of filing the petition for determining the best interests of the children." She points out that "over fourteen months passed from the time the petition was filed and the dispositional hearing was concluded," and emphasizes that she "presented substantial evidence of her progress subsequent to the date the petition was filed." She contends that the court erred in failing to measure her children's best interests as of the day of disposition.

¶9 While Tara's legal premise is sound, her factual argument is refuted by the record. As quoted, the court repeatedly referred to Tara's and the children's current circumstances, right up to the day of disposition. The court repeatedly invoked the "best interests" standard, and explicitly addressed that standard in the context of all the facts and circumstances including Tara's significant recent progress and the children's current status with their foster parents in "the only home that they really know." The court carefully considered the facts and accurately applied the law.[3]

[3] Tara also argues that the circuit court applied "an incorrect legal standard" in relying on the "standards set forth in ***B.L.J. v. Polk County DSS***, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991), and ***State v. Kelly S.***, 2001 WI App 193, 247 Wis. 2d 144, 636 N.W.2d 120," in determining she was unfit. In her reply brief, Tara clarifies her argument, stating "that the [circuit] court's finding[, pursuant to ***B.L.J.*** and ***Kelly S***,] that her unfitness as a parent was so egregious to warrant the termination of her parental rights, tainted any [subsequent] finding [relevant to] the best interests of the children." She maintains, therefore, that "the 'legal (continued)

By the Court.—Order affirmed.

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

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significance' of 'egregious unfitness' permeates the entire dispositional hearing," and that fact, coupled with the supreme court's overruling of ***Kelly S.***, *see* ***Sheboygan County DHSS v. Julie A.B.***, 2002 WI 95, ¶¶4-5, 255 Wis. 2d 170, 648 N.W.2d 402 (holding that the best interests of the child shall be the polestar for the court in a dispositional hearing), warrants a new dispositional hearing. This court disagrees.

Here, the circuit court's application of the dispositional standard set forth in ***B.L.J*** and ***Kelly S.*** did not prejudice Tara. ***B.L.J.*** and ***Kelly S.*** required findings in addition to those required by ***Julie A.B.***. Further, as the State argues, "Tara provides no reason to believe that the [circuit] court's best[-]interest finding would be any different absent its finding on egregious behavior." The State is correct. As explained, the circuit court weighed the interests of the children and the factors in WIS. STAT. § 48.426(3), and, pursuant to WIS. STAT. § 48.424(3), determined that termination of Tara's parental rights was in the best interests of each child.