COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0063
03-0064

Cir. Ct. Nos. 02-TP-000005
02-TP-000006

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

03-0063

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

COLUMBIA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT L. W.,

RESPONDENT-APPELLANT.

03-0064

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

COLUMBIA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ROBERT L. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Columbia County: JAMES O. MILLER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Robert L.W. appeals two orders of the circuit court terminating his parental rights to his children, Summer E.M. and Daniel A.W. Robert argues that (1) the evidence was insufficient to prove that Robert failed to assume parental responsibility; (2) the court failed to find that Robert was an unfit parent before determining that his parental rights should be terminated; and (3) the circuit court misused its discretion when it found that termination was in the best interests of the children. We disagree with all of Robert's arguments and affirm.

Background

¶2 The facts in this case are largely undisputed. Robert and his wife, Shannon, had two children during their marriage: Daniel, born July 7, 1992, and Summer, born April 4, 1994. Before Summer was born, Robert and Shannon separated. When Daniel was two years old and Summer was eight months old,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All subsequent references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Robert was incarcerated in an Oklahoma prison. Sometime after his incarceration, Robert and Shannon divorced.

¶3 After Robert's incarceration, the children lived with their mother and other relatives. They lived with Robert's half-sister and her husband for about a year and a half until they were placed in foster care in November 2000. On November 6, 2000, the county filed a children in need of protection and services (CHIPS) petition for each child. The circuit court entered CHIPS orders on January 26, 2001. On June 20, 2002, the county filed petitions to terminate Robert's parental rights to Daniel and Summer. The petitions against Robert alleged that Robert had failed to assume significant parental responsibility and that there were continuing CHIPS orders.[2] The court held a jury trial to determine whether Robert had assumed parental responsibility. Robert remained incarcerated at the time of the trial.

¶4 At trial, the parties presented evidence of Robert's relationship with his children. Before Robert was incarcerated, Summer and Daniel stayed with Robert two weekends a month.[3] While incarcerated, Robert maintained contact with his children through written correspondence and telephone calls. On one occasion, Summer visited Robert in prison, but Daniel has not seen Robert since Robert was incarcerated. While incarcerated, Robert has not provided any material benefits to either child.

[2] Shannon voluntarily agreed to terminate her parental rights to both children.

[3] Robert testified at the dispositional hearing that Daniel lived with him until Daniel was a year and a half. This evidence was not presented to the jury at the hearing to determine whether Robert had assumed parental responsibility.

¶5 During the time that the children lived with Robert's half-sister, Robert called the children once a month and wrote them letters "at least" once a month. While the children were in foster care, Robert did not have telephone contact with his children but wrote them approximately three times a month. A social worker testified as an expert. The social worker testified that in her opinion the children did not respond to Robert as their father in a normal fashion. The social worker also testified that the children do not remember having telephone conversations with Robert, and that they only know Robert as their father because he has been labeled as such.

¶6 The jury found that Robert failed to assume parental responsibility for Daniel and Summer. The district attorney then asked the circuit court to "make the finding based upon the jury's verdict." Before the circuit court complied, Robert moved for a judgment notwithstanding the verdict, which the circuit court denied. Immediately after denying Robert's motion, the circuit court stated: "With that in mind, the Court will make the requisite finding based upon the determination made by this jury and will establish a date for disposition that must be within 45 days of today's date."

¶7 At the ensuing dispositional hearing, two social workers testified that both children were adoptable, and that there was a good chance that they would be adopted together. The circuit court found that the county made reasonable efforts to prevent removal of the children from the home. The circuit court considered the best interests of the children and concluded that "continuing their involvement with their parents [is] not in their best interest and it is clearly contrary to their welfare." The circuit court commented that "clearly, the relationship, if any, between [Robert] and the two children has not been substantial." In addition, the circuit court stated: "Emotionally and

psychologically, to sever the relationship, in this Court's opinion, will have very little effect on the children at this time." The circuit court then terminated Robert's parental rights.

Discussion

¶8 Robert argues that the county failed to "show by clear and convincing evidence that [he] did not have a substantial parental relationship with Daniel and Summer." Upon a challenge to the sufficiency of the evidence,

> [w]e examine the evidence before the jury and reasonable inferences drawn therefrom in the light most favorable to the verdict. This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts.

State v. Tarantino, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990) (citations omitted). Under WIS. STAT. § 48.415(6)(a), parental rights may be terminated if the parent has failed to assume parental responsibility, "by proving that the parent … [has] never had a substantial parental relationship with the child."

> "[S]ubstantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child ….

WIS. STAT. § 48.415(6)(b).

¶9 We conclude the evidence was sufficient to support the verdict. Robert was incarcerated when Summer and Daniel were very young. The jury heard testimony that Summer did not live with Robert prior to his incarceration, although Summer and Daniel did visit Robert every other weekend. The children do not remember speaking with Robert over the telephone. While Robert sent the children letters regularly, an expert testified that the children do not have a normal parent-child relationship with Robert, and see him as a father in name only. At the time of trial, Summer was eight years old and Daniel was ten years old. Daniel has not seen his father since he was two years old, and Summer has only seen Robert once in the past eight years. The children have not had telephone contact with Robert since November 2000. While incarcerated, Robert has not provided any material benefits to either child. From this evidence, and given our deferential standard of review, a reasonable jury could conclude that Robert never had a substantial parental relationship with the children.

¶10 Robert next argues that the circuit court failed to find him to be an unfit parent. Under WIS. STAT. § 48.424(4), "[i]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." Robert contends that the circuit court's statement that "the Court will make the requisite finding based upon the determination made by this jury" does not amount to a specific finding that he is an unfit parent. In essence, Robert argues that § 48.424 requires the circuit court to use the statute's "magic words" in order to find a parent unfit. We disagree.

¶11 Once the circuit court considered and rejected Robert's motion for a judgment notwithstanding the verdict, the court had no option other than to find Robert unfit, and thus, no purpose would be served by requiring the circuit court to repeat the statute's "magic words." Furthermore, the court did make the necessary

finding. Viewed in context, the circuit court's statement that it was making the "requisite finding" can only be interpreted as a finding that Robert was an unfit parent.

¶12 Robert next argues that the circuit court misused its discretion when it terminated his parental rights at the dispositional hearing. The decision to terminate parental rights is discretionary with the circuit court. ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 103-04, 470 N.W.2d 914 (1991). We review discretionary decisions under the erroneous exercise of discretion standard. "Discretionary acts 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.'" ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App 1999) (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). "We will generally look for reasons to sustain a trial court's discretionary decision." ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999) (citations omitted). "Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling." ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

¶13 When considering whether to terminate parental rights, "[t]he best interests of the child shall be the prevailing factor …." WIS. STAT. § 48.426(2).

> 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.

WIS. STAT. § 48.426(3).

¶14 Robert contends that the circuit court misused its discretion because it "failed to adequately consider" whether it would be harmful to the children to sever their relationship with their father, under WIS. STAT. § 48.426(3)(c). However, the record contradicts Robert's claim. The circuit court commented that "clearly, the relationship, if any, between [Robert] and the two children has not been substantial." In addition, the circuit court stated: "Emotionally and psychologically, to sever the relationship, in this Court's opinion, will have very little effect on the children at this time." We are satisfied by our review of the record that the circuit court properly considered each factor and appropriately exercised its discretion.

By the Court.—Orders affirmed.

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