COURT OF APPEALS
DECISION
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Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0488
03-0489

Cir. Ct. Nos. 01TP000290
01TP00291

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 03-0488
CIR. CT. NO. 01TP000290

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES B.,

RESPONDENT-APPELLANT.

NO. 03-0489
CIR. CT. NO. 01TP000291

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 FINE, J. James B. appeals from an order terminating his parental rights to Justin B. and Taylor B. The trial court found in a bench trial, following James B.'s waiver of his right to a jury, that both Justin and Taylor "continue to be in the need of the protection and services of the court, pursuant to WIS. STATS. 48.415(2)," and that termination of James B.'s parental rights to the children was both warranted and in the children's best interests. He also seeks reversal of the post-termination order entered by the trial court following our remand for consideration of additional issues. *See* WIS. STAT. RULE 809.107(6)(am) (appellate briefs may raise issues litigated on remand); ***State v. Jacobus***, 167 Wis. 2d 230, 233–234, 481 N.W.2d 642, 643 (Ct. App. 1992) (court of appeals has jurisdiction to consider order entered after notice of appeal has been filed if that order is the result of action taken by the trial court following remand for further proceedings).

¶2 James B. argues that the trial court erred, contending that: (1) he "substantially complied with the conditions for [the] return" of Justin and Taylor, and that therefore the trial court erred in finding that there were grounds to terminate his parental rights to the children; (2) the trial court misapplied the "best interests" criteria; and (3) the trial court relied on his physical disabilities as a basis to terminate his parental rights to the children, and that this was "fundamentally unfair," and also

that his trial lawyer gave him ineffective representation when she did not pursue that theory before the trial court. We affirm.[1]

I.

¶3 The major facts in this sad case are essentially not contested, and we do not understand that James B. contends that any of the trial court's findings of fact are "clearly erroneous," which is the standard we apply to those findings. WIS. STAT. RULE 805.17(2). Briefly, Justin was born in March of 1994, and was eight years old when the trial court entered its order terminating James B.'s parental rights. Taylor was born in October of 1995, and was almost seven years old when the trial court entered its order terminating James B.'s parental rights. Both are non-marital children born to James B. and Cynthia J. At the time of the hearing, both children were taking medication for attention deficit hyperactivity disorder. When Justin was placed in the first foster home in December of 1997, he had "fairly severe" asthma, but has "gotten better over the years." James B. was born in 1947 and was fifty-five years old when the trial court entered its order terminating his parental rights to Justin and Taylor.[2]

¶4 Cynthia J. has, during the children's lives, had serious drug-abuse problems together with the ancillary criminal activity and periods of incarceration that for many persons generally go hand-in-hand with illegal drug use. She has, so far, been unable to successfully eliminate illegal drugs from her life. James B., who suffers significant disabling physical infirmities as the result of back surgery, heart

[1] We commend all counsel for the excellence of their appellate briefs and the evident attention, scholarship, and care they invested in this case.

[2] The trial court also terminated Cynthia J.'s parental right to the children.

by-pass surgery, and a stroke, was told by the case managers for the social service agency with responsibility for implementing court-ordered services for the family that in light of Cynthia J.'s significant and severe problems with illegal drugs, the children could not be placed with him if Cynthia J. also lived there. James B. knew this. Nevertheless, Cynthia J. lived with James B. from 1998 at least through the June of 2002 hearing, except when she was incarcerated.

¶5 The trial court found in its written findings:

> 28. During the period that the children have been placed in foster care, Mr. [B.] has used cocaine with Ms. [J.] and has enabled Ms. [J.] by allowing her to live with him while she was abusing cocaine.
>
> 29. Mr. [B.] has been unwilling to live apart from Ms. [J.] and has, therefore, failed to demonstrate the ability to live independent of Ms. [J.] in a setting where he is able to physically have the children placed with him.

The trial court also found that there was no evidence that James B. "is physically able to have any, or all, of the children placed with him."

II.

A. *Grounds to terminate*.

¶6 WISCONSIN STAT. § 48.415(2) provides that one of the grounds that may warrant the termination of parental rights to a child is that he or she is in continuing need of protection or services. Under WIS. STAT. § 48.415(2)(a)3, a child may be found to be in continuing need of protection or services if there is sufficient proof:

> [t]hat the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders [as referenced in WIS. STAT. § 48.415(2)(a)1] not including time spent outside the home as an unborn

> child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

The trial court so concluded and the evidence is clear: First, no one disputes that Justin and Taylor were outside James B.'s home for more than six months pursuant to one of the orders referenced in § 48.415(2)(a)1. Second, James B. has not met the conditions established for the safe placement of the children in his home. James B. contends that he has tried to meet these conditions, and that he has made what he characterizes as heart-felt efforts to comply. But, as the trial court pointed out, results, not wishes, must govern. Third, given the confluence of James B.'s longstanding unwillingness to exclude Cynthia J. from his home, which, James B. concedes in his reply brief, whose continued drug abuse makes her "arguably unsuitable," and his physical inability to adequately care for the children, the trial court's conclusion that there is a substantial likelihood that James B. would not, within the requisite twelve-month period, meet the conditions for the safe placement of the children in his home is amply supported by the totality of the circumstances revealed by the evidence. That is the issue, not, as James B. would have it, whether the trial court could have found to the contrary. The trial court did not err in finding that grounds to terminate James B.'s parental rights to Justin and Taylor were met.

B. *Termination*.

¶7 Once grounds to terminate a person's parental rights to his or her children are found, the trial court must decide whether termination is in the children's best interests. WIS. STAT. §§ 48.424(1) & (4); 48.426(2). Significantly, the parents whose action or inaction results in a finding that there are grounds to

terminate their parental rights have no special claim to the children in the best-interests phase. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999).

¶8 Whether circumstances warrant termination of parental rights is within the trial court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. ***Brandon S.S.***, 179 Wis. 2d at 150, 507 N.W.2d at 107. We review *de novo*, however, whether the trial court has applied the correct legal standard. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

¶9 WISCONSIN STAT. § 48.426(3) sets out some of the factors that the judge must consider in determining whether termination of parental rights is in the children's best interests:

> (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.

Contrary to James B.'s contention, the trial court considered all of these factors in deciding that termination of James B.'s parental rights to Justin and Taylor were in the children's best interests.

¶10 First, the trial court found that there was "a high likelihood" that the children would be adopted. James B. does not contend that this finding is clearly erroneous. Second, the trial court recognized that both children needed therapy. Significantly, the children's therapist opined that "permanency one way or another" would help alleviate the children's behavior problems. The trial court acted well within its discretion in finding that, as we discuss below, permanency was more likely through adoption than it would be if the trial court gave to James B. yet more time.

¶11 Third, although the trial court recognized that both children knew and liked James B., and that the three interacted well whenever there was a visitation, the relationship was not, in the trial court's view, "substantial" as the trial court assessed that word in the context of the legislature's command that the best interests of the children be paramount.

¶12 Fourth, the trial court recognized that Justin did not want to be separated from James B., and that severing the children's formal relationship with James B. "may well cause them some harm." Nevertheless, the trial court concluded that Justin's wish to go to his father did not outweigh what the trial court perceived as the substantial benefits to the children that would flow from their adoption.

¶13 Fifth, the trial court noted that Justin and Taylor "have been away from" both Cynthia J. and James B. for "a substantial period of their lives." Summing it all up, and assessing the final non-exclusive factor in WIS. STAT. § 48.426(3)(f), the trial court opined that the children needed stability and that it should not "risk bouncing them on through" the child-welfare system towards an unknown and possibly perilous future because "there's a high likelihood of adoption after a termination of parental rights." The trial court concluded that it was "satisfied that if there is a termination of parental rights and adoption that [the children] will be able to enter into a more stable and permanen[t] family relationship as a result of termination."

¶14 Although James B. contends that the trial court unfairly punished him for both the sins of Cynthia J. and his own disabilities, and also argues that termination was not "essential" to the children's welfare, the trial court considered the material factors and appropriately exercised its discretion. As we pointed out earlier, once there is a finding that there are grounds to terminate parental rights, the birth parents have no special claim to the children in the best-interests phase. ***Richard D.***, 228 Wis. 2d at 672–673, 599 N.W.2d at 97. We cannot say that the trial court's thoughtful and insightful analysis was an erroneous exercise of its discretion.

C. *James B.'s physical disabilities and claim of ineffective assistance of counsel.*

¶15 James B. asserts that his trial lawyer was ineffective on two grounds. First, because she did not litigate the nature and extent of James B.'s disabilities in an attempt to persuade the trial court that it should not terminate his parental rights to the children. Second, because she did not argue that James B.'s rights under the

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, trumped Wisconsin's termination-of-parental-rights scheme. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). James B. recognizes, however, that a published decision of this court has held that the Disabilities Act does not apply in termination-of-parental-rights cases, *see* ***State v. Raymond C.***, 187 Wis. 2d 10, 12, 15–16, 522 N.W.2d 243, 244, 245–246 (Ct. App. 1994), and he appropriately raises the issue here to preserve it for possible review by the supreme court.

¶16 James B. also makes a separate claim, apparently unrelated to his contention that the Disabilities Act should govern, that had he "been completely healthy throughout the [child-in-need-of-protection-or-services] proceedings, Justin and Taylor would probably be with him today." He does not, however, claim, other than reference to the Disabilities Act, that the social work agency did not make a "reasonable effort," WIS. STAT. § 48.415(2), to provide him with needed services. Indeed, the trial court found that the social service agency "made reasonable efforts to make it possible for the children to be placed back in the parental home."

¶17 Insofar as James B.'s ineffective-assistance-of-counsel claim is predicated on his trial lawyer's failure to raise the Disabilities Act issue in the termination-of-parental-rights proceeding, James B. has not, under the law as it is today under ***Raymond C.***, shown "prejudice" as that concept is used in ***Strickland v. Washington***, 466 U.S. 668 (1984), namely that there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. Insofar as his ineffective-assistance-of-counsel claim is based on the trial lawyer's general failure to assert and litigate James B.'s disabilities in the context of the termination-of-parental-rights proceeding, James B. has also not shown that he was prejudiced under ***Strickland***.

¶18 As noted, in the first phase of the termination-of-parental-rights proceeding the trial court focused on James B.'s unwillingness to separate himself from Cynthia J. and therefore provide a safe, secure home for the children. Although during the best-interests phase of the termination-of-parental-rights proceeding the trial court opined that James B. lacked a sufficient "support system" to properly care for the children because, as it explained to James B., there was "no indication you're physically capable of having the children with you alone," the trial court reflected during the post-termination hearing that the "case was never decided with respect to [James B.] on his ability or inability to care for the children." Rather, the trial court explained, James B. "put all of his marbles on [Cynthia J.]. He continued to live with her when she was abusing drugs. He continued to live with her when she was not compliant with the conditions that she had to meet."

¶19 Undoubtedly, James B.'s physical inability to care for the children and their special needs by himself was a thread in the fabric of the trial court's decision, as it should have been; it would defeat the legitimate paramount focus on the *children's* interests, not only as mandated by WIS. STAT. § 48.01(1) but also as required by common justice and fairness—the underpinnings of all legitimate law—for a court to say, we know these children will be at significant risk if we do not remove them from your home, but we are powerless to do so because that risk is a function of your disability. James B. has not demonstrated that his trial

lawyer's failure to litigate the degree and nature of his disability made the first phase of the termination-of-parental-rights proceeding unreliable. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994). In the second phase, of course, as we have already seen, the *only* focus is on the children and what is good for *them*, not the parents.

By the Court.—Orders affirmed.

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