

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2004

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 No. 04-1047
STATE OF WISCONSIN**

Cir. Ct. No. 03TP000014

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
SELINA J.C., A PERSON UNDER THE AGE OF 18:**

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

TAWANNA W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Tawanna W. appeals an order terminating her parental rights to Selina J.C. Tawanna argues that her due process rights were violated when both corporation counsel and the guardian ad litem argued to the jury that they should hold Tawanna's failure to testify against her. We conclude that Tawanna's due process rights were not violated and we therefore affirm the order of the trial court.

FACTS

¶2 Tawanna gave birth to Selina on January 22, 2001. On or about March 26, 2001, Tawanna was jailed and her probation revoked; she remained in jail until October 2001. On April 6, 2001, with Tawanna in jail, Selina was taken into protective custody. On June 18, 2001, Selina was adjudged in need of protection or services and was placed in foster care. The trial court's written order was entered on June 25, 2001.

¶3 On June 10, 2002, the dispositional order for protective services was extended for an additional year. On February 12, 2003, the Rock County Department of Human Services (the County) filed a petition for termination of parental rights (TPR) against Tawanna and the putative father of Selina. The putative father consented to the termination of his parental rights and his rights were thus terminated.

¶4 As grounds for termination of Tawanna's parental rights, the County alleged that Selina was in continuing need of protection or services under WIS.

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

STAT. § 48.415(2). After the three-day jury trial concluded on September 19, 2003, Selina was found to be in continuing need of protection or services. Tawanna did not testify at the trial. During a conference after the parties rested, the County indicated that in its closing arguments, it intended to make reference to the fact that Tawanna did not testify. Tawanna's counsel objected. The guardian ad litem agreed with the County. The trial court concurred, concluding that because the trial was a civil proceeding, not a criminal proceeding, Tawanna had no right to remain silent. During their respective closing arguments, both the County and the guardian ad litem argued that Tawanna's failure to testify was significant and urged the jury to consider her failure to testify in their deliberations.

¶5 The dispositional hearing was held on January 12, 2004. The trial court concluded that terminating Tawanna's parental rights was in Selina's best interest. A written order terminating Tawanna's parental rights was entered on January 12, 2004. Tawanna appeals.

DISCUSSION

¶6 Tawanna argues that when the County and the guardian ad litem argued in their closing arguments that the jury should hold her failure to testify against her, her constitutional right to due process was violated. We disagree.

¶7 Constitutional issues present questions of law that are reviewed de novo. *Door County DHFS v. Scott S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). A TPR adjudication is among the most consequential of judicial acts, involving the "awesome authority of the State to destroy permanently all legal recognition of the parental relationship." *Steven V. v. Kelley H.*, 2004 WI 47, ¶21, ___ Wis. 2d ___, 678 N.W.2d 856 (citation omitted). Termination of

parental rights permanently extinguishes all rights, powers, privileges, immunities, duties and obligations that exist between parent and child. *Id.*

¶8 A parent's interest in the parent-child relationship and in the care, custody and management of his or her child is a fundamental liberty interest protected by the Fourteenth Amendment. *Id.* The United States Supreme Court and the Wisconsin supreme court have both found that due process in a TPR proceeding requires that parents be provided with fundamentally fair procedures. *Id.*, ¶23, citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Specifically, parents are entitled to a hearing and proof of parental unfitness by clear and convincing evidence. *Id.* at 747-48. The heart of due process is the right to notice and a meaningful opportunity to be heard. *Schultz v. Sykes*, 2001 WI App 255, ¶25, 248 Wis. 2d 746, 638 N.W.2d 604, *cert. denied*, 536 U.S. 941 (2002).

¶9 The code of civil procedure applies to all civil actions and special proceedings unless a different procedure is prescribed by statute or rule. WIS. STAT. § 801.01(2); *also Steven V.*, ¶32. Termination of parental rights proceedings are civil proceedings. The law is well settled in Wisconsin that TPR proceedings are governed by the rules of civil procedure. *See id.* The right to remain silent and the right to be free from comments to the jury of the invocation of that right is grounded in the Fifth Amendment of the United States Constitution. That right is reserved solely for criminal defendants in criminal proceedings. *See* WIS. STAT. § 905.13(1) and (3). Tawanna points to no authority that suggests otherwise. Tawanna's argument that she is entitled to the same protection in a civil proceeding as a criminal defendant enjoys in a criminal proceeding is without merit. Furthermore, there is nothing in the TPR statutes that explicitly or implicitly prohibits commentary on a TPR respondent's failure to testify.

¶10 The due process clause of the Fourteenth Amendment does not invoke any constitutional right against self-incrimination in civil proceedings. WIS. STAT. § 905.13(4). As we have already noted, the right against self-incrimination is guarded by the Fifth Amendment and applies only to criminal defendants. Tawanna has cited no authority for her contention that she has a due process right to remain silent in a civil TPR proceeding; perhaps that is because the principle involved here is so fundamental. She does not argue that the County's and the guardian ad litem's comments on her failure to testify in any way affected her right to notice and a meaningful opportunity to be heard. *See Schultz*, 248 Wis. 2d 746 at ¶25. We therefore affirm the order of the trial court terminating her parental rights.

By the Court.—Order affirmed.

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

