COURT OF APPEALS DECISION DATED AND FILED

October 25, 2001

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.**

Nos. 01-2047
01-2048

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

01-2047
IN RE THE TERMINATION OF PARENTAL RIGHTS TO ETERNITY E., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DANA E.,

RESPONDENT-APPELLANT.

01-2048
IN RE THE TERMINATION OF PARENTAL RIGHTS TO SIERRA E., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DANA E.,

RESPONDENT-APPELLANT.

APPEALS from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

¶1 VERGERONT, P.J.[1] Dana E. appeals from an order terminating her parental rights to her children, Eternity E. (DOB December 3, 1994) and Sierra E. (DOB July 11, 1996). Dana contends the trial court failed to make the first step in the "egregious analysis" required by ***State v. Kelly S.***, 2001 WI App 193, __ Wis. 2d __, 634 N.W.2d 120. We conclude that the trial court did engage in the proper analysis and therefore affirm.

BACKGROUND

¶2 Dana is the biological mother of Eternity and Sierra. The amended petition for termination of Dana's parental rights, filed on January 22, 2001, alleged abandonment under WIS. STAT. § 48.415(1), and continuing need of protection or services under § 48.415(2).[2]

¶3 Eternity and Sierra had been adjudged in need of protection or services in a 1998 CHIPS proceeding. Following that decision, they were placed outside the home for approximately three years. The court orders placing them outside the home required Dana to meet several conditions before the children could be returned. Among those return conditions were: maintaining suitable and

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

[2] A petition was also filed against the children's father, but that is the subject of a separate appeal.

safe housing for three months prior to the children's return, being financially independent, maintaining steady employment, having regular contact with the social worker, maintaining a drug-free lifestyle, addressing mental health issues and treatment needs, participating in parenting instruction, not being arrested, paying child support, following the visitation plan, and maintaining consistent contact with the children. The petition for termination of parental rights against Dana alleged that she had failed to visit or communicate with her children for a period of three months or longer and had failed to meet the return conditions.

¶4 Dana pled no contest to abandonment, thereby waiving her right to a jury trial on the grounds for termination. At the dispositional hearing, the court heard the testimony of the children's therapist, the social worker assigned to the children's case, a clinical psychologist who had evaluated the families, Dana's stepfather, and Dana, and received other evidence regarding Dana's ability to parent. The testimony included evidence of Dana's failure to meet the court ordered conditions. The court commented on the evidence at length and found that Dana was unfit and it was in the children's best interests to terminate her parental rights.

DISCUSSION

¶5 Dana contends on appeal that the trial court failed to make a finding that her conduct undermined her ability to function as a parent and that such a finding is part of the "egregious analysis" set forth in ***Kelly S.*** We understand her argument to be that the court did not apply the correct legal standard. This presents a question of law, which we review de novo. ***Carney v. Mantuano***, 204 Wis. 2d 527, 532, 554 N.W.2d 854 (Ct. App. 1996).

¶6 In ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 470 N.W.2d 914 (1991), the supreme court interpreted the statutes governing the trial court's responsibilities after finding grounds for termination of parental rights. The court considered the language of WIS. STAT. § 48.424 and WIS. STAT. § 48.427(2). The court concluded that even if the jury had found facts that constituted grounds for termination of parental rights, the court had to determine whether the evidence supporting the parent's unfitness was egregious enough to warrant termination. ***Id.*** at 103. The court elaborated, stating that parental rights may be terminated when the court finds that the parent's conduct affects the ability to function as a parent and when termination is in the best interest of the child. ***Id.*** at 112, 115.

¶7 In ***Kelly S.***, we considered more precisely how the trial court is to apply the egregious standard set forth in ***B.L.J.*** We concluded it consists of a two-part, sequential test. ***Kelly S.***, 2001 WI App 193 at ¶8. First, the trial court must decide whether the parent's unfitness is of such strength that it undermines the ability to parent. ***Id.*** at ¶9. Second, if so, the trial court must determine whether that inability is seriously detrimental to the child.[3] ***Id.*** at ¶10. If the trial court makes unmistakable but implicit findings that the parent's actions affect the ability to parent and that continuing the parent-child relationship would seriously jeopardize the child's safety and welfare, the court has properly performed the requisite analysis. ***Id.*** at ¶12.

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[3] Dana does not contend that the trial court failed to make the findings required by the second step. Accordingly, we do not address this issue.

¶8 We conclude that the trial court here made unmistakable findings that Dana's unfitness was of such strength that it undermined her ability to parent. The court began its oral decision by observing that a termination of parental rights was warranted "only in the most serious of cases." It distinguished between what it considered trivial violations of the conditions and those that went to Dana's fitness as a parent, stating that it needed to "assess [if Dana was] … somehow victimized by the system such that if only given the appropriate chance, [she] would be able to have acted appropriately as [a] parent[] and that [she] still [is] capable of acting in that capacity …." However, the court found that was not the case and that it was clear she was "not fit to parent [her] children."

¶9 In reviewing the evidence, the court stated that the best indicator of the great unlikelihood that Dana would ever meet the conditions set forth by the court to have her children returned to her home was her record of visitation with the children. The court stressed that Dana knew her inconsistent visits with her children were a major concern; nevertheless, she visited her children only three times in a ten-month period. The court also referred to the evidence that she failed in virtually every condition over a long period of time and continued to fail even after the petition for termination of parental rights had been filed.

¶10 The court also considered Dana's statement that she now has the commitment and the resources to take care of her children because of the stable relationship she has with a man. However, the court observed this relationship had been in existence for over seven months before the dispositional hearing, but she had visited her children only twice in that time. The court stated:

> If under circumstances that she describes as being this stable relationship, this positive setting where now somebody is treating her well and so on, if under those circumstances she can do no better than that, I have no faith

> that in the next year or the next six months or any additional period of time that we might extend to her that she will make the kind of progress that will allow her to be a parent to her child.

¶11 The court also determined that giving Dana more time would not result in her being able to meet her children's needs. With respect to Sierra, in particular, the court found that Dana did not have "anywhere close to the capacity to be a parent" to her.

¶12 We reject Dana's suggestion that the trial court must say the exact words—"unfitness is of such strength it undermines her ability to parent." The court unmistakably found Dana's conduct was sufficiently egregious to undermine her ability to parent and warrant termination. There is no point in remanding to the trial court for it to make more explicit what is already unmistakably clear—that is superfluous and a waste of judicial resources. ***B.L.J.***, 163 Wis. 2d at 109.[4]

By the Court.—Order affirmed.

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

[4] Dana does not challenge the sufficiency of the evidence to support the trial court's findings.