COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-2052, 01-2053, 01-2054, 01-2055

Cir. Ct. Nos. 99-TP-13, 99-TP-14, 99-TP-15, 99-TP-16

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

NO. 01-2052

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

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JANET S.,

RESPONDENT-APPELLANT,

EUGENE S.,

RESPONDENT-CO-APPELLANT.

NO. 01-2053

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

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JANET S.,

RESPONDENT-APPELLANT,

EUGENE S.,

RESPONDENT-CO-APPELLANT.

NO. 01-2054

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

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JANET S.,

RESPONDENT-APPELLANT,

EUGENE S.,

RESPONDENT-CO-APPELLANT.

NO. 01-2055

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

LANGLADE COUNTY,

PETITIONER-RESPONDENT,

V.

JANET S.,

RESPONDENT-APPELLANT,

EUGENE S.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Langlade County: MICHAEL NOLAN, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Janet S. and Eugene S. appeal from orders terminating their parental rights to their children. They argue that: (1) the evidence introduced at the fact-finding hearing was insufficient to establish that the Langlade County Human Services Department made diligent efforts to provide the services ordered by the trial court; (2) the trial court erred by instructing the jury to disregard all testimony and other evidence concerning events or developments which occurred after the filing of the TPR; (3) the trial court erred by allowing a social worker to give her opinion of whether or not the legal requirements of "diligent effort" were met in this case; and (4) at the dispositional hearing, the trial court erred by failing to find Janet's conduct was egregious enough to terminate her parental rights. We disagree and affirm the orders.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

BACKGROUND

¶2 This case involves both special needs children and special needs parents. Janet and Eugene are the parents of Savannah, Jacob, Felicia, and Sasha. All four children were removed from Janet and Eugene's home on February 23, 1998, due to allegations of abuse and neglect.[2] On May 4, 1998, CHIPS dispositional orders were entered imposing conditions for the return of the children to the parents' home.[3]

¶3 On October 11, 1999, the County petitioned for termination of Janet and Eugene's parental rights on the grounds of continuing need of protection or services. *See* WIS. STAT. § 48.415(2). The petitions alleged that Janet and Eugene had not complied with the CHIPS dispositional orders and that there was a substantial likelihood that they would not meet those conditions within twelve months.

¶4 A jury trial was held on January 18, 2000. The jury returned a verdict finding that grounds for termination of parental rights existed. At the dispositional hearing, the trial court terminated Janet and Eugene's parental rights. An appeal was filed. We remanded the case for a hearing on post-judgment motions. Those motions resulted in a new trial.

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[2] Each of the children has significant mental or physical disabilities. Savannah is wheelchair bound and has cerebral palsy. The other children all suffer from behavioral and learning disorders.

[3] The conditions imposed required, among other things, that Janet and Eugene participate in the Intensive In-Home Program offered by the department, individual counseling and family counseling. Janet and Eugene were also ordered to cooperate with the department.

¶5 A second jury trial was held on February 8 and 9, 2001. Before trial, Eugene filed a motion in limine seeking an order prohibiting the County from arguing that the children had been out of the home during the time between the two trials. Janet joined in the motion. The trial court ordered that evidence of Janet and Eugene's conduct and the department's efforts to provide services after the TPR was filed on October 11, 1999, would not be admissible.

¶6 At trial, social workers Elizabeth Hinds and Karen Purmort, who ran the in-home and family preservation program, testified that they both worked with Janet and Eugene from February 1998 through May 1999. Hinds and Purmort had extensive experience and training in working with developmentally disabled adults. They testified that they recognized that Janet and Eugene had special needs in both developmental disability and mental health areas. Hinds and Purmort testified that after working extensively with Janet and Eugene, the department terminated the family preservation counseling because Janet and Eugene did not cooperate.

¶7 Counselors Thomas McGrath and Sue Pennington also testified. McGrath provided joint counseling to Janet and Eugene as well as individual counseling to Eugene. Pennington provided individual counseling to Janet. McGrath testified that after numerous efforts, he ended further counseling due to Eugene's lack of cooperation. Pennington concluded that the prognosis was poor for Janet because of her retardation and attention deficit and hyperactivity disorder.

¶8 The supervising caseworker, Kim Plautz, directed the services provided to Janet and Eugene. She testified that she supervised Janet's and Eugene's visitation with the children and arranged for all of the programs. She

stated that, while Janet and Eugene were not receiving financial aid, both were provided transportation assistance and financial counseling. Plautz testified that, in her opinion, she made diligent efforts to help Janet and Eugene meet the conditions in the CHIPS orders. She concluded that termination of parental rights was required because of Janet's and Eugene's lack of cooperation.

¶9 Psychologist James Heider testified as an expert witness. He stated that he evaluated both Janet and Eugene at the request of the department. Heider diagnosed Eugene as suffering from a personality disorder with a strong and manipulative personality. Heider diagnosed Janet as having mental retardation, attention deficit disorder, hyperactivity disorder, anxiety disorder and post-traumatic stress disorder. Heider described the type of programming he thought Janet needed and believed someone like Janet would have a forty to fifty percent success rate. Heider testified that the department appeared not to have provided Janet and Eugene the proper type of program that would take into account all of their needs. As a result, he was not sure he could recommend termination.

¶10 With two dissents, the jury found that grounds for termination of parental rights existed under WIS. STAT. § 48.415(2). Following the March 20, 2001, dispositional hearing, the trial court terminated Janet's and Eugene's parental rights.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

¶11 Janet and Eugene argue that the evidence introduced at the fact-finding hearing was insufficient as a matter of law to meet the County's burden of showing that it made a "diligent effort" to provide court-ordered services and that

Janet and Eugene would not meet the conditions for the return of the children within twelve months pursuant to WIS. STAT. § 48.415(2)(c) (1995-96).[4]

¶12 "Grounds for termination of parental rights must be proven by clear and convincing evidence." ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). The burden is on the County to establish by clear and convincing evidence that it made a diligent effort to provide the services ordered by the court. *See* ***In re T.M.S.***, 152 Wis. 2d 345, 358 n.11, 448 N.W.2d 282 (Ct. App. 1989).

¶13 We examine the evidence and reasonable inferences drawn from the evidence in a light most favorable to the verdict. ***State v. Pankow***, 144 Wis. 2d 23, 30, 422 N.W.2d 913 (Ct. App. 1988). We will only substitute our judgment for the trier of fact's when the fact finder relied upon evidence that was inherently or patently incredible. ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

A. Eugene's Special Needs

¶14 Eugene argues that there was no credible evidence supporting the verdict because there was no evidence showing the department made a diligent effort to provide services tailored to meet his special mental health needs. Eugene concedes that the primary service providers had the necessary training, recognized his needs, and planned in advance how to present things to Eugene so that he

[4] Because the CHIPS order was entered on May 1, 1998, the applicable standard was for the department to make a "diligent effort" to provide the services ordered by the court. *See* WIS. STAT. § 48.415(2)(c) (1995-96). The current standard is that the department make a "reasonable effort" to provide services ordered by the court. *See* WIS. STAT. § 48.415(2)(a)2b (1999-2000).

would understand. It is also undisputed that Eugene received extensive services. Nevertheless, Eugene argues that the services were not sufficiently tailored to meet his special needs. He contends that the department must work around his low level of cooperation rather than simply using it as a basis for termination.

¶15 To demonstrate a continuing need of protection or services as a ground for termination, the County had to show that it made a diligent effort to provide the services ordered by the court. WIS. STAT. § 48.415(2)(b) (1995-96). A diligent effort means an "earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case." ***Id.***

¶16 There is nothing in the record to indicate that Eugene was suffering from an untreated mental illness or that his manipulative personality disorder could be treated. There is no evidence that had treatment been given, it would have been successful. The jury had the right to believe that Eugene's manipulative personality was exactly that, a manipulative personality. The record supports a finding that over a period of time, he resisted or refused the treatment offered. He was rude and abusive to his children, wife and service providers.

¶17 Further, social service providers are not required to endlessly spin their wheels. The diligent effort requirement specifically factors in the level of cooperation of the parent. *See* ***In re Torrance P.***, 187 Wis. 2d 10, 16, 522 N.W.2d 243 (Ct. App. 1994) (finding of diligent effort not erroneous when much of Human Services' inability to facilitate completion of court-ordered conditions attributable to parent's failure to keep appointments).

¶18 The record supports a finding that Eugene did not cooperate on many occasions. Even Eugene himself admitted at trial that he was resistant to counseling and would have a hard time getting over his anger at the department. A review of the record establishes that there is sufficient credible evidence to support the jury's finding that the department made a "diligent effort" to provide services.

B. Heider's Testimony

¶19 Janet argues that Heider's testimony establishes as a matter of law that the department failed to make a diligent effort to provide her the court-ordered services. Her argument is based upon Heider's comment that he did not believe the department had provided the proper type of program, taking into account all of Janet's and Eugene's needs. As a result, he was not sure that he could recommend termination.

¶20 However, Janet ignores ample evidence showing that the department did follow Heider's recommendations. Janet's primary service providers, Hinds and Purmort, had extensive training and experience with developmentally disabled and mentally ill adults. They not only recognized Janet's special needs, but spent each week planning in advance how to teach her. They followed Heider's advice to break everything down and have specific instructions for each task.

¶21 Janet's counselor also testified that she was conscious of Janet's disability and made every effort to accommodate her. However, the counselor concluded that Janet's main problem was personality related, not cognitive.

¶22 The existence of conflicting testimony does not call for reversal. ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984). To survive

a sufficiency of the evidence challenge, there need only be credible evidence to sustain the verdict. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). The jury decides who to believe. ***Fells v. State***, 65 Wis. 2d 525, 529, 223 N.W.2d 507 (1974). It may draw reasonable inferences from testimony, and it may choose to believe part of one witness' testimony and part of another's, even though the witnesses, as a whole, are inconsistent. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Here, there is credible evidence to sustain the verdict despite Heider's testimony.

C. Substantial Likelihood of Meeting the CHIPS Conditions

¶23 Janet argues that the jury could not find that there was a substantial likelihood that she would not fulfill the CHIPS conditions within twelve months. She contends that Heider's testimony precludes the jury from making this finding. Heider testified that Janet would have a forty to fifty percent success rate in the program.

¶24 However, Janet's argument ignores the department's extensive efforts that substantially followed Heider's programming recommendations. Her argument also ignores the contrary opinions of the social workers. Further, Heider's forty to fifty percent chance of success estimate is not a mathematical certainty. Whether Janet would meet the conditions within the next twelve months remained a question for the jury.

II. EXCLUSION OF EVIDENCE

¶25 Janet and Eugene argue that the trial court erred by instructing the jury to consider the facts and circumstances as they existed on the date the petitions were filed and not to consider events or developments that occurred after

the filing. They contend that the instruction misstates the law and constitutes plain error requiring a new trial. We disagree.

¶26 Any alleged misstatement of the law was invited error. Janet and Eugene made a tactical choice to seek the exclusion of post-petition evidence. They are prohibited from raising on appeal the very thing they sought and obtained at trial. ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

¶27 Prior to trial, Eugene filed a motion in limine seeking an order prohibiting the County from arguing the passage of time since the prior jury trial. Janet joined in the motion. At the hearing, Janet and Eugene argued that the County should be prohibited from relying on the fact that the children had been out of the home during the time between the two trials. As the jury instruction makes clear, one of the considerations as to whether there is a substantial likelihood a parent will not meet the conditions in the next twelve months is "[t]he length of time the children have been in placement outside [the parent's] home."

¶28 Janet and Eugene attempted to prevent the County from presenting evidence pertaining to the post-petition period, yet both wanted to testify about what they had done since the filing. However, as the trial court pointed out, they could not have it both ways. If Janet or Eugene did testify about the post-petition period, then the County would be able to counter their testimony. Janet and Eugene made a tactical choice and agreed to testify only about what they would do in the future. Now, they want to reverse an order that they requested. Even if the trial court erred when it directed the jury not to consider post-petition evidence, it did so at Janet and Eugene's invitation and will not be reversed on appeal.

III. PLAUTZ'S EXPERT TESTIMONY

¶29 Eugene argues that the trial court erred by allowing Plautz to testify that in her opinion she had made a diligent effort to help Janet and Eugene meet the conditions of the CHIPS orders. Eugene contends that Plautz was not allowed to give her opinion on one of the ultimate legal issues in the case because: (1) she was not an expert; and (2) it was not a proper subject for an expert opinion because it was strictly a legal conclusion.

¶30 During Plautz's testimony, the following colloquy occurred:

> Q: Do you believe that you made a diligent effort to meet—help them meet the conditions?
>
> MS. CADWELL: Objection, invades the province of the jury.
>
> THE COURT: What was that?
>
> MS. CADWELL: It invades the province of the jury.
>
> THE COURT: I'll allow her opinion as to whether they feel that they did this. It will be up to the jury to ask for the ultimate decision. If you are asking for an opinion—
>
> MR. UTTKE: That's what I meant.
>
> A: In my opinion, yes.

¶31 WISCONSIN STAT. § 907.04 expressly permits testimony on an ultimate legal issue.[5] As a social worker with many years of experience in child protection, Plautz was qualified to offer an opinion on the question of diligent effort. The trial court properly allowed her opinion testimony.

[5] WISCONSIN STAT. § 907.04 reads as follows: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

¶32 Further, Plautz was not specifically asked to give a legal conclusion. She was not asked if the department had complied with WIS. STAT. § 48.415(2). She was asked if she had made a diligent effort to help Janet and Eugene meet the conditions. Plautz had both the personal knowledge and the expertise to answer the question posed. Therefore, the trial court did not err by allowing Plautz to give her opinion.

IV. EGREGIOUSNESS ANALYSIS

¶33 Last, after the jury had found evidence supporting termination of parental rights, the trial court was required to determine whether the evidence was sufficiently "egregious" to order termination. ***B.L.J. v. Polk County DSS***, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991). Janet argues that the trial court erred by failing to properly apply the two-part "egregiousness" analysis described in ***State v. Kelly S.***, 2001 WI App 193, 247 Wis. 2d 144, 634 N.W.2d 120.

¶34 In ***Kelly S.*** we considered how to more precisely apply the egregiousness standard set forth in ***B.L.J.*** We divided the determination into a two-part, sequential test. ***Kelly S.***, 2001 WI App at ¶8. First, the trial court must decide whether the parent's unfitness 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. ***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.

¶35 The ultimate determination whether to terminate parental rights is discretionary with the trial court. ***State v. Margaret H.***, 2000 WI 42, ¶27, 234

Wis. 2d 606, 610 N.W.2d 475. Here, the trial court did not follow the precise framework of ***Kelly S.*** However, its analysis is unmistakable. The court first made the statutory finding of unfitness pursuant to WIS. STAT. § 48.424(4) based upon the finding of grounds by the jury.

¶36 At the dispositional hearing, the trial court addressed the parents' unfitness:

> There is not doubt that Mr. and Mrs. [S.] care for their children and have an expressed intention which they expressed at the trial and again today to make the necessary changes in order for the children to return to their home.
>
> However, there was strong evidence throughout the trial that this kind of opportunity was given to Mr. And Mrs. [S.] time and again during the years that the children were placed outside of their home and that Mr. and Mrs. [S.] either could not or would not adopt to the requirements that were there for them ….

The court emphasized the "inability and at times great opposition of Janet and Eugene [S.] to do what is needed to be done to make the changes necessary" to function as parents. The court also pointed to the tremendous change that occurred since the children were placed in foster care.

¶37 The trial court also explicitly found as to each child that "continuation of the child in the parents' home is contrary to the welfare of the child …. The children were in effect being damaged in their parents' home and are [now] on the road to recovery." The court additionally found that "reasonable efforts have been made to prevent the removal of the child from the home."

¶38 The trial court identified Janet as unable or unwilling to make necessary changes, despite being given ample opportunity to do so. By these observations, the court found Janet unable to function as a parent.

¶39 The trial court then found that the children had been "damaged" in the home and it was not in their best interests to be returned. Thus, the second part of the "egregiousness" analysis was met. Janet's inability to parent was seriously detrimental to the children. We conclude that the court followed the law.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.