COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 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 Nos. 04-2550
04-2551
04-2552

Cir. Ct. Nos. 03TP000082
03TP000083
03TP000084

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

NO. 04-2550
IN RE THE TERMINATION OF PARENTAL RIGHTS TO
STORMI C., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAWN C.,

RESPONDENT-APPELLANT.

NO. 04-2551
IN RE THE TERMINATION OF PARENTAL RIGHTS TO
HEAVEN C., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAWN C.,

RESPONDENT-APPELLANT.

NO. 04-2552
IN RE THE TERMINATION OF PARENTAL RIGHTS TO ARIEL C., A PERSON UNDER THE AGE OF 18:

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAWN C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, P.J.[1] Dawn C. appeals from orders terminating her parental rights to her three children, Stormi C., Ariel C., and Heaven C. She claims the circuit court erroneously accepted her no contest plea to the allegations in the petition without first hearing witness testimony in support of the petition. We conclude that the circuit court did err in failing to hear witness testimony and that such error was not harmless. We reverse the orders terminating Dawn's

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

parental rights to her three children and remand for proceedings consistent with this opinion.

BACKGROUND

¶2 In November 2003, the Kenosha County Department of Human Services filed petitions to terminate Dawn's parental rights to Stormi, Heaven and Ariel. Each petition alleged two grounds for terminating Dawn's parental rights: abandonment under WIS. STAT. § 48.415(1)(a)2 and continuing need of protection or services under § 48.415(2). With regard to the abandonment allegation, each petition alleged:

> The mother has not visited, in person, or had oral communication with [name of child] since June 2003, a period of longer than three months. That the mother has written to the child since April 29, 2003, a period of longer than three months.[2]

¶3 On April 26, 2004, prior to the fact-finding hearing, Dawn completed a "Termination of Parental Rights Plea Questionnaire/Waiver of Rights/Appeal Rights" form with the assistance of her attorney. The plea form outlined the rights that she would be waiving by entering her no contest plea as well as the potential consequences to her should the court terminate her parental rights. Specifically, by initialing the form, Dawn acknowledged that there are enough facts in the petition for the jury/court to find that there are grounds to

[2] Presumably, the County intended this to read: "That the mother has *not* written to the child since April 29, 2003, a period of longer than three months." This error does not impact our resolution of the issues in this case.

terminate her parental rights and that she does not object to the court finding such facts exist.

¶4 On the same day, at the fact-finding hearing, Dawn entered no contest pleas to the abandonment allegations in each of the petitions. Apparently, in exchange for the no contest pleas, the County agreed to drop the continuing need of protection and services allegations.

¶5 At the hearing, the court engaged Dawn in a colloquy regarding her intent to enter a no contest plea to the abandonment ground in each of the petitions. The court advised Dawn of the elements of the abandonment ground, the legal effect of her no contest plea, the right to present a defense and the burden that the County bears in this case. At the conclusion of the court's colloquy, it accepted Dawn's no contest plea and found that her plea was "freely, voluntarily, intelligently, knowingly made with the advice of counsel." The court then determined that there was a factual basis contained in the termination of parental rights petition for the abandonment ground and therefore entered its finding of unfitness.

¶6 On June 7, 2004, the court conducted a contested dispositional hearing. Dawn and two social workers who had interaction with the children testified. After the testimony, the guardian ad litem joined with the County in urging the court to terminate Dawn's parental rights. The court did so, and the respective written orders terminating Dawn's parental rights were entered on June 8, 2004. Dawn appeals.

STANDARD OF REVIEW

¶7 Termination of parental rights is governed by Subchapter VIII of Chapter 48 of the Wisconsin Statutes, the Children's Code. The "best interests of the child" represents a consistent legislative objective throughout the Children's Code. WISCONSIN STAT. § 48.01(1) provides in part: "In construing this chapter, the best interests of the child ... shall always be of paramount consideration." *See also* ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶21, 255 Wis. 2d 170, 183, 648 N.W.2d 402.

¶8 However, our supreme court recently clarified that despite this broad language, the "best interests of the child" standard *does not* dominate every step of every proceeding because other vital interests must be accommodated. ***Id.***, ¶22.

> When the government seeks to terminate parental rights, the best interests of the child standard does not "prevail" until the affected parent has been found unfit pursuant to Wis. Stat. § 48.424(4). "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" This fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."

Julie A.B., 255 Wis. 2d 170, ¶22 (citations and footnote omitted).

¶9 "'Termination of parental rights' means that, pursuant to a court order, all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed." WIS. STAT. § 48.40(2). Plainly, the consequences of termination are profound. ***Julie A.B.***, 255 Wis. 2d 170, ¶23. After the petition has been filed and the preliminaries have been

completed, a contested termination proceeding involves a two-step procedure. ***Id.***, ¶24. The first step is the fact-finding hearing "to determine whether grounds exist for the termination of parental rights." WIS. STAT. § 48.424(1). "During this step, the parent's rights are paramount." ***Julie A.B.***, 255 Wis. 2d 170, ¶24 (citation omitted). "During this step, the burden is on the government, and the parent enjoys a full complement of procedural rights." ***Id.***

¶10 Because termination of parental rights interferes with a fundamental liberty interest, we apply strict scrutiny and require the government to show that termination is narrowly tailored to serve a compelling governmental interest. ***Monroe County DHS v. Kelli B.***, 2003 WI App 88, ¶8, 263 Wis. 2d 413, 662 N.W.2d 360, *aff'd*, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831. At the close of the fact-finding hearing, the jury or the court determines "whether any grounds for the termination of parental rights have been proven." *See* WIS. STAT. § 48.424(3). If the jury or court determines that the facts alleged in the petition have not been proven, the court dismisses the petition. ***Julie A.B.***, 255 Wis. 2d 170, ¶27 n.10. Conversely, "[i]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." Sec. 48.424(4).

¶11 Notwithstanding a jury verdict, the court may dismiss a petition if it finds that the evidence does not sustain any one of the jury's individual findings. ***Julie A.B.***, 255 Wis. 2d 170, ¶27. This is consistent with the sufficiency-of-evidence principles in WIS. STAT. § 805.14. ***Julie A.B.***, 255 Wis. 2d 170, ¶27. The trial court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and application of the correct standard of law. ***Id.***, ¶43. "[I]f ... the evidence for any one of the ... findings does not support the jury finding, that would be reason to dismiss the petition because a

'finding' of unfitness *cannot be sustained* if one of the ... required findings is not ... supported by 'clear and convincing evidence.'" ***Id.***, ¶27 n.10 (emphasis added; citation omitted).

DISCUSSION

¶12 Dawn argues, and the County concedes, that pursuant to WIS. STAT. § 48.422(3),[3] which requires courts to hear testimony in support of allegations in a petition where the petition is not contested, and ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, the circuit court erred in failing to hear testimony in support of the allegations. Extrapolating from the ***Steven H.*** decision, the County, however, argues that the circuit court's error in failing to take testimony in support of the allegations of the petition, did not prejudice Dawn. The County cites as support for its harmless error argument the petitions, the plea questionnaire/waiver form, and the plea colloquy.

¶13 We begin our analysis of the parties' arguments with a discussion of ***Steven H.***, the case both parties agree controls the matter at hand. ***Steven H.*** involved a respondent to a termination of parental rights petition who voluntarily waived his right to contest the allegations in the petition. ***Id.***, ¶41. Based largely on this waiver, and without first taking testimony to support the allegations in the petition, the circuit court found that grounds existed to terminate the respondent's parental rights. ***Id.***, ¶¶45-51.

[3] WISCONSIN STAT. § 48.422(3) reads: "If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)."

¶14 On review, our supreme court concluded that the circuit court erred in failing to take testimony to support the respondent's parental rights. ***Id.***, ¶¶54, 56 (citing WIS. STAT. § 48.422(3)). As the court explained, the respondent's waiver of his right to contest the petition was not tantamount to the respondent admitting the allegations in the petition; the circuit court still had the duty to make findings sufficient to support the allegations in the petition for termination. ***Steven H.***, 233 Wis. 2d 344, ¶¶52, 56. Rather, the court noted that "[a] factual basis for several of the allegations in the petition can be teased out of the testimony of other witnesses at other hearings when the entire record is examined." ***Id.***, ¶58. Based on this factual basis, the court held that although it had grave concerns about the circuit court's failure to follow the statutory procedure for termination proceedings, its examination of the entire record persuaded it that the circuit court's error was not sufficient to justify overturning the termination order. ***Id.***, ¶¶58-60.

¶15 ***Steven H.*** teaches that where, as here, the parent enters a no contest plea and does not admit the allegations, WIS. STAT. § 48.422(3) requires the court to hear testimony from witnesses in support of the allegations in the petition before entering a finding of unfitness. ***Steven H.***, 233 Wis. 2d 344, ¶¶52, 56. According to ***Steven H.***, the legislature intended the circuit court to hear testimony in support of the allegations because testimony safeguards accurate fact-finding and protects the parents. ***Id.***, ¶56. This is particularly true where the grounds for termination include abandonment. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856 (listing abandonment among the many termination of parental rights cases where "the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding

hearing because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child."). As ***Steven H.*** instructs, however, if the circuit court fails to comply with § 48.422(3) and bases its decision solely on the no contest colloquy and the statements from the parent, the appellate court may still review the testimony of other witnesses at other hearings and tease out the factual basis for the allegations in the petitions. ***Steven H.***, 233 Wis. 2d 344, ¶¶54, 57-58. The court has since affirmed the principles articulated in ***Steven H***. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶32-33, 246 Wis. 2d 1, 629 N.W.2d 768.

¶16 Applying these principles to this case, it is clear that the petition, the plea questionnaire form and the plea colloquy are not sufficient to justify upholding the circuit court's termination order. Testimony from witnesses either at the fact-finding hearing or at a later hearing that would support the factual basis for the allegations in the petition is needed. In light of the profound consequences of termination and the cited policy that at the fact-finding hearing the parent's rights are paramount, the importance of WIS. STAT. § 48.422(3)'s testimony requirement cannot be overlooked.

¶17 After reviewing the testimony presented at the dispositional hearing, we cannot find the requisite factual basis for the allegation of abandonment. Abandonment is defined in WIS. STAT. § 48.415(1)(a)2 and requires findings that (1) the child has been placed, or continued in a placement outside the parent's home by a court order and (2) the parent has failed to visit or communicate with the child for a period of three months or longer. None of the witnesses who testified at the dispositional hearing provided a specific reference to the amount of time it had been since Dawn had visited or communicated with the children. There simply is nothing in their testimony that would support by clear and

convincing evidence the County's allegation that Dawn had abandoned her children by failing to communicate with either Stormi, Heaven or Ariel for a period of three months. Accordingly, pursuant to the standards articulated in ***Steven H.***, the circuit court's failure to comply with WIS. STAT. § 48.422(3) was not harmless.

By the Court.—Orders reversed and cause remanded with directions.

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