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

Appeal Nos. 03-1859
03-1860

Cir. Ct. Nos. 02TP000140
02TP000141

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 03-1859
CIR. CT. NO. 02TP000140

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

VIRTIS A.,

RESPONDENT-APPELLANT.

NO. 03-1860
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IN RE THE TERMINATION OF PARENTAL RIGHTS TO KHALEEL A., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

VIRTIS A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 FINE, J. Virtis A. appeals from the trial court's order terminating his parental rights to Keyanus A. and Khaleel A. Keyanus was born in October of 1997, and Khaleel was born in April of 2000. Keyanus lived with foster parents since Khaleel's birth, as did Khaleel, once he was able to leave the hospital several months after his birth. Khaleel had to stay in the hospital because he was born addicted to heroin. A jury agreed with the State that there were grounds to terminate Virtis A.'s parental rights to the children when it found that: (1) Virtis A. had abandoned Keyanus; (2) Virtis A. had failed to assume his parental responsibility for both Keyanus and Khaleel; and (3) Keyanus remained a child in need of protection and services. Virtis A. alleges no legal errors. Rather, he contends that the evidence does not support the jury's findings, and that the trial court erroneously exercised its discretion in entering the termination order. We affirm.

¶2 This case is governed by our standard of review. We give significant deference to jury verdicts on appeal, and may not overturn them "if there is any credible evidence" that supports what the jury has found, giving to the

jury's finding every reasonable supporting inference. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 449, 655 N.W.2d 752, 761.

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

¶4 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* 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).

A. *The jury's verdicts*.

¶5 Only one predicate ground need be proven before the best-interests phase of a termination-of-parental-rights proceeding kicks in. *See* WIS. STAT. § 48.424(4). As noted, the jury found three grounds as to Keyanus, and one ground as to Khaleel: that Virtis A. had abandoned Keyanus, had failed to assume his parental responsibility for both Keyanus and Khaleel, and that Keyanus remained a child in need of protection and services. These were the predicate

grounds submitted to the jury. *See* WIS. STAT. §§ 48.415(1) (abandonment), 48.415(2) (continued need of protection or services), & 48.415(6) (failure to assume parental responsibility). We discuss these findings in turn.

1. *Abandonment of Keyanus*.

¶6 WISCONSIN STAT. § 48.415(1)(a)2 defines "abandonment" as including a situation where "the child has been placed, or continued in a placement, outside the parent's home by a court order containing [the requisite statutory notice] and the parent has failed to visit or communicate with the child for a period of 3 months or longer." Mere incidental contact is not enough. WIS. STAT. § 48.415(1)(b) ("Incidental contact between parent and child shall not prevent the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2. or 3.").

¶7 As we have seen, Keyanus was placed in a foster home shortly after Khaleel's birth in April of 2000. There was evidence that the jury could have believed that although weekly visits with Keyanus in the foster home were arranged for Virtis A. and Keyanus's mother from September of 2000 until July of 2001, Virtis A.'s attendance (and the mother's) was not good. Further, the social-worker case manager assigned to Keyanus's case, testified that the visitation schedule was suspended because Virtis A. had also only sporadically complied with the court-ordered alcohol and drug programs, and a regular visitation schedule was not re-established because "there was not consistent and constant contact with him." Although he complains about the suspension, Virtis A.'s briefs on appeal do not indicate how or why it was not justified. Despite the visitation suspension, the foster parents permitted Virtis A. to talk to Keyanus on the telephone. According to the foster mother's testimony, however, neither Virtis A.

nor Keyanus's mother called very often. Virtis A. had no contact with Keyanus from approximately early July of 2001 until February of 2002. Although Virtis A. blames the foster parents for the lack of telephonic communication, and the suspension of his in-person visits for his failure to maintain contact with Keyanus, the jury was free, given the evidence, to lay these failures at his feet. Under our standard of review, the jury was entitled to find that Virtis A. had "abandoned" Keyanus as that term is defined by WIS. STAT. § 48.415(1)(a)2.

2. *Failure to assume parental responsibility in connection with Keyanus and Khaleel.*

¶8 WISCONSIN STAT. § 48.415(6)(a) provides that a "[f]ailure to assume parental responsibility" is "established by proving that the parent ... never had a substantial parental relationship with the child," which WIS. STAT. § 48.415(6)(b) defines as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child." In disputing the jury's finding, Virtis A. points to the foster father's testimony that Keyanus "has a very strong emotional bond to" Virtis A., and, as phrased by Virtis A. in his appellate brief, "Keyanus had recognized [Virtis A.]'s voice during phone calls." He also points to the foster father's testimony that he had "no doubt" that Virtis A. loved Keyanus. The evidence was overwhelming, however, that Virtis A., whatever his inner feelings and desires may be, had only peripheral contact with Keyanus. The jury was thus entitled to find that Virtis A. had failed to assume his parental responsibility, as that phrase is defined by § 48.415(6)(a) & (b), in connection with Keyanus.

¶9 Khaleel was born addicted to heroin, and, as a result, suffered horrific medical problems following his birth. Indeed, his birth-mother testified

that he was a "methadone baby." Khaleel never lived with Virtis A., and, as with Keyanus, Virtis A.'s contact with Khaleel was sporadic at best, and non-existent between July of 2001 and April of 2002. Other than asserting as an explanation that he did his best but was thwarted by the social workers and the foster parents, which the jury did not have to accept, Virtis A. does not challenge the jury's finding that he never had a substantial parental relationship with Khaleel. Accordingly, the jury was entitled to find that Virtis A. had failed to assume his parental responsibility, as that phrase is defined by WIS. STAT. § 48.415(6)(a) & (b).

3. *Keyanus's continuing need of protection or services.*

¶10 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:

> That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders 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.

There was substantial evidence that from at least 1997, when Keyanus was born, Virtis A. used cocaine. Indeed, he admitted it. He also admitted at the trial that he used heroin "[r]oughly twenty to thirty times" in the preceding two years, and that he tested positive for opiates and cocaine even after the petition to terminate his parental rights was filed. Virtis A. also admitted that he did not show up for many random urine tests that were required by his drug-treatment program. Although Virtis A. had, apparently, satisfied all but five of the sixty-one conditions that the trial court had set before the children could be placed with him, the jury was

entitled to use Virtis A.'s past conduct as a predictor of what he would do in the future, *see* ***La Crosse County Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶18, 252 Wis. 2d 179, 189, 643 N.W.2d 194, 199, and find that Keyanus was a child in need of society's protection or services under § 48.415(2)(a)3 because there was "a substantial likelihood" that Virtis A. would not meet conditions for the safe placement of Keyanus "within the 12-month period following the fact-finding hearing."

B. *Termination*.

¶11 As we have seen, once a fact-finder has found that there are grounds to terminate a person's parental rights to his or her children, the circuit court judge must decide whether termination is in the children's best interests, giving no special preference to the birth-parents. The statute sets out some of the factors that the judge must consider:

> (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.

WIS. STAT. § 48.426(3).

¶12 The trial court's oral decision to grant the petition terminating Virtis A.'s parental rights to Keyanus and Khaleel revealed its struggle to do the right thing—the right thing for the children, which is what the statutes require. The trial court acknowledged that the foster parents may have "engag[ed] in behavior that undermine[d]" the process to help the birth-parents be reunited with their children, and, also, that it believed that the foster parents "lied to me on the stand." But, as the trial court recognized, the issue was not what was good for either the birth-parents on one hand or the foster parents on the other hand, but what was in the best interests of Keyanus and Khaleel. Thus, in concluding that termination of Virtis A.'s rights to the children were in the children's best interests, the trial court, addressing both Virtis A. and the mother at the dispositional hearing, explained:

> [Y]ou made choices in your life that caused your children to become part of this System's responsibility. And you made choices in your life that caused your children to enter into relationships that are now at the very core of their emotional well-being for now nearly three years[.] ... Your choices have put these other people in your children's life and have made them their parents on a day-to-day basis for a very significant period of time. And as I say it's clear to me in the testimony, it's clear to me from the reports, it is clear to me from all of the things that I know about this case, that those relationships are now at the very core of their emotional well-being. And to end those relationships now on an assumption that you are now committed to and will make better choices and prioritize your children, it seems to me that that is a risk that cannot be justified.

(Paragraph breaks omitted.) The trial court also recognized, however, that Virtis A. "is busting his back to do everything that he knows how to do to demonstrate to us that he has moved beyond this stuff and that he is going to get it right in his life." But, for Keyanus and Khaleel it was too little and too late:

> You are saying just give me [a] little more time, Judge, and this is going to be okay. And I will restore my relationship with my children. Your children have been waiting a long time, and despite my earlier comments, there was no point in this entire course of this litigation that which, would it been [*sic*] appropriate or at which I would have considered returning your children to your care until very, very, very recently. And we're nearly three years into this. Your children grow and develop and people that come into their lives become their anchors. And that is what happened with your children. And in essence you have waited too long.... [Your c]hildren can and will be adopted. They are very adoptable. [Their] foster parents are committed.... These people have been functioning as their parents for a very significant period of the [children's] life. And in fact, as to Khaleel -- as to Keyanus, Khaleel, all of his life; Keyanus' significan[t] period, longer than half of his life. I do believe that this, interrupting those placements would have significantly endangered their emotional welfare.

(Paragraph breaks omitted.)

¶13 Although, as the trial court recognized, termination of parental rights in this case was "sad and it's hurtful," the trial court concluded that it was also "right." In light of the statutory factors and the facts, we cannot say that the trial court erroneously exercised its discretion in entering the termination order. Accordingly, we affirm.

By the Court.—Order affirmed.

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