COURT OF APPEALS DECISION DATED AND FILED

March 26, 2014

Diane M. Fremgen
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. 2014AP160

Cir. Ct. No. 2013TP9

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

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

MARY E. B.,

PETITIONER-APPELLANT,

V.

CECIL M.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed.*

¶1 REILLY, J.[1] Mary E. B. appeals from an order dismissing her petition to terminate Cecil M.'s parental rights to their child, Kayden T. B. Mary argues that the trial court made an error of law when it determined that she had not proved that Cecil had failed to assume parental responsibility for Kayden and, alternatively, that the evidence did not support the court's decision. We reject Mary's arguments and affirm as the trial court was not clearly wrong.

BACKGROUND

¶2 Mary and Cecil met as high school students and had an on-again/off-again relationship for seven years. Between March and June 2012, while the two were living in Florida, the relationship was on again and Kayden was conceived. In June, Mary moved to Wisconsin, where she discovered she was pregnant and informed Cecil of his probable paternity. Cecil was still living in Florida at this time, where he was participating in a pretrial diversion program and working to pay restitution for a grand larceny charge that prevented him from leaving that state. In Wisconsin, Mary lived briefly with an ex-boyfriend and a friend before she moved into a homeless shelter in July. Mary texted Cecil regularly with updates about her progress with legal issues that would allow her to return to Florida.

¶3 In October, Mary started seeing a specialist after her unborn child was diagnosed with an enlarged ventricle in the brain. Mary was upset about the situation and tried to talk to Cecil about it. They fought, and later in October, Mary cut off contact with Cecil. Cecil continued to send text messages to Mary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and inquire after the unborn baby. Mary did not respond, having switched cell phone services and later blocking Cecil on Facebook.

¶4 Meanwhile, Mary contacted an adoption agency and expressed interest in giving her unborn child up for adoption. An agency caseworker sent Cecil a letter regarding Mary's adoption plan in January 2013, and both the caseworker and Mary were contacted by Cecil shortly thereafter during which he expressed doubts about adoption. Within a week, Cecil filed a paternity suit in Florida court seeking custody, placement, and child support for the unborn child. Shortly following Kayden's birth in February, Kayden was placed in foster care with his prospective adoptive parents, and Mary filed this action to involuntarily terminate Cecil's parental rights on the ground that he had failed to assume parental responsibility.

¶5 At the fact-finding trial, Mary and Cecil offered competing views of Cecil's support and care for both Mary and Kayden during her pregnancy and after Kayden's birth. Mary testified that Cecil had never asked about Kayden or how to contact the foster parents. She testified that while she was living in the homeless shelter, she had asked Cecil for money, food, and transportation to medical appointments "[p]robably a couple times a week, if not every day," but that he denied all of her requests. She said the only time Cecil helped her during her pregnancy was once when he bought her a pizza. Mary also testified that at one point, most likely in October when they "were fighting real bad," Cecil texted her "[t]o have an abortion or put Kayden up for adoption. But he didn't care."

¶6 Cecil testified that Mary never asked him for food or money while she was living in the homeless shelter, except for maybe one time when she asked him to buy her pizza. He stated that he had tried to get information about the baby

but kept getting stonewalled due to Mary's efforts to keep information from him. He testified that the couple had been planning for Mary to return to Florida with her children so they could have a better future as a family. Cecil testified that he had purchased clothes, toys, a baby bed, and a car seat for Kayden and that he had set aside $3000 to support his son when he finally got custody. Cecil admitted that he had not given any items or money to Kayden's foster parents. He also testified that he had asked to see his son and had been prevented from doing so. He read from text messages that he sent to Mary after Kayden's birth where he asked about Kayden's well-being and whether the baby needed anything. Cecil denied that he told Mary she could have an abortion.

¶7 Based on the testimony and evidence at the trial, the court found that although Cecil had provided little support and "made awful statements in text messages" to Mary, Cecil had made efforts to exercise parental responsibility through legal proceedings in both Florida and Wisconsin, had saved money for the child, had attempted to get information about the child's well-being, and had expressed some concern for the child and Mary during her pregnancy. The trial court noted that Cecil's efforts had been constrained by the timing of the petition, filed only a few days after Kayden's birth, and his lack of understanding about his need to provide financial support during the pending legal proceedings. The court found that Cecil had expressed concern or interest in the support, care, or well-being of the child; that he had not neglected or refused to provide care or support for the child; and that, therefore, Mary had not met her burden of establishing that Cecil had failed to assume parental responsibility. Mary appeals.

DISCUSSION

¶8 Failure to assume parental responsibility, one of the grounds for terminating parental rights, is established "by proving that the parent … [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). "'[S]ubstantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Sec. 48.415(6)(b). A nonexclusive list of factors that the court may consider in determining whether the parent has a "substantial parental relationship" with the child includes

> whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id.

¶9 During the fact-finding stage of a proceeding to terminate parental rights, the parent's rights are paramount. ***State v. Lamont D.***, 2005 WI App 264, ¶19, 288 Wis. 2d 485, 709 N.W.2d 879. Accordingly, the petitioner has the burden of proving grounds to terminate parental rights by clear and convincing evidence. WIS. STAT. § 48.31(1). Because the ground of failure to assume parental responsibility involves the adjudication of parental conduct vis-à-vis the child, the determination of parental unfitness will require the resolution of factual disputes at the fact-finding trial in many cases. ***Steve V. v. Kelley H.***, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856. In reviewing findings made in a trial to the court, we review the evidence in the light most favorable to the findings made by the trial court. ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶19, 301

Wis. 2d 752, 734 N.W.2d 169. We will not overturn a trial court's decision to dismiss for insufficient evidence unless the record reveals that the trial court was "clearly wrong." ***Lamont D.***, 288 Wis. 2d 485, ¶10. The trial court is owed "substantial deference" as it is better positioned to decide the weight and relevancy of the testimony as well as assess the evidence. ***Id.***

¶10 Although Mary characterizes her first challenge to the trial court's dismissal of her petition as raising a question of law, based on her interpretation of the court's decision as relying solely on Cecil expressing an interest in the child, we think it is better characterized as a mixed question of fact and law. Essentially, her argument is twofold: (1) that the court was clearly wrong in finding that Cecil had not neglected the child, as the evidence in the record established that he had neglected the child and none of the court's fact findings supported a contrary conclusion, and (2) that, absent a finding of neglect, Cecil's expression of interest in the child does not equate to having a substantial relationship with the child. We disagree.

¶11 As for the court's finding that Cecil had not neglected Kayden, the burden was on Mary to provide clear and convincing evidence that Cecil willfully and deliberately failed to provide support and care for Kayden, both during the pregnancy and after his birth. *See* ***State v. Bobby G.***, 2007 WI 77, ¶49, 301 Wis. 2d 531, 734 N.W.2d 81. Mary argues that Cecil neglected his parental responsibilities because he knew that Mary "was living in a homeless shelter while experiencing a high risk pregnancy, and yet refused to provide her any support whatsoever." Mary supports her assertions by pointing to parts of the record where Cecil acknowledged that he knew Mary was living in a homeless shelter and that her unborn child had been diagnosed with possible medical issues. Cecil, however, denied Mary's testimony that she had asked for his help with finances

during her pregnancy. Additionally, Mary argues that Cecil refused to provide care for Kayden after his birth, pointing to Cecil's testimony that he had not contributed to Kayden financially because he did not have access to his son.

¶12 In its findings, the trial court agreed that Cecil knew Mary was living in a homeless shelter, while also finding "[that] the mother didn't ask for help, but it was obvious that she needed help." Furthermore, although the court stated that Cecil "could have and should have provided financial support for the child," it also questioned "whether he knew that or should have known that." The court found that Cecil had made efforts to establish a relationship with his child by initiating and participating in legal proceedings in Florida and Wisconsin and that he "ha[d] spent a lot of money trying to assert his rights." These findings are tantamount to a finding that Cecil's failure to provide support or care was not willful or deliberate, and therefore would not meet the standard for neglect under the law. A review of the record most favorable to the court's finding shows that Cecil made numerous efforts to gain information about his son, seek access to his son, and provide support and care through legal channels. Oftentimes, these efforts were blocked by Mary and others. The court's finding was not clearly wrong.

¶13 Mary's argument that the court relied on an erroneous standard of law falls apart with our affirmance of the court's finding that Cecil did not neglect the child. She now must show that both of the court's findings that Cecil "expressed an interest" and that he "has not neglected" the child are insufficient to meet the standard set by WIS. STAT. § 48.415(6). Mary's challenge must fail by that statute's express terms, which permit a court to consider whether the parent has expressed an interest in or neglected the child to ascertain whether the parent has failed to assume parental responsibility.

¶14 Mary alternately argues that the court erred in finding that she had not provided clear and convincing evidence that Cecil failed to assume parental responsibility. To support her argument, she recites from a litany of the testimony provided at trial that is favorable to her case and argues that the evidence supporting a conclusion that Cecil failed to assume parental responsibility "far outweighs the 'interest' factors the circuit court cited." We disagree. First, we reiterate that it mischaracterizes the court's decision to state that the court relied solely on a finding that Cecil expressed an interest in the child. Second, we grant substantial deference to the weight given by the trial court to the evidence at the fact-finding trial as it is better positioned to assess relevance and credibility. ***Lamont D.***, 288 Wis. 2d 485, ¶10. We will not reweigh the evidence, and in fact, we will review the evidence in the light most favorable to the trial court's findings because of this deferential standard. ***Tang***, 301 Wis. 2d 752, ¶19.

¶15 Our review of the record supports the court's findings that Cecil did not neglect Kayden and expressed interest in Kayden's support, care, and well-being. The record shows that although Cecil had responsibilities that kept him in Florida for the latter half of 2012 and Mary had cut off contact with him several months before Kayden was born, Cecil attended one of Mary's medical appointments by phone, Cecil promptly filed a paternity action in Florida after he learned of Mary's adoption efforts, Cecil tried to contact the hospital for news about Kayden, Cecil tried to open bank accounts for his son's benefit, Cecil set aside money for the child, Cecil purchased various items for Kayden's benefit in anticipation of getting custody of Kayden, Cecil attempted to re-establish contact with Mary after she cut off channels of communication, Cecil inquired about his son's well-being via text messages to Mary, Cecil asked Mary about her medical appointments and progress during her pregnancy, and Cecil texted Mary to see if

Kayden needed anything after his birth. Although some of this evidence was contradicted by Mary, we defer to the trial court's assessments of witness credibility in making its findings. The court did not clearly err in determining that Mary had not provided clear and convincing evidence that Cecil failed to assume parental responsibility.

By the Court.—Order affirmed.

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