STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No.: 2024AP1174

Circuit Court Case No.: 23-TP-23

In re the Termination of Parental Rights to J.S.
A person under 18 years of age:

E.S.

Petitioner-Respondent,

v.

K.R.K.,

Respondent-Appellant.

On Notice of Appeal From An Order for Termination of Parental Rights
Entered in the Circuit Court of Waukesha County,
The Honorable Brad D. Schimel Presiding

Brief of the Petitioner-Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioner-Respondent agrees that oral argument is not warranted in this case as this appeal involves the application of a specific set of facts to established law.

This appeal does not satisfy the criteria for publication.

ARGUMENT

Pursuant to Wis. Stat. § (Rule) 809.19(3)(a)2 Petitioner-Respondent elects not to present a full statement of the issues and statement of the case. Facts are presented below as necessary to respond to Appellant's arguments challenging the dispositional hearing procedure and argument in support of a new dispositional

hearing. For all the reasons that follow and for all the reasons as articulated in the Guardian ad Litem's brief, this court must affirm the order for termination of parental rights.

I. THE CIRCUIT COURT'S ORDER FOR TERMINATION OF K.R.K.'S PARENTAL RIGHTS MUST BE AFFIRMED AND THE REQUEST FOR A NEW DISPOSITIONAL HEARING MUST BE DENIED.

The facts are undisputed. K.R.K. abandoned her child and made no efforts to contact J.S. or communicate with J.S. for over six years. Waukesha County Circuit Court Brad D. Schimel correctly ruled at summary judgment that the ground for termination of rights of "abandonment" was met as a matter of law. Judge Schimel scheduled the matter for a dispositional hearing.

K.R.K. appeared personally at the dispositional hearing. K.R.K. did not present any evidence at the hearing and relied only on her counsel's oral argument in opposition to termination of rights. (R. 68).

On appeal, K.R.K. does not challenge Judge Schimel's summary judgment order on the grounds phase of this case. Instead, K.R.K. presents a constitutional challenge to Wis. Stat. §48.426 and argues that K.R.K. is entitled to a new dispositional hearing.

1. Wisconsin's Statutory Scheme Controlling the Best Interests of Child Stage in a Termination of Parental Rights Proceeding is Constitutional.

Once any ground for termination is established by clear and convincing evidence, the court must find the parent unfit and schedule a dispositional hearing.

No Wisconsin case law supports Appellant's contention that a clear and convincing evidentiary burden at the dispositional hearing in a termination of rights case.

"Statutes are generally presumed constitutional," and H.C. as the challenger "must persuade us that the 'heavy burden' to overcome the presumption of constitutionality has been met, and that there is proof beyond a reasonable doubt that the statute is unconstitutional." ***Tammy W-G. v. Jacob T***., 2011 WI 30, ¶46, 333 Wis. 2d 273, 797 N.W.2d 854. The Court of Appeals reviews independently whether WIS. STAT. § 48.426 satisfies the requirements of due process. ***See Kenosha Cnty. DHS v. Jodie W***., 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845.

It is established law that the primary focus of the dispositional hearing in the second step in a TPR case is the child's best interests. ***Sheboygan Cnty v. Julie A.B.,*** 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. However, with no law cited as support, Appellant claims that the lack of a clear and convincing evidentiary standard at the second step is facially unconstitutional. Appellant's Br. at 13. Because this challenge attacks the law itself as drafted by the legislature, a presumption of constitutionality exists. ***Tammy W-G. v. Jacob T.,*** 2011 WI 30, ¶1, 333 Wis. 2d 273, 797 N.W.2d 854. Appellant must persuade the court to overcome the presumption of constitutionality. Appellant fails to meet this heavy burden.

There is no dispute that a parent's interest in a parent-child relationship is a fundamental liberty interest protected by the Fourteenth Amendment. ***Santosky v.***

Kramer, 455 U.S. 745, 753 (1982). When there is a fundamental liberty interest at risk, there must also be a fundamentally fair procedure in place. ***Id***. at 747. As such, the Wisconsin legislature requires the moving party in a TPR proceeding to prove by clear and convincing evidence that there are grounds to find a parent is unfit. Wis. Stat. §48.31(1). Under ***Santosky***, this procedure is considered fundamentally fair and protects the fundamental rights of the parent. ***Santosky***, 455 U.S. at 748. Moreover, E.S. satisfied this burden by proving by clear and convincing evidence that K.R.K. abandoned J.S. Upon a finding of parental unfitness, the child's best interests become the paramount consideration. Wis. Stat. §48.426(2).

As argued by the Guardian ad Litem the statutory scheme controlling the best interests stage is constitutional. No case law supports Appellant's contention. Santosky does not support Appellant's contention. Nothing supports Appellant's contention that the dispositional hearing should somehow be subject to a clear and convincing burden of proof. Conversely, the legislature made it clear that it was not imposing any sort of burden on the moving party to prove termination is in the best interests of the child. It is left to the circuit court's discretion with the circuit court required to consider standards and factors enumerated in Wis. Stat. §48.426. The statute is constitutional.

2. K.R.K. is not Entitled to a Second Dispositional Hearing.

A second dispositional hearing would be a waste of time and judicial resources. Judge Schimel's handling of this termination of parental rights case was flawless. At all stages of the case the circuit court respected K.R.K.'s fundamental

interests. E.S., however, proved that there were grounds to terminate K.R.K.'s parental rights and then proved that termination of those rights is in the best interests of J.S.

Even applying a burden of proof does not upset the circuit court's ultimate discretion in the decision to terminate parental rights. ***See State v. Margaret H.***, 2000 WI 42, ¶¶27, 32, 234 Wis. 2d 606, 610 N.W.2d 475. Rather, it remains within the circuit court's discretion to determine the best interest of the child.

The circuit court had the discretion whether to terminate K.R.K.'s parental rights. Discretionary determinations are reviewed for erroneous exercise of discretion. ***Ness v. Digital Dial Communications, Inc.***, 227 Wis. 2d 592, 599-600, 596 N.W.2d 365 (1999). A trial court will not be reversed for coming to a conclusion which another court might not reach, if the decision is one that a reasonable judge could reach after considering the law and facts through a reasoned process. ***Filppula-McArthur v. Halloin***, 2000 WI App. 79 ¶ 16, 234 Wis.2d 245, 257-258, 610 N.W.2d 201, aff'd 2001 WI 8, 241 Wis.2d 110, 622 N.W.2d 436. The test on appeal, therefore, is not whether the Court of Appeals would have ruled the same way but whether the trial court, in fact, exercised appropriate discretion. ***See Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The reviewing court's task is to search the record for reasons to sustain the [circuit] court's exercise of discretion." ***See Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998).

WIS. STAT. § 48.426 provides that the best interest of the child "shall be the prevailing factor considered by the court" and the court "shall consider" the six factors in evaluating the best interest of the child.

Here, Judge Schimel examined the relevant facts from the record, applied the correct legal standard and engaged in a reasoned process when the court decided to terminate K.R.K.'s parental rights. Remember that by this stage of the case the court had already found that K.R.K. had abandoned J.S. and that K.R.K. was unfit. The court noted, correctly, that J.S.'s best interests were the primary concern. (R. 68:40). As the court also noted it was not a hard case for the court to decide. (R. 68:41).

Judge Schimel noted that the petitioner and his wife were model citizens. (R. 68:34). Judge Schimel noted that they were both great parents. The circuit court noted the guardian ad litem diligently performed her job in conducting her investigation. (R. 68:35).

The court noted that a step-parent adoption was likely. (R. 68:35). The court noted the relationship between J.S. and his step-mother. (R. 68:36).

The court stated that "there's nothing about leaving [K.R.K.] with any parental rights that will make things better for J.S. (R. 68:36). The court noted there was no parent child relationship between K.R.K. and J.S. and the last time she saw J.S. she committed crimes and put J.S. in danger. (R. 68:36). Enforcing a parent child relationship would bring chaos. (R. 68:38). K.R.K. completely ignored her relationship with J.S. (R. 68:39).

The court noted the criminal conduct committed by K.R.K. in Milwaukee and that it was lucky that J.S. did not have any involvement in K.R.K.'s life at the time. (R. 68:38).

The court then specifically addressed the statutory factors. (R. 68:43).

The court addressed the likelihood of adoption per sub (3)(a).

The court addressed the age and health of J.S., noting that both were good and both were good mainly due to E.S. and stepmom. (R. 68:43).

The court addressed whether J.S. had a substantial relationship with K.R.K. (which he did not). (R. 68:43).

The court addressed whether it would be harmful to sever the relationship (it would not be, in fact it would be harmful to force the relationship). (R. 68:43).

The court addressed the wishes of J.S. (R. 68:43).

The court noted the lengthy duration of the separation between K.R.K. and J.S. (which was also discussed during the summary judgment hearing at which the court established that K.R.K. had abandoned J.S. (R. 68:44; see also R. 67).

The court addressed whether termination would allow J.S. to enter into a more stable and permanent family relationship. (R. 68:44).

Here, Judge Schimel was patient and diligent at both the summary judgment hearing on the grounds phase and at the dispositional hearing. His analysis was flawless. There was no erroneous exercise of discretion.

At the time of the disposition, the circuit court listed each factor found in WIS. STAT. § 48.426(3) on the record, assigned a weight to each factor, and

provided factual support from the testimony and other evidence introduced at the disposition to support its analysis of each factor. Even if there were some burden of proof that E.S. had to meet at the dispositional hearing he would have met that burden of proof. E.S. proved that K.R.K. abandoned J.S. and had no relationship with him. E.S. proved that J.S.'s health was good. E.S. proved that there was a long separation between K.R.K. and J.S. E.S. proved that his wife wanted to adopt J.S. as J.S.'s step-parent. E.S. proved that there was no parental relationship between K.R.K. and J.S. proved that termination of K.R.K.'s rights would result in a more stable and permanent family environment for J.S.E.S. proved that J.S. was in support of termination. As the circuit court stated, this was not a close call. This appeal is not a close call either. There was overwhelming evidence to support termination of K.R.K.'s parental rights.

CONCLUSION

The order terminating K.R.K.'s parental rights must be affirmed.

Dated this 2nd day of August, 2024.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b)&(c) for a brief produced with a proportional serif font. The length of this brief is 1,774 words.

I hereby further certify that this brief was submitted electronically pursuant to the rules contained in Wis. Stat. §809.801(8).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of August, 2024.

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