COURT OF APPEALS DECISION DATED AND FILED

December 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

Nos. 99-2136
99-2137

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

NO. 99-2136

IN RE THE TERMINATION OF PARENTAL RIGHTS TO NICHOLAS E-D, A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HEALTH AND FAMILY SERVICES,

PETITIONER-RESPONDENT,

V.

FREDERICK L. E.,

RESPONDENT-APPELLANT.

NO. 99-2137

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CAMERON E-D, A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HEALTH AND FAMILY SERVICES,

PETITIONER-RESPONDENT,

v.

FREDERICK L. E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Frederick L.E. appeals from an order terminating his parental rights to Nicholas E-D and Cameron E-D, his five- and six-year-old non-marital children. He asserts that his Fourteenth Amendment Due Process right was infringed because social workers testified that he behaved appropriately with his children, and because the trial court suggested that his mother might be an appropriate person to adopt his children. He also asserts that the Dane County Department of Social Services failed to make a diligent effort to provide him with services, thereby violating his Fourteenth Amendment Due Process and Equal Protection rights. Finally, he claims that the trial court erred when it terminated his parental rights despite his mother's interest in adopting his children, and that there were less extreme alternatives available to the trial court.

¶2 We conclude that no constitutional violations occurred. We also conclude that Frederick L.E. cannot assert error in the fact-finding hearing because he pleaded no contest to the State's complaint alleging that he was an unfit father. Accordingly, we affirm.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

¶3 Frederick L.E. and Jerleen M.D. lived together. They had two children, Nicholas E-D, born February 26, 1993 and Cameron E-D, born October 22, 1994. Frederick L.E. tells us that Nicholas E-D was adjudicated a child in need of protection and services in February 1994, and Cameron E-D was so adjudicated in March 1997. On December 11, 1995, Frederick L.E. left the household. A social worker testified that after he left, Frederick L.E. was difficult to find. He attempted to contact Frederick L.E. but was only partly successful. He kept open his offer of services to Frederick L.E. but Frederick L.E. gave no indication that he would like to use those services. The services included individual therapy, an AODA assessment, Alternatives to Aggression, and visitation with his children. In January of 1997, Dane County took emergency custody of both children, and they were placed in foster care. In April of 1998, Dane County petitioned for the termination of both parents' parental rights. Jerleen M.D. consented to the termination, but Frederick L.E. contested it. However, on the date set for trial of Dane County's petition, Frederick L.E. pleaded no-contest to the petition, leaving only the issue of disposition. The trial court held a hearing on this issue, concluded that termination of parental rights was in the children's best interests, and entered orders terminating both parents' parental rights. Frederick L.E. appeals.

¶4 Section 48.426, STATS., sets out the standard for termination of parental rights and the factors the trial court should consider in deciding whether or not to terminate a parent's parental rights. The standard is the best interests of the child, and § 48.426(3) lists the factors the trial court is to consider in making this determination:

> In considering the best interests of the child under this section the court shall consider but not be limited to the following:

> (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.

¶5 Our standard of review was explained in ***David S. v. Laura S.***, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993) (citations omitted):

> A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court. A circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion.

¶6 Frederick L.E. cites ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987), which holds that questions of constitutional fact are subject to independent review. We agree, and will review his assertions of constitutional error de novo. But even though termination of parental rights is overlain by constitutional concepts, ***Stanley v. Illinois***, 405 U.S. 645, 658 (1972), we cannot apply a de novo standard of review to the trial court's determination as to the best interests of Frederick L.E.'s children in light of ***David S.*** We are bound by prior decisions of the supreme court. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

¶7 Frederick L.E. asserts that his right to due process of law was violated by termination of his parental rights because social workers stated that he behaved appropriately with his children and the trial court suggested that his mother may be the appropriate person to adopt his children.

¶8 There are two sections to Frederick L.E.'s due process argument, and his first section has two parts. First, Frederick L.E. cites four cases from which he concludes that Dane County's attempt to interfere with his parental rights is subject to strict judicial scrutiny: ***Santosky v. Kramer***, 455 U.S. 745 (1982); ***Youngberg v. Romeo***, 457 U.S. 307 (1982); ***Pierce v. Society of The Sisters of The Holy Names of Jesus And Mary***, 268 U.S. 510 (1925); and ***Meyer v. Nebraska***, 262 U.S. 390 (1923). There is nothing in any of these cases which has anything to do with "strict scrutiny." Strict scrutiny, or close scrutiny, is a Fourteenth Amendment Equal Protection concept which holds that classifications such as those based on nationality or race are subject to close judicial scrutiny. *See* ***Graham v. Richardson***, 403 U.S. 365, 371-72 (1971). Frederick L.E.'s attempt to mix and match constitutional principles is meritless.

¶9 The second argument in this section asserts that because Frederick L.E. positively impressed the social worker with the way he handled his children, Dane County interfered with his constitutional liberty interest without sufficient reason. He cites no authority supporting this proposition. We would be surprised if any court has held that if a parent can demonstrate that on several occasions during the parent's children's minority, the parent has behaved appropriately with his or her children, the United States Constitution prohibits a termination of the parent's parental rights. We have explained many times that argument without citation to authority is inadequate, and that we will refuse to consider it. *See* ***State***

v. Shaffer, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 377-78 (Ct. App. 1980). We see no reason to depart from this holding now.

¶10 In the second section of Frederick's due process argument, he asserts that the legal standards and procedures safeguarding a termination of parental rights proceeding were not properly applied. But the only case he cites for this proposition, ***T.M.F. v. Children's Serv. Soc'y of Wisconsin***, 112 Wis.2d 180, 332 N.W.2d 293 (1983), holds that a parent's consent to the termination of her parental rights must be voluntary and informed, and that the record did not support a conclusion that the parent's consent met that test. We agree with the proposition for which Frederick L.E. cites ***T.M.F.***, that each parent and each family is different, but we fail to see how that relates to the initial assertion that the trial court somehow infringed upon Frederick L.E.'s right to due process of law. Other than the assertion of constitutional error, and the citation to ***T.M.F.***, Frederick L.E. does not tie anything the trial court did or did not do to any authority that demonstrates the trial court's error. This section of Frederick L.E.'s due process argument is without merit.

¶11 Frederick L.E.'s reply brief raises different due process issues, but he again cites no authority for his assertions. He claims that due process required that his no-contest plea be "knowing and voluntary," and that, although his attorney failed to object to asserted revisions of Dane County's pleadings, he now objects.[2] He claims, without citation to authority, that statutory requirements are

[2] Citing ***Boykin v. Alabama***, 395 U.S. 238 (1969) and ***Ernst v. State***, 43 Wis.2d 661, 170 N.W.2d 713 (1969), Frederick L.E. claims that a court is required to determine and make a record of the facts showing that there is a factual basis for a plea. We agree that pleas in criminal cases must be knowing and voluntary. But Frederick L.E. does not explain his assertion. How this principle applies in civil cases and why the trial court's November 23, 1998 inquiry was insufficient are matters Frederick L.E. omits entirely from his brief.

not waived by the lack of an objection. The only case he cites in this section of his brief is, ironically, ***Shaffer***, 96 Wis.2d 531, 292 N.W.2d 370. Because Frederick L.E. raises this "knowing and voluntary" due process issue for the first time in his reply brief, Dane County and the guardian ad litem had no opportunity to respond to it. Frederick L.E. fails to discuss the hearing of November 23, 1998, at which his attorney questioned him about his understanding of Dane County's petitions and his understanding of his constitutional rights regarding a trial. Frederick L.E.'s attorney, the corporation counsel and the court also asked Frederick L.E. questions concerning the voluntariness of his plea.

¶12 The record does not appear to support Frederick L.E.'s assertion that Dane County's petitions were amended. It appears that Frederick L.E. pleaded no contest to Dane County's petitions filed on April 13, 1998. He does not tell us how the petition was amended, or where the amended petition is found. He says nothing about what he understood he was pleading to. We do not address issues raised for the first time in a reply brief. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). Nor do we address issues not raised in the trial court. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990). "We cannot serve as both advocate and judge." ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). We would have to do just that were we to consider Frederick L.E.'s newly raised and unsupported claim. Frederick L.E. is aware of our holding in ***Shaffer***. We see no reason to depart from that holding here.

¶13 Frederick L.E. makes other assertions in this section of his first argument, such as the asserted incongruity of the trial court's comments to the effect that Frederick L.E.'s mother seemed to be a nice person, and its decision to cut off his children's contact with her through a termination of parental rights and

subsequent adoption, the trial court's observation that Frederick L.E. was in prison, and his claim that it is not unusual for African-American fathers to spend a period of time in prison. Again, he cites no authority holding that a trial court denies a parent due process of law in this way, and we again refer him to ***Shaffer***, 96 Wis.2d at 545-46, 292 N.W.2d at 377-78.

¶14 In Frederick L.E.'s second argument, he asserts that the Dane County Department of Human Services failed to meet the diligent effort standard for him, although it met that standard for the mother of his children. He concludes that this failure violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States and Wisconsin Constitutions.

¶15 Again, Frederick L.E. fails to cite authority linking due process and equal protection violations to his allegations about Dane County's failures. But more importantly, the alleged failures pertain to matters which preceded the trial court's decision to terminate his parental rights. Frederick L.E. correctly notes that § 48.069(1)(c), STATS., requires Dane County to "[m]ake an affirmative effort to obtain necessary or desired services for the child and the child's family or for the expectant mother of an unborn child and investigate and develop resources toward that end." But this is part of the adjudication phase of a termination of parental rights proceeding. Section 48.415(2)(a)2.b, STATS., requires that, before an involuntary termination of parental rights can occur on the ground of a continuing need of protection or services, the agency responsible for the care of the child and the family or of the unborn child and expectant mother make a reasonable effort to provide services ordered by the court.

¶16 Frederick L.E. obviated the adjudicative phase of his termination of parental rights proceeding by pleading no contest to the allegations in the petition.

He could have challenged Dane County's alleged failure to provide services and he could have had a trial on the issue. But, by pleading no contest, he waived the right to challenge Dane County's assertion that it "made a diligent effort to provide services ordered…." He also waived the right to contest Dane County's assertion that its social worker "discussed the available resources to provide Mr. [L.E.] with individual therapy and Mr. [L.E.] stated that he would contact the discussed agencies." A guilty plea, voluntarily and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violations of constitutional rights prior to the plea. *See* ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980). Frederick L.E. makes no claim that the alleged failure of Dane County to offer him services was a defect going to the trial court's jurisdiction. We conclude that Frederick L.E. has waived the "diligent effort" assertions that he makes in the second section of his brief.

¶17 In the last section of his brief, Frederick L.E. asserts that the trial court erred by terminating his parental rights when it appeared that his mother was likely to adopt his children, and when there were less extreme alternatives to termination. The standard and factors the trial court is to use in deciding whether to terminate parental rights are found in § 48.426, STATS. Section 48.426(2) provides, "The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter." In ***Gerald O. v. Cindy R.,*** 203 Wis.2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996), we held that the decision whether to terminate parental rights is discretionary. Thus, our standard of review is whether the trial court erroneously exercised its discretion by deciding to terminate Frederick L.E.'s parental rights. "The trial court properly exercises its discretion when it examines

the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Id.***

¶18 The trial court considered that Frederick L.E.'s mother might adopt his children. His mother testified that, "if it comes necessary," she would be interested in adopting them. Frederick L.E. translates this into an "understanding" that Frederick L.E.'s mother was the likely person to adopt the children. "If it comes necessary" is a long way from an adoption. Frederick L.E.'s mother had not moved to Madison or Wisconsin, there is no evidence that she petitioned to adopt the children and there is no evidence of any studies made to determine whether she was qualified to adopt the children. The evidence showed that Frederick L.E. wanted the children to live with his sister, not his mother. Despite this, Frederick L.E. asserts that "[M]ost ordinary people do not know that alternatives exist" as a reason for Frederick L.E.'s mother's failure to petition to be Cameron E-D and Nicholas E-D's guardian.

¶19 Perhaps ordinary people do not know of alternatives to termination of parental rights. However, attorneys do, and Frederick L.E. was represented by an attorney. Had Frederick L.E. been as interested prior to trial in his mother becoming his children's guardian as he now is on appeal, he could easily have told his attorney of her interest, and his mother could have been asked to file a petition for guardianship. There would then be a record of that petition, and its investigation and recommendations, rather than the blank pages we now face. Frederick L.E. suggests, without citation to authority, that the trial court and the guardian ad litem had an obligation to ask the attorneys to look into alternatives to termination of parental rights. We decline the invitation to research this assertion. *See* ***Shaffer***, 96 Wis.2d at 545-46, 292 N.W.2d at 377-78.

¶20 Frederick L.E. claims it is absurd to terminate his parental rights when the children will still maintain a relationship with him through his mother. But no-one can adopt Frederick L.E.'s children until his parental rights are terminated. And the record shows that it is unknown whether his mother can or will adopt the children. The record does show that Dane County social workers believed that the children were adoptable, and were young enough to form relationships with their adoptive parents. The test is not whether the trial court erred by terminating Frederick L.E.'s parental rights but whether it erroneously exercised its discretion.

¶21 The trial court determined that Frederick's children needed permanency, someone to take care of them and be there for them, and to stop being "bounced around." The trial court determined that Frederick L.E., whose credibility the trial court questioned, was overly optimistic about his chances of making a new life after he was released from prison. Though the trial court was sympathetic, it concluded that "there is just not enough here, it's woefully short of anything I could rely on for these little kids." The record shows that Frederick L.E.'s conduct justified the trial court's lack of confidence in him. After he left the family in December of 1995, Frederick L.E. lived the life of a vagabond. He was ordered to support his children but did not do so and was held in contempt of court. He was to contact his social worker and keep him informed of his address, place of employment and telephone number. However, he disappeared for awhile and was evasive about where he lived. He denied the need for individual therapy, and did not apply for it. He was to establish a source of income, manage his finances, and obtain a residence. But he stole from his employer, passed bad checks and was sentenced to four years in prison. He was given the opportunity to

visit with his children. But he did not see them after he left the household in December of 1995.

¶22 Frederick L.E. claims that there were less drastic alternatives to termination of parental rights available to the court, and suggests that his mother could have been appointed the children's guardian. But this procedure would have left the children without the permanency and stability that the social worker testified they needed, and the trial court found they needed. Frederick L.E. has furnished us with no authority requiring the trial court to chose the least drastic disposition, and such a rule would remove the discretion given to the trial court by the legislature. The trial court is to chose between dispositions, and is not required to choose the least drastic one.

¶23 Frederick L.E.'s reply brief addresses other issues or other matters under headings entitled "CHILD SUPPORT," "INCARCERATION" and "OTHER ISSUES." Much of these sections are suggestions for changes in termination of parental rights statutes or policy, and we do not address them. Some of the suggestions are more akin to closing arguments to a jury or a trial court than to appellate argument. Some sections repeat arguments we have previously rejected, and we do not address those argument again. The remainder of these sections pertain to Frederick L.E.'s attempts to distinguish ***State v. Allen M.***, 214 Wis.2d 302, 571 N.W.2d 872 (Ct. App. 1997) and ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 500 N.W.2d 649 (1993). We have not relied on these cases in this opinion. Thus, whether they do or do not support Dane County's position is moot.

¶24 The trial court examined the facts we have repeated and which we conclude are relevant. It applied a proper standard of law—the best interests of

the children. It used a rational process to conclude that Frederick L.E. was unreliable and would not be there for his children, and that his mother might be a good adoptive parent, but that before she could adopt, Frederick L.E.'s parental rights must be terminated. We are confident in our conclusion that the trial court did not erroneously exercise its discretion when it decided that the children's best interests required that Frederick L.E.'s parental rights be terminated.

By the Court.–Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.