COURT OF APPEALS
DECISION
DATED AND RELEASED

February 18, 1997

NOTICE

No. 96-3429

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

In re the Termination of Parental Rights of Dannisha P., a Person Under the Age of 18:

State of Wisconsin,

Petitioner-Respondent,

v.

Danny P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

SCHUDSON, J.[1] Danny P. appeals from the trial court order terminating his parental rights to Dannisha P. He argues that the evidence was insufficient to support the trial court's finding of "unfitness," and that

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

§ 48.415(6)(a)(2), STATS., is unconstitutional and denied him due process and equal protection. This court affirms.

The factual background is undisputed. Dannisha was born on November 29, 1992, to Collisce J. while she was an inmate at the Taycheedah Correctional Institution. Collisce and Danny had had an intimate relationship since February 1992, had continued their sexual relationship during the presumptive period of conception, and had lived together from June until October 1992 when Collisce went to prison. Danny testified, however, that he did not realize he was Dannisha's father until he received Collisce's July 19, 1996 letter informing him of that.[2] By that time, Danny also was incarcerated. He never had any contact with Dannisha and only had his paternity confirmed by blood tests and adjudicated in 1996, after the State filed its petition for termination of Danny's and Collisce's parental rights.[3]

On August 5, 1996, Danny appeared with counsel in the trial court and stipulated that grounds existed for termination of his parental rights by virtue of his failure to establish a parental relationship with Dannisha.[4] In the

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[2] Danny P.'s brief inexplicably implies that the letter was dated June 16, 1995.

[3] The trial court also ordered termination of the parental rights of Collisce who failed to appear, was defaulted, and does not challenge her termination in this appeal.

[4] Section 48.415(6)(a)2, STATS., provides that grounds for involuntary termination of parental rights may include:

> That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the filing of a petition for termination of parental rights although the father had reason to believe that he was the father of the child and has not assumed parental responsibility for the child.

Although not specifically citing the statute during its colloquy with Danny, the trial court used part of the statutory language of § 48.415(6)(a)2, STATS., when questioning him. Danny does not dispute that, in the terms of the trial court order for termination, he, through counsel, "stipulated that there were grounds to terminate his parental rights pursuant to s. 48.415(6) in that he failed to assume parental responsibility for Dannisha."

subsequent dispositional hearing, however, he contested the termination of his parental rights.

Where grounds for termination exist, the trial court must determine whether termination is the appropriate disposition. *See* §§ 48.424(3)-(4), and 48.427, STATS. "[T]he trial court 'must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child.'" ***Mrs. R. v. Mr. & Mrs. B.***, 102 Wis.2d 118, 131, 306 N.W.2d 46, 52 (1981) (quoting ***State Dep't of Pub. Welfare v. Johnson***, 9 Wis.2d 65, 75, 100 N.W.2d 383, 390 (1960)).

Danny argues that the evidence was insufficient to support the trial court's finding of his unfitness. His argument misconstrues the law. Section 48.424(4), STATS., states: "If grounds for the termination of parental rights are found by the court..., the court shall find the parent unfit." Thus, once Danny stipulated that grounds did exist for termination, he had no legal basis on which to dispute the trial court's mandatory finding of unfitness.

Danny did, however, retain the right to contest termination. Section 48.424(4), STATS., also states: "A finding of unfitness shall not preclude a dismissal of a petition" for termination. *See also* ***K.D.J. v. Polk County Dep't of Soc. Serv.***, 163 Wis.2d 90, 93, 470 N.W.2d 914, 915 (1991). Thus, at the dispositional hearing, Danny was allowed to present evidence and argument in opposition to termination.

Essentially, Danny contended in the trial court, as he does on appeal, that he had had no knowledge that Dannisha was his daughter; that he had maintained parental relationships with his other children and would have attempted to do so with Dannisha had he known of his paternity; that during his incarceration his relatives might be able to care for Dannisha; and that upon his release, he would seek custody. The trial court concluded, however, that the evidence had failed to establish the potential for placement and custody either with Danny, who remained incarcerated,[5] or his relatives, with whom Dannisha

[5] *See* ***L.K. v. B.B.***, 113 Wis.2d 429, 439, 335 N.W.2d 846, 851-52 (1983), in which the supreme court concluded "that the mere fact that the father of a child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude

had had no contact. Further, the trial court rejected Danny's claim of ignorance of his paternity:

> The fact is that he resided with the mother prior to her pregnancy and during her pregnancy, actually, that he knew she was pregnant and gave birth when she was incarcerated, that he knew also that he had sexual relationships with her during the conceptive period, and it's simply reasonable that he had to have known that that could have been his child. He may not have been absolutely certain it was his child, but he had to have known that that could have been his child. It's just reasonable.
>
> So to say that he never had any idea that this was his child until the adjudication simply does not—the Court does not find that credible or reasonable at all.

Danny argues that "[f]or approximately three years of Dannisha P.'s life [he] had no idea that she was his child," and that "no evidence" supported the trial court findings to the contrary. He is incorrect. Among other things, in response to questioning by his own lawyer at the August 22, 1996 dispositional hearing, Danny testified:

Q:Okay. And when did you live together?

A:In '92.

Q:What months, Danny?

A:June all way up to—'til she went to jail in October.

Q:From June up 'til October?

A:Yes.

(..continued)
possible termination of his parental rights under section 48.415(6)(a)2, Stats."

Q:Did she at any time tell you that she was pregnant?

A:No. Until when she was in jail.

Q:Oh, when she was in jail?

A:Yes.

Q:So you found out she was pregnant when she went to jail?

A:Yeah, but she never said it was mine.

In a termination case, a trial court's factual findings "will not be set aside unless against the great weight and clear preponderance of the evidence." ***L.K. v. B.B.***, 113 Wis.2d 429, 440, 335 N.W.2d 846, 852 (1983). Unquestionably, given Danny's testimony and the undisputed evidence of Danny's relationship with Collisce, the trial court's findings were amply supported by the evidence; they properly formed part of the basis for the trial court's determination of the disposition.[6]

Danny, however, also "challenges the constitutionality" of § 48.415(6)(a)2, STATS., and argues that its application "violates his right to due process and equal protection." He maintains that the statute "protects the mother of a child and all females in a greater degree tha[n] fathers," because, obviously, females always know of their parenthood while males do not.

Danny's argument fails for two reasons. First, it is premised on his assertion of ignorance of his paternity of Dannisha—an assertion the trial court reasonably rejected. Moreover, this court notes that the supreme court has accepted the legislative determination, under § 48.415(6)(a)2 & (b), STATS., "that a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with

[6] Danny also asserts that the trial court "did not specifically mention those factors that supported an unfitness finding nor mention the word 'unfitness' in its oral findings," and contends that "the court must make separate and independent findings of unfitness and explain it[s] reasoning of such...." He offers no authority, however, to support this argument in the context of a case in which a parent stipulates to the factual grounds for termination that, by statute, require the finding of unfitness.

the child." ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 684, 500 N.W.2d 649, 654 (1993). Second, Danny's argument presents a position on appeal inconsistent with his trial court position established by his stipulation to the grounds for termination under the very statute he now challenges. *See* ***Siegel v. Leer, Inc.***, 156 Wis.2d 621, 628, 457 N.W.2d 533, 536 (Ct. App. 1990) (precluding a party from asserting a position on appeal that is inconsistent with a position previously asserted in the trial court); *see also* ***L.K.***, 113 Wis.2d at 448-51, 335 N.W.2d at 856-57 (rejecting gender-based equal protection challenge to § 48.415(6)(a)2).

"Grounds for termination must be proven by clear and convincing evidence." ***Ann M.M.***, 176 Wis.2d at 682, 500 N.W.2d at 653. Danny offers no other challenge to the trial court's determination that termination of his parental rights was in Dannisha's best interests. This court has reviewed the full record and noted the careful manner in which the trial court addressed the required statutory criteria for termination. This court is satisfied that the termination of Danny P.'s parental rights to Dannisha P. was supported by the facts and consistent with law.

By the Court. – Order affirmed.

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