COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2404 **Cir. Ct. No. 2013TP19**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ALANDRIA A. O.:
A PERSON UNDER THE AGE OF 18:

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ASHLEY A. O.,

RESPONDENT,

HENRY S. A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed*.

¶1 BROWN, C.J.[1] Henry S.A. appeals from an order terminating his parental rights to Alandria A.O. The circuit court granted summary judgment on the question of Henry's unfitness as a parent because Henry was denied physical placement for more than one year. *See* WIS. STAT. § 48.415(4). The underlying order denying physical placement was based upon Henry's incarceration. We reverse because the record does not show that the circuit court made the individualized determination of unfitness that the state and federal constitutions require before termination. *See* ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶49, 293 Wis. 2d 530, 716 N.W.2d 845.

Facts

¶2 Alandria was born in October 2007. Henry had intermittent contact with Alandria during the first two years of her life. Henry was convicted of domestic violence against Alandria's mother in 2008. Alandria's mother obtained a restraining order against Henry in October 2008. Henry was incarcerated in September 2009.

¶3 In June 2011, Alandria was removed from her mother's care and placed in a foster home. In October 2011, a court ordered that Henry could have telephone and written contact with Alandria but that physical visitation at the prison would not be allowed. The only condition for reinstatement of physical visitation was that Henry reestablish visitation in the community after his discharge from prison.

[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.

¶4 In May 2013, the County filed a petition for termination of parental rights [TPR] to Alandria. With respect to Henry, the petition alleged that termination was warranted on grounds of abandonment, continuing need of protection or services, denial of periods of physical placement, and failure to assume parental responsibility.

¶5 In September 2013, the County moved for summary judgment "as to the grounds phase" of the petition for termination of Henry's rights on the grounds that "there is no genuine issue as to any material fact that … [Henry] was denied periods of physical placement or visitation by a court order," under WIS. STAT. § 48.415(4). Henry opposed the motion, arguing that the denial of visitation "was restricted to while [Henry] was in prison." He argued that while a trial on unfitness may not be necessary in a case in which continuing denial of visitation had been based on an underlying finding of unfitness, in his case the underlying order offered "no specific evidence or finding of unfitness." Instead, Henry argued, the only basis for stopping the visitation was to stop Alandria from physically going to the prison, and other forms of visitation (by phone and letter) were permitted and continued to occur. Under the circumstances of his case, Henry argued, granting summary judgment on his fitness "would be a denial of due process."

¶6 The circuit court granted summary judgment, finding that "based on the facts of this case, that there were denials of periods of physical placement for in excess of a one-year period of time, and … no genuine issue of material fact with respect to the grounds for the TPR." The court then stated that it would "go to the unfitness stage" and would "put off any type of hearings with respect to unfitness or dispositional hearing" for Henry "until such time as we have a resolution with respect to the mother's case."

¶7 At the dispositional hearing, Henry first pointed out that the factual basis for finding him unfit was summary judgment due to continuing denial of physical placement, where the only condition for reinstatement of placement was for him to leave prison, which he will not be eligible to do until 2016. He argued that there was no evidence that he ever mistreated Alandria and that evidence showed she referred to him as "Daddy" and knew him to be her father. For these reasons, Henry argued, termination was not in Alandria's best interests and, in the alternative, the court should consider a relative placement.

¶8 The court found that it was in Alandria's best interests that Henry's parental rights be terminated and that Alandria remain with the preadoptive family with whom she was already living.

Analysis

¶9 Proceedings to involuntarily terminate parental rights require two stages. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. First, in the fact-finding stage, there must be a determination of whether there is a factual basis establishing parental unfitness under one or more of the grounds described in WIS. STAT. § 48.415. ***Julie A.B.,*** 255 Wis. 2d 170, ¶¶24-25**.** At the fact-finding stage, "the parent's rights are paramount," and the petitioner bears the burden of establishing unfitness. ***Id.*** (citation omitted). Once unfitness has been established, "the focus shifts to the interests of the child," and the court goes on to determine whether termination of parental rights is warranted. ***Id.***, ¶28.

¶10 Here, grounds for unfitness were determined by summary judgment. Use of summary judgment procedures is consistent with due process in the unfitness phase of a TPR case, ***Steven V. v. Kelley H.***, 2004 WI 47, ¶44, 271 Wis.

2d 1, 678 N.W.2d 856, and summary judgment on grounds for unfitness is appropriate "where the entire proof of unfitness under the statute is an undisputed court record." ***Id.***, ¶39. We review de novo whether summary judgment was appropriate. ***Id.***, ¶20.

¶11 Summary judgment during the unfitness phase of a TPR case is appropriate where there is no genuine issue of material fact in dispute and the petitioner is entitled to partial summary judgment on parental fitness as a matter of law. ***Id.***, ¶34 (citing WIS. STAT. § 802.08(2)). Under WIS. STAT. § 48.415(4), evidence that a court denied periods of physical placement or visitation for more than a year establishes parental unfitness. As Henry points out, however, "a parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent." ***Jodie W.***, 293 Wis. 2d 530, ¶49. Hence, in ***Jodie W.***, the court held that a parent's failure to fulfill conditions of return that were impossible due to incarceration, "standing alone, is not a constitutional ground for finding a parent unfit." ***Id.*** The state and federal constitutional requirement of an "individualized determination of unfitness" requires evidence of something more than the parent's incarceration. ***Id.***, ¶¶49-50.

¶12 The County argues that where there was an underlying court order denying physical visitation for more than a year, the court proceedings that led to that order have already accomplished the fact finding that due process requires before termination of parental rights, as discussed in ***Dane County DHS v. P.P.***, 2005 WI 32, ¶¶26, 32, 279 Wis. 2d 169, 694 N.W.2d 344. The County contends that we may "draw the reasonable inference that Henry" was denied visitation "not solely on the basis of his incarceration" but due to "a lack of any significant ongoing relationship with his child" before incarceration. The County also points to the evidence that Henry battered Alandria's mother, and quotes the court's

statement at the dispositional hearing that Henry had "no substantial relationship" with Alandria.

¶13 In the case at hand, however, the underlying order on which the summary judgment rests states clearly that the sole condition for reinstatement of placement is that Henry no longer be incarcerated and be available for visits outside of prison. It makes no reference to any other defect whatsoever with respect to Henry's fitness as a parent, and the circuit court never made any findings that Henry was unfit for any other reason. A parent's incarceration is "not … irrelevant" to unfitness, but it is unconstitutional to base a finding of unfitness upon nothing more than incarceration. ***Jodie W.***, 293 Wis. 2d 530, ¶¶49-50. This would be a different case if there were evidence that the incarcerated parent failed to meet multiple conditions for return of the child. *See, e.g.*, ***Ozaukee Cnty. DHS v. Callen D.M.***, No. 2013AP1157, unpublished slip op. ¶¶16-18 (WI App Sept. 25, 2013) (citing ***Waukesha Cnty. DHHS v. Teodoro E.***, 2008 WI App 16, 307 Wis. 2d 372, 745 N.W.2d 701 (2007)). Likewise, this case is distinguishable from ***Dane County DHS v. Latasha G.***, No. 2014AP45, unpublished slip op. ¶¶2-3, (WI App Apr. 3, 2014), where the parent was incarcerated for child abuse of the children in the TPR case and reinstatement was conditioned on modification of the no-contact order protecting the children. In those circumstances, an order showing denial of physical placement established unfitness based on something besides the parent's incarcerated status. ***Id.***, ¶13.

¶14 In Henry's case, the only evidence that was offered in support of the grant of summary judgment on his unfitness at the fact-finding phase was the order denying periods of physical placement, and by its own terms that order is based solely upon Henry's incarceration. The circuit court made no additional findings concerning Henry's unfitness and made a confusing reference to a later

"hearing[] with respect to unfitness or dispositional hearing." In these circumstances, we cannot affirm summary judgment on grounds of unfitness and must remand for proper completion of the fact-finding phase, in which the court must make a finding of whether there exist facts that establish grounds for finding Henry unfit, besides the sole fact of his incarceration.

By the Court.—Order reversed.

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