COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0118

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF MARLANA W., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROCHELLE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

FINE, J. Rochelle H. appeals from the trial court's order terminating her parental rights to Marlana W. Marlana, who was born in April of 1989, was found to be a child in need of protection or services in June of 1990. *See* § 48.13, STATS. Since December of 1991, she has lived with the persons who are seeking to adopt her. Assuming certain procedural protections not at issue

here are satisfied, § 48.415(2), STATS., permits a court to terminate a person's parental rights to a child if the child has been found to be in need of protection or services, the responsible agency "has made a reasonable effort to provide the services ordered by the court," and "the parent has failed to meet the conditions established for the safe return of the child to [the parent's] home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing."

A fact-finding hearing was held before a jury, and the jury found: 1) that the Milwaukee County Department of Human Services had made "a diligent effort to provide the services ordered by the court"; 2) that Rochelle H. had "failed to demonstrate substantial progress toward meeting the conditions of return" of Marlana to Rochelle H.'s home; and 3) that there was "substantial likelihood" that Rochelle H. would "not meet" those conditions within "the next 12 months." The trial court determined that terminating Rochelle H.'s parental rights was in Marlana's best interest. *See* §§ 48.426 & 48.427, STATS. Although Rochelle H. presents the issues as whether there was sufficient evidence to support the jury's finding that she was not likely to be able to meet the conditions of return within the twelve-month period from the date of the fact-finding hearing, and whether termination of her rights to Marlana violated her constitutional rights because she did nothing "egregious," those issues distill to whether a court may terminate a person's parental rights to his or her child on a finding that the person has not met and will not be able to meet, within the statutorily specified twelve-month period, the child's emotional needs, even though the parent may have been well-intentioned. Thus, although Rochelle H. offers a superficial challenge to the sufficiency of the evidence to support the jury's finding that Rochelle H. would not be able to meet the conditions of return, because the psychologist treating

Rochelle H. at the time of the fact-finding hearing testified that he believed that Rochelle H. could meet those conditions, the spine of Rochelle H.'s contention is that, Marlana's emotional needs aside, Rochelle H.'s parental rights cannot be terminated unless the State first proves that she did something "egregious."[1] We affirm.

Section 48.424(4), STATS., provides, as material here: "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." This section was enacted by the legislature to overturn the supreme court's decision in ***In the Interest of J.L.W.***, 102 Wis.2d 118, 306 N.W.2d 46 (1981), that a person's parental rights could not be terminated unless the parent was "unfit" at the time of trial. *See* ***State v. Allen M.***, 214 Wis.2d 302, 324–326, 571 N.W.2d 872, 880–881 (Ct. App. 1997) (Fine, J., concurring). Nevertheless, the trial court retains the discretion it had under the prior law to not order that a person's parental rights be terminated if the circumstances do not warrant termination. ***Ibid.*** Thus, § 48.427(2), STATS., permits the trial court to "dismiss the petition if it finds that the evidence does not warrant the termination of parental rights," even if a jury has found that the grounds for termination exist. Section 48.424(4), STATS. ("A finding of unfitness shall not preclude dismissal of a petition under s. 48.427(2)."). This discretion, which the legislature vested in the

[1] Although Rochelle H. gives lip service to the established principles that we may not overturn a jury verdict if there is any evidence in the record to support it, *see* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990), that in a jury trial the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, *see* ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996), and that the jury may disregard even uncontradicted expert testimony, *see* ***First National Bank v. Wernhart***, 204 Wis.2d 361, 369, 555 N.W.2d 819, 822 (Ct. App. 1996), she makes an undeveloped argument that the testimony of the psychologists, social workers and therapists who testified that Rochelle H. had not and could not meet Marlana's needs and the conditions of return was not credible. As the trial court recognized, the jury's findings are supported by evidence in the record.

trial court, was described in ***In the Interest of K.D.J.***, 163 Wis.2d 90, 470 N.W.2d 914 (1991):

> This means that even though the jury finds the "facts" that would constitute "grounds" for termination, the court may still dismiss the petition if the court finds either that the evidence does not sustain any one of the jury's individual findings or that even though the findings may be supported by the evidence, the evidence of unfitness is not so egregious as to warrant termination of parental rights. This conclusion follows from the wording of sec. 48.427(2), Stats., that the evidence "does not warrant the termination of parental rights." Thus, it seems clear that in spite of what the evidence may show, whether such evidence warrants termination, is a matter within the discretion of the court. This is so because the word "warrant" implies an overview of the evidence, the findings, and also the implication of what is in the best interest of the child.

Id., 163 Wis.2d at 103–104, 470 N.W.2d at 920. Rochelle H. seizes upon the phrase "the court may still dismiss the petition if the court finds either that the evidence does not sustain any one of the jury's individual findings or that even though the findings may be supported by the evidence, the evidence of unfitness is not so egregious as to warrant termination of parental rights" as requiring "egregious *behavior*" by the parent, that is, something beyond what the jury and the trial court determines is an inability to successfully parent the child. Neither ***K.D.J.*** nor any constitutional provision to which Rochelle H. has pointed, or of which we are aware, requires any such thing; indeed, the evidence in support of termination can be sufficient to support an order terminating parental rights (and thus, to use the word in ***K.D.J.*** upon which Rochelle H. seizes, "egregious") even though the parent may be well-intentioned. *See* ***id***., 163 Wis.2d at 105–106, 112, 470 N.W.2d at 921, 923.

Whether the evidence is or is not sufficient to warrant termination once the statutory grounds have been found is a matter that lies within the trial court's discretion. ***Id.***, 163 Wis.2d at 104, 470 N.W.2d at 920. In what is also a largely undeveloped argument, Rochelle H. blasts those who testified at the trial that she lacked sufficient parenting skills to properly nurture and care for Marlana as adherents of "'pop psychology' at its worst." But assessment of the evidence is left to the jury in its fact-finding role, and to the trial court in the exercise of its responsibility to determine whether termination is warranted. The trial court carefully considered not only the non-exclusive factors set out in § 48.426(3), STATS., but also, as instructed by § 48.426(2), STATS., Marlana's best interests.[2]

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[2] Section 48.426, STATS., provides:

> **Standard and factors.** **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. 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.
>
> **(3)** FACTORS. 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.

(continued)

In a well-reasoned decision, the trial court noted that Marlana had not been with Rochelle H. "since a very early, tender age"; that when Marlana was removed from Rochelle H.'s home, the "medical experts who saw her upon that removal saw a child that they believed had been a victim of abuse by somebody"; that Marlana had, since her removal from Rochelle H.'s home, been in "three separate foster homes"; that those who had provided services to Marlana since her removal from Rochelle H.'s home "seem uniform in their belief that she's bonded to her present placement" with the couple who wants to adopt her; that Marlana "needs to have permanency, needs to feel safe, needs to get on with her life"; and that to disturb "her current placement" "would be really harmful" to Marlana. In light of the overriding emphasis this State appropriately places on the welfare of children, *see* § 48.01(1), STATS. ("the best interests of the child" "shall always be of paramount consideration"), we cannot say that the trial court erroneously exercised its discretion.

By the Court.—Order affirmed.

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

(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.