COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-2592

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DANIEL E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

¶1 NETTESHEIM, J. Daniel E. appeals from an order terminating his parental rights (TPR) to his biological daughter, Mariah O.A.E. Daniel contends that the termination order is invalid because he was not properly notified of a

request to extend a CHIPS[1] order in an earlier proceeding involving Mariah. Alternatively, Daniel contends: (1) that the evidence does not support the juvenile court's finding that he had failed to assume parental responsibility over Mariah, and (2) that the court erred in the exercise of its discretion by terminating his parental rights.

¶2 We reject all of Daniel's arguments. We affirm the termination order. We will recite the relevant facts as we discuss each of Daniel's appellate arguments.

DISCUSSION

Validity of the TPR Order

¶3 Daniel is the biological father of Mariah. The legal history of this case began in December 1996, when the Racine County Human Services Department filed a CHIPS petition on Mariah's behalf. Daniel participated in this proceeding and was represented by counsel. In due course, a CHIPS order was entered on February 4, 1997.

¶4 Thereafter, Daniel was convicted of two counts of delivery of cocaine. He was sentenced to a ten-year prison term on one count and a concurrent term of probation on the other count. While Daniel was in prison serving his sentence, the Department applied for an extension of the CHIPS order. The Department erroneously sent notice of this application to another prisoner also named Daniel E. Therefore, Daniel did not appear at the hearing and the juvenile court entered the extension order on January 20, 1998.

[1] CHIPS refers to proceedings involving children alleged to be in need of protection or services. *See* § 48.13, STATS.

¶5 On January 19, 1999, the Department filed the instant TPR action against both Daniel and Angela C., Mariah's biological mother. The petition alleged that both parents had abandoned Mariah pursuant to § 48.415(1)(a)2, STATS., and had failed to assume parental responsibility over Mariah pursuant to § 48.415(6). Daniel participated in this proceeding and was represented by counsel.

¶6 On February 18, 1999, while the TPR proceeding was pending, a further extension of the CHIPS order was entered. Daniel was duly notified of the Department's request, was represented by counsel and did not object to the extension.

¶7 Thereafter, Daniel moved to dismiss the TPR petition because he had not been properly notified of the Department's 1998 request to extend the CHIPS order. The juvenile court denied the motion because that extension order had expired and was superseded by the February 1999 extension order which Daniel had not contested. In addition, the court noted that Daniel had received a copy of the 1998 extension order and had taken no steps to challenge it. As such, the court found Daniel guilty of laches.

¶8 At the ensuing bench trial, the juvenile court determined that both Daniel and Angela had failed to assume their parental responsibilities pursuant to § 48.415(6), STATS. In addition, the court determined that Angela had abandoned Mariah pursuant to § 48.415(1)(a)2, STATS. Later, the court determined that termination of the parental rights of both parents was in Mariah's best interest.

¶9 On appeal, Daniel renews his argument that the TPR petition should have been dismissed because he had not been properly notified of the January 1998 request to extend the CHIPS order. Although we will later explain why we

agree with the juvenile court's determination that Daniel was guilty of laches for failing to raise this issue earlier, we also ground our affirmance on a threshold basis that the court could not have foreseen when it made its ruling. Although the TPR petition alleged both abandonment and failure to assume parental responsibility against Daniel, the order terminating Daniel's parental rights was ultimately based only on Daniel's failure to assume parental responsibility pursuant to § 48.415(6), STATS. Termination of parental rights on this ground does not require, or contemplate, a prior CHIPS proceeding.[2] Therefore, any defect pertaining to the January 1998 extension order was of no consequence to this case.

¶10 At the time the juvenile court rejected Daniel's motion to dismiss, it could not have foreseen that it would eventually ground the termination of Daniel's parental rights only on his failure to assume his parental responsibilities. With the benefit of hindsight, however, we can now confidently say that the failure to provide Daniel with notice of the January 1998 extension order had no bearing on this case. Daniel's failure to abide by the conditions imposed in the CHIPS orders was not the basis of the allegation that Daniel had failed to assume his parental responsibilities. If there had been no CHIPS proceeding, this case could have proceeded under the same facts. And, as we will later explain, those facts abundantly established that Daniel had failed to assume his parental responsibilities.

[2] We assume that the abandonment allegation pursuant to § 48.415(1)(a)2, STATS., does rest on a prior CHIPS proceeding since the statute speaks of the notice required by § 48.356(2), STATS. That statute requires that the parent be informed of the risk of TPR if the conditions in a CHIPS order are not satisfied.

¶11 Alternatively, we also agree with the trial court's analysis of the issue based on the situation at the time the court heard Daniel's motion. The January 1998 extension order had been superseded by the February 1999 extension order. Daniel's objection to the January extension did not come until after the February extension had been issued. Although he did not receive notice of the application for the January extension, Daniel did receive a copy of the order thereafter. This prompted Daniel to seek a review hearing. At this hearing, which was conducted in July 1998, Daniel never challenged the validity of the January extension order, even in the face of notice that the Department was intending to seek the termination of his parental rights and to place Mariah for adoption. Thereafter, Daniel was provided proper notice of the February 1999 extension application. He participated in that proceeding, was represented by counsel and did not contest the extension.

¶12 In ***Schoenwald v. M.C.***, 146 Wis.2d 377, 432 N.W.2d 588 (Ct. App. 1988), the court of appeals held that a challenge to the juvenile court's competency to proceed was barred where the party could have raised the issue at an earlier proceeding but failed to do so. *See* ***id***. at 395, 432 N.W.2d at 596. The court reasoned that "[t]he public interest in protecting adoptions strongly supports a ruling that parents are precluded from litigating a trial court's competency to grant a dispositional extension in a prior CHIPS proceeding except in the proceeding granting the extension or in an appeal from the order in such a proceeding." ***Id***. at 396, 432 N.W.2d at 596.

¶13 The same considerations are in play here. And these considerations fully support the juvenile court's application of laches against Daniel.

Sufficiency of the Evidence

¶14 Daniel contends that the evidence does not support the juvenile court's finding that he had failed to assume his parental responsibilities within the meaning of § 48.415(6), STATS. This matter was tried to the court. Findings of fact made by a trial court shall not be set aside unless clearly erroneous and we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *See* § 805.17(2), STATS.

¶15 The juvenile court's findings are extensive and consume some eleven pages of transcript. We will not set out those findings in full. But we do recite the court's ultimate observations about the evidence. The court said:

> I think the evidence in this case is absolutely overwhelming. Certainly more than a preponderance of the evidence. I think even more than clear and convincing evidence. I think there's evidence beyond any doubt that [Daniel] has failed in his responsibility. It's obvious. Essentially parents care for their children in a number of ways. Giving them emotional support. Giving them financial support. Providing for them the safety and security of a stable home environment. [Daniel] has failed on every score.

Later, the court stated, "It's really not anywhere near a close call."

¶16 We have read the record in full and we fully agree with the juvenile court's assessment of the evidence. The court first set out the applicable standard test for measuring whether Daniel had ever established a "substantial parental relationship with the child." Section 48.415(6)(b), STATS. The court then measured this standard against the evidence, explaining how Daniel had failed under this standard to establish a "substantial parental relationship" with Mariah.

¶17 We summarize the juvenile court's findings. Mariah was born a "crack baby," with substantial health problems and medical needs. Daniel had

failed to contribute any money to Angela's lying-in expenses or to Mariah's medical expenses. Once, by happenstance, Daniel encountered Mariah's foster mother and gave her twenty dollars for Pampers. That represented the extent of his financial contribution to Mariah's care.

¶18 Daniel's emotional support for Mariah was equally abysmal. His visits with her at the foster home before he was imprisoned were brief and sporadic. Yet, after he was imprisoned, Daniel's interest in Mariah suddenly increased. He sought to be personally produced at the court hearings, rather than participate by speaker phone. The court said these requests were motivated by Daniel's desire to temporarily get out of prison, not by a legitimate interest in Mariah's fate. This was a credibility call that the court was entitled to make. And it is a credibility call that is fully supported by the record.

¶19 The juvenile court also alluded to Daniel's criminal behavior. Given the suspicion that Daniel was dealing in drugs, Mariah's status as a "crack baby" and Angela's involvement with cocaine, the Department directed Daniel to submit to urine analysis. He refused. As the court aptly put it: "All [Daniel has] to do is choose, Mariah or cocaine. And his actions are very clear. He chose not his daughter, he chose the other choice. That's apparent also from the police reports … he's out there dealing at a time when he's purportedly showing concern for his daughter."[3] Daniel conceded that he supplied other people with cocaine for money, although he denied supplying Angela.

[3] Daniel even had the chutzpah to have the Department contact him via the pager he was using to deal drugs.

¶20 Daniel's response is that the Department thwarted his attempts to establish a relationship with Mariah. Not only is this allegation unsupported by the record, it also reflects Daniel's continuing refusal or inability to face up to his parental responsibilities to Mariah.

¶21 In summary, Daniel had every reasonable opportunity to establish a substantial parental relationship with Mariah. As the juvenile court noted, he failed at every opportunity. The evidence abundantly supports the court's finding that Daniel had failed to assume his parental responsibilities.

Termination of Parental Rights

¶22 The preceding discussion largely governs Daniel's final argument that the juvenile court erred by terminating his parental rights. We say this because Daniel's argument on this issue is linked directly to his challenge to the sufficiency of the evidence.

¶23 The determination whether to terminate parental rights is addressed to the juvenile court's discretion. *See* ***State v. Allen M.***, 214 Wis.2d 302, 315, 571 N.W.2d 872, 877 (Ct. App. 1997). Since we have upheld the court's factual findings, we reject Daniel's appellate challenge to the court's termination ruling.

CONCLUSION

¶24 We hold that the TPR petition was not subject to dismissal because Daniel had not received notice of the request to extend the original CHIPS order. We further hold that the juvenile court's factual determination that Daniel had failed to assume his parental responsibilities is not clearly erroneous. Finally, we hold that the court did not err in the exercise of its discretion by terminating Daniel's parental rights. We affirm the order.

By the Court.—Order affirmed.

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