COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2017AP1814 **Cir. Ct. No. 2016TP211**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. A. M., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. M. O.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: LAURA GRAMLING PEREZ, Judge. *Affirmed.*

¶1 KESSLER, J.[1] L.M.O. appeals the order terminating his parental rights to his son, D.A.M. He also appeals the order denying his postdisposition motion to vacate the termination order. We affirm.

BACKGROUND

¶2 D.A.M. was born on August 22, 2008 and is L.M.O.'s biological son. After his birth, D.A.M. lived with his mother. L.M.O. visited his son periodically and provided supplies for D.A.M. and D.A.M.'s siblings. L.M.O. was adjudicated D.A.M.'s father in June 2009. At that time, L.M.O. and the child's mother were awarded joint custody and primary physical placement of the child was with the mother.

¶3 When D.A.M. was approximately two and a half years old, he was removed from his mother's home by the Bureau of Milwaukee Child Welfare (the Bureau)[2] and placed with L.M.O. D.A.M. remained with L.M.O. for approximately two years; however, in January 2013, D.A.M. was removed from L.M.O.'s home and placed in foster care because L.M.O. beat the child with a belt. L.M.O. pled guilty to three counts of misdemeanor battery and was sentenced to two years probation.

¶4 While D.A.M. was in foster care, L.M.O. was detained by Immigration Control and Enforcement (ICE). The detention lasted approximately nine months, from August 2013 to April 2014. When L.M.O. was released from ICE detention, the Bureau and L.M.O. began working towards a trial reunification;

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Bureau of Milwaukee Child Welfare is now known as the Division of Milwaukee Child Protective Services.

however, on January 12, 2016, L.M.O. was arrested following another incident of physical abuse of D.A.M. L.M.O. was convicted of one count of child abuse and sentenced to twenty-two months of initial confinement and twenty-three months of extended supervision. L.M.O. was also subject to a no-contact order.

¶5 On June 27, 2016, the State filed a petition to terminate L.M.O.'s parental rights to D.A.M., who was then seven years old. The petition alleged that L.M.O. failed to assume parental responsibility. L.M.O. waived his right to a jury trial and a trial was held before the circuit court.

The TPR Proceedings

¶6 The grounds phase of the proceedings was tried to the circuit court on January 11, 2017 and January 12, 2017. Multiple witnesses testified.

¶7 Jennifer Ramirez, a former initial assessment worker with the Bureau, testified that she was referred to L.M.O.'s residence in 2013 because of suspicions of child abuse. She testified that she found D.A.M. with multiple bruises all over his body. Ramirez took D.A.M. to Children's Hospital, where medical professionals found multiple bruises in varying color shades, suggesting that D.A.M. had been subject to multiple instances of "severe physical abuse." D.A.M. also had "looping" marks, consistent with being struck by a belt. Ramirez testified that when she confronted L.M.O. about the abuse, L.M.O. admitted to hitting D.A.M. with a belt, but that L.M.O.'s explanation was inconsistent with medical reports.

¶8 Kathryn Francher, a former case manager at SaintA Child Welfare, testified that following the death of D.A.M.'s mother, L.M.O. was not cooperative in allowing SaintA to obtain therapy for D.A.M. L.M.O. did not believe that

D.A.M. was in need of therapy. Francher also testified that when L.M.O. was approached by D.A.M.'s school about the need for an individualized education program due to concerns with D.A.M.'s behavioral development, L.M.O. refused to consent to the program. Francher also testified that during visits between L.M.O. and D.A.M., L.M.O. was controlling and would dismiss suggestions for more productive visits. Francher also stated that at one point, visits between L.M.O. and D.A.M. had to be split between agencies because L.M.O. refused to work with the specialists. Francher told the court that after an unsupervised visit in January 2016, D.A.M. went home physically hurt. An investigation revealed that L.M.O. "put his knuckles up to [D.A.M.'s] nose and told him not to say anything." In short, L.M.O. hit D.A.M.

¶9 Epiphany Williams, a case manager at SaintA Child Welfare, testified that she was assigned to D.A.M.'s case in June 2015. Williams testified that from January 2016 through the date of trial, L.M.O. had not reached out to her to inquire about D.A.M. She stated that during that period she sent L.M.O. multiple forms, including consent forms for therapy for D.A.M. Williams stated that prior to the instance of violence during the unsupervised visit, she encouraged L.M.O. to attend D.A.M.'s medical and dental appointments and school activities, but that L.M.O. did not do so.

¶10 L.M.O. also testified. He admitted to hitting D.A.M. in 2013 for disciplinary reasons, but denied that he hit D.A.M. multiple times. He also testified that he was not concerned about D.A.M.'s inability to speak at age four and a half, and admitted to striking D.A.M. with a belt when D.A.M. had a bathroom accident, leaving multiple bruises on D.A.M.'s body. L.M.O. stated that he did not attend D.A.M.'s doctors or dentist appointments, but claimed that he was never informed about the dates of the appointments. L.M.O. also admitted

that he never asked about the appointments. L.M.O. admitted that while he was in custody he made no attempt to inquire about D.A.M.'s well-being with D.A.M.'s teachers, doctors or social workers. L.M.O. admitted that he did not believe D.A.M. was in need of therapy, but claimed that he did sign consent forms to allow for therapy. L.M.O. also admitted that the no-contact order did not prevent him from having contact with D.A.M.'s foster parents, but that he and the foster parents did not have "good communication" and L.M.O. was "scared" to contact the foster family.

¶11 The circuit court found that the State met its burden of proving that L.M.O. failed to assume parental responsibility and that grounds existed to terminate L.M.O.'s parental rights. At the disposition hearing, the court found that it was in D.A.M.'s best interest to terminate L.M.O.'s parental rights.

¶12 L.M.O. filed a notice of appeal and a motion for remand, which we granted. L.M.O. then moved the circuit court for postdispositional relief, arguing that there was insufficient evidence to establish that L.M.O. failed to assume parental responsibility and that his due process rights were violated. Following a hearing, the circuit court denied the motion. This appeal follows.

DISCUSSION

¶13 On appeal, L.M.O. argues that there was insufficient evidence for the circuit court to find that he failed to assume parental responsibility. He also argues that the court's findings violated his due process rights because they were "based on [D.A.M.'s] out-of-home placement and [L.M.O.'s] subsequent lack of contact with [D.A.M.] when the no-contact order was in effect." Essentially, L.M.O. argues that he assumed parental responsibility during the times D.A.M. was in his care and that he was later prevented from exercising that responsibility

by the no-contact order. We conclude that L.M.O. misreads the statutes defining the requirements of exercising parental responsibility.

I. There was sufficient evidence to establish that L.M.O. failed to assume parental responsibility.

¶14 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.*** "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (brackets, citation and quotation marks omitted). The second phase, the disposition hearing, "occurs only after the fact-finder finds a WIS. STAT. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Jacob T.***, 333 Wis. 2d 273, ¶19 (citations omitted).

¶15 This appeal concerns the first step, establishing the statutory grounds for termination of parental rights, specifically here, failure to assume parental responsibility. *See* WIS. STAT. § 48.415(6). In reviewing findings made in a trial to the court, we review the evidence in the light most favorable to the findings made by the circuit court. *See* ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169. We will not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "'clearly wrong.'" *See* ***State v. Lamont D.***, 2005 WI App 264, ¶10, 288 Wis. 2d 485, 709 N.W.2d 879 (citation omitted). The circuit court

is owed "'substantial deference'" as it is better positioned to decide the weight and relevancy of the testimony as well as assess the evidence. ***Id.*** (citation omitted).

¶16 Failure to assume parental responsibility is established "by proving that the parent ... [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). "'[S]ubstantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." § 48.415(6)(b). A nonexclusive list of factors that the court may consider in determining whether the parent has a "substantial parental relationship" with the child includes

> whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id. Failure to assume parental responsibility grounds involve consideration of the totality of the circumstances over the course of the child's entire life. ***Jacob T.***, 333 Wis. 2d 273, ¶¶22-23.

¶17 We conclude that the record supports the circuit court's findings. The circuit court acknowledged that while L.M.O. and D.A.M. had a substantial relationship at an earlier point in time, that relationship changed shortly before D.A.M. turned five years old, after L.M.O. inflicted severe abuse on the child. Medical records indicate that the incident could have been one of many, as the bruising on D.A.M.'s body was at various levels of healing. Case workers testified that L.M.O. was resistant to parenting advice and failed to get along with visitation supervisors. The record supports the court's finding that L.M.O. again abused D.A.M. in 2016 and failed to accept responsibility for either child abuse

incident. Testimony supports the circuit court's findings that L.M.O. failed to reach out to D.A.M's foster family, case manager, school, or doctors, all of which L.M.O. could have done notwithstanding the no-contact order. The record supports the court's finding that L.M.O. failed to prioritize D.A.M.'s well-being, as testimony indicates that L.M.O. refused to sign therapy consent forms for D.A.M. In short, the record amply supports the conclusion that, at this point of D.A.M.'s life, L.M.O., by his conduct, abdicated his responsibility for the "daily supervision, education, protection and care of the child," as required by WIS. STAT. § 48.415(6)(b). Accordingly, we conclude that the circuit court was not "'clearly wrong'" and we uphold its findings. *See* ***Lamont D.***, 288 Wis. 2d 485, ¶10 (citation omitted).

II. L.M.O.'s due process rights were not violated.

¶18 L.M.O. argues that his due process rights were violated because D.A.M.'s out-of-home placement and the no-contact order rendered it impossible for him to assume parental responsibility. In short, he argues that WIS. STAT. § 48.415(6) was unconstitutional as applied to him.

¶19 Whether a statute, as applied to a parent, violates the parent's constitutional right to substantive due process presents a question subject to independent appellate review. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We begin with the presumption of the statute's constitutionality. *See* ***id.*** Because termination of parental rights interferes with a fundamental right, strict scrutiny is applied to the statute. *See* ***id.***, ¶¶17, 23. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. *See* ***id.***, ¶17. The Wisconsin Supreme Court has already

determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***Kelli B.***, 271 Wis. 2d 51, ¶25, and the issue here is whether that statute, as applied to L.M.O., is narrowly tailored to meet the State's compelling interest in protecting D.A.M., *see* ***id.***, ¶17.

¶20 The crux of L.M.O.'s argument is that L.M.O. did have a substantial relationship with his son, but was essentially forced to stop contact with D.A.M. as a result of the no-contact order. Accordingly, his substantive due process rights were violated because the circuit court made it impossible for him to assume parental responsibility within the meaning of the statute.

¶21 The record does show that D.A.M. lived with L.M.O. for approximately two years and that L.M.O. attended regular visits with D.A.M. for a time thereafter. However, the record also shows that L.M.O.'s ultimate lack of a relationship with his son resulted from L.M.O.'s own intentional actions. D.A.M. was removed from L.M.O.'s home because L.M.O. severely abused his son by striking him with a belt numerous times. Medical records reported bruising all over D.A.M.'s body, suggesting that D.A.M. was struck multiple times. When L.M.O. eventually had unsupervised visits with D.A.M., L.M.O. again struck D.A.M., this time with his fist. The result, necessary to protect D.A.M., was the no-contact order which L.M.O. cites to excuse his lack of demonstrated interest in his son. The order barred direct contact between L.M.O. and D.A.M.; however, L.M.O. did not inquire about D.A.M.'s well-being from either the foster parents or other care providers. The fact that D.A.M. was in foster care and that L.M.O. was ordered not to contact the child did not prevent L.M.O. from behaving as a concerned parent normally would.

¶22 We conclude that L.M.O.'s due process rights were not violated and WIS. STAT. § 48.415(6) was not unconstitutional as applied to him.

By the Court.—Order affirmed.

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