COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2526 **Cir. Ct. No. 2003TP655**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MARSAIDE J.C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DENETTRIA J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Reversed and cause remanded with directions*.

¶1 CURLEY, J.[1] Denettria J. appeals the order terminating her parental rights to her daughter, Marsaide J.C. She submits that the trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

erroneously exercised its discretion in denying Denettria's psychologist access to information the trial court ordered the court-appointed psychologist to have. Because Denettria established that her psychologist needed access to the information in order to present a defense, and the recent holding in ***Brown County v. Shannon R.***, 2005 WI 160, ___ Wis. 2d ___, 706 N.W.2d 269, directs that "preventing a parent from presenting expert opinion testimony on an issue central to the defense" when the State is permitted to do so "deprives the parent of a 'level playing field,' ***id.***, ¶70 (footnote omitted), and "denie[s] [the parent] the due process right to present a defense and goes to the fundamental fairness of the proceeding," ***id.***, ¶72, this court reverses the trial court's judgment and remands for a new dispositional hearing.

I. BACKGROUND.

¶2 On September 23, 2003, the State filed a petition seeking to terminate the parental rights of the parents of Marsaide and Dwayne P.[2] Marsaide's adjudicated father, after originally appearing and waiving his right to a jury trial, failed to appear at the court trial, and a default judgment terminating his parental rights was entered. With respect to Denettria, the petition alleged that Denettria gave birth to Marsaide on February 11, 1995, and that Marsaide was removed from Denettria's home in April 1998 as the result of a CHIPS petition (a child in need of protection or services). The petition stated that Marsaide has remained in foster care since April 1998, as a result of the CHIPS dispositional order being annually extended. The petition claimed two grounds for terminating Denettria's parental rights: first, that Denettria had failed to assume parental

[2] Denettria is not appealing the termination of her parental rights to Dwayne.

responsibility for Marsaide, as defined in WIS. STAT. § 48.415(6)[3]; and second, that Marsaide had continued to be a child in need of protection or services pursuant to WIS. STAT. § 48.415(2).

¶3 After the petition was filed, Denettria stipulated to the grounds presented by the State, according to which, under WIS. STAT. § 48.415(2), Marsaide had continued to remain in need of protection or services, and the State dismissed the remaining ground for termination of Denettria's parental rights. Denettria continued to oppose the termination petition and a dispositional hearing was scheduled. Before the dispositional hearing date, Denettria's attorney sought to have a psychologist examine the records and interview the child. The guardian ad litem objected, stating: "I have a problem with an expert picked by the defense interviewing my ward." Eventually, Denettria's attorney agreed to the appointment of a psychologist suggested by the guardian ad litem. At the next hearing, after receipt of the court-appointed psychologist's report, Denettria's attorney renewed his request for his psychologist to be allowed to evaluate the child, and asked that she be permitted to observe the interaction of Denettria and Marsaide during visitation, as had been afforded the court-appointed psychologist.[4] The trial court ordered the parties to submit briefs and adjourned the matter.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[4] Originally, Denettria's attorney wanted the expert witness to interview the foster parents. It appears that that request was later abandoned, and Denettria's attorney sought only to have the foster parents answer several questionnaires.

¶4 At the next hearing, Denettria's attorney argued to the court that he had a right to counter the State's evidence and recommendation in order to present a defense for Denettria, and that he could not do so if his psychologist was not given the same access to information as that given to the court-appointed psychologist. He claimed that, without the information, fair play demanded that his psychologist be armed with the same information as the court-appointed psychologist. The trial court denied the request, stating that the court-appointed psychologist was independent, and that no objection had been made at the time he was appointed. Further, the court expressed its belief that another psychologist would be duplicative. The trial court did, however, permit the psychologist to testify, but denied her the opportunity to interview the child or observe a visitation between Denettria and Marsaide.

¶5 At the dispositional hearing, numerous witnesses were called, including the defense psychologist. The defense attempted to establish that Marsaide had a strong bond with her mother, that she was not interested in being adopted, and that termination would not result in Marsaide having a more stable family. At the completion of the trial, the trial court said: "In Marsaide's case it is a little bit a [sic] closer call and a more difficult decision." However, the trial court found that the State had met its burden and that the best interest of Marsaide required that Denettria's parental rights be terminated.

II. ANALYSIS.

¶6 Denettria submits that the trial court erroneously exercised its discretion when it refused to permit her psychologist the same access to information as it did the court-appointed psychologist. Denettria argues that her psychologist's opinions were central to her defense, and that she was significantly

hampered in presenting a defense by the trial court's ruling. As a result, Denettria claims that her due process rights to present a defense were violated, and the dispositional hearing was fundamentally unfair. Denettria relies principally on the holding in ***Brown County***, 706 N.W.2d 269, a case published after this appeal was filed.

¶7 The State and the guardian ad litem filed a combined brief. In it, they acknowledge the holding in ***Brown County***, but claim that this case is distinguishable. First, they note that in ***Brown County***, the defense expert witness was not permitted to give an opinion about a key dispute, whereas here, Denettria's psychologist was allowed to testify. Second, they note that in ***Brown County***, the expert witness was prohibited from giving an opinion at the grounds phase of the termination trial, and because Denettria stipulated to one of the grounds alleged by the State in its petition seeking termination, the psychologist's testimony came at the dispositional phase. Finally, they submit that the matters which the defense psychologist was going to address, had she been allowed to evaluate the child and observe the interaction of the child and mother during a visitation, were largely undisputed. This court disagrees.

¶8 Wisconsin has a two-part 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. At the first, or "grounds" phase of the proceeding, the petitioner must prove that one or more of the statutory grounds for termination of parental rights exist. ***Id.***; *see* WIS. STAT. § 48.31(1). There are twelve statutory grounds of unfitness for an involuntary termination of parental rights under WIS. STAT. § 48.415(1)-(10), and if a petitioner proves one or more of the grounds for termination by clear and convincing evidence, "the court shall find the parent unfit." WIS. STAT. § 48.424(4); ***Steven V.***, 271 Wis. 2d 1, ¶25 (citation omitted).

"A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated." ***Steven V.***, 271 Wis. 2d 1, ¶26. "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Id.*** "At the dispositional phase, the court is called upon to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished." ***Id.***, ¶27.

¶9 Whether circumstances warrant termination of parental rights is within the trial court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (Ct. App. 1993). WISCONSIN STAT. § 48.426(3) sets out the factors that the trial court must consider in deciding whether termination is in the child's best interests. Section 48.426(3) provides:

> 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.
>
> (f) Whether the child will be able to enter into a more stable and permanent 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.

¶10 As noted, before the dispositional hearing, Denettria's attorney sought to obtain an order permitting his psychologist access to the identical information given to the earlier court-appointed psychologist. Specifically,

Denettria's attorney wanted his psychologist to observe Denettria and Marsaide during a visitation and wanted his psychologist to conduct a psychological evaluation of Marsaide. Denettria's attorney advised the court and opposing counsel that Denettria's defense was, pursuant to WIS. STAT. § 48.426(3)(c), (d) and (f), that she had a substantial relationship with Marsaide, that Marsaide did not want to be adopted, and that the termination would not result in Marsaide's having a more stable and permanent relationship. Denettria's attorney claimed that, given the nature of the defense, the psychologist was key to Denettria's defense.

¶11 Admissibility of expert testimony is governed by WIS. STAT. § 907.02, which permits expert testimony if the witness possesses scientific, technical, or other specialized knowledge relevant to a specific question and the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. Section 907.02 on expert witnesses "'continues the tradition of liberally admitting expert testimony' in Wisconsin." ***Brown County***, 706 N.W.2d 269, ¶35 (footnote omitted). Admissibility of expert testimony is generally within the discretion of the trial court. ***Id.***, ¶31.

¶12 Here, the trial court ruled that the psychologist suggested by the guardian ad litem and appointed by the trial court was independent, and that permitting another evaluation of Marsaide would be duplicative. The trial court did not address Denettria's right to present a defense. This court now must decide whether such a determination was an erroneous exercise of discretion resulting in prejudicial reversible error. This court concludes that it was.

¶13 As explained in ***Brown County***: "The due process protections of the 14th Amendment[5] apply in termination of parental rights cases.[6] When the State seeks to terminate familial bonds, it must provide a fair procedure to the parents, even when the parents have been derelict in their parental duties."[7] ***Id.***, ¶56 (footnotes by ***Brown County***).

¶14 Termination of parental rights are extremely serious to the parent:

> A parent's private interest in a termination of parental rights proceeding is a grievous loss, namely the permanent deprivation of a legal relationship with his or her child. Termination "work[s] a unique kind of deprivation."[8] "[T]he removal of a child from the parent is a penalty as great [as], if not greater, than a criminal penalty...."

Id., ¶58 (footnote by ***Brown County***).

¶15 Moreover, ***Brown County*** instructs that:

> Although they are civil proceedings,[9] termination of parental rights proceedings deserve heightened protections because they implicate a parent's fundamental liberty interest.[10] Parents have a fundamental, constitutionally protected liberty interest in the "companionship, care,

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[5] "No State shall … deprive any person of life, liberty, or property, without due process of law."

[6] ***Santosky v. Kramer***, 455 U.S. 745, 754-70 (1982); ***Lassiter v. Dep't of Soc. Servs.***, 452 U.S. 18, 27-32 (1981).

[7] ***Santosky***, 455 U.S. at 753-54; ***Lassiter***, 452 U.S. at 27-32.

[8] ***M.L.B. v. S.L.J.***, 519 U.S. 102, 127-28 (1996); *see* ***Lassiter***, 452 U.S. at 27.

[9] *See* ***M.W. v. Monroe County Dep't of Human Servs.***, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984).

[10] *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶20-21, 246 Wis. 2d 1, 629 N.W.2d 768; ***L.K. v. B.B.***, 113 Wis. 2d 429, 441, 335 N.W.2d 846 (1983) (citing ***Santosky***, 455 U.S. at 769); ***In re J.L.W.***, 102 Wis. 2d 118, 132, 306 N.W.2d 46 (1981).

> custody, and management" of their children.[11] The United States Supreme Court has repeatedly declared that "personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[12] "[A] parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[13] "Terminations of parental rights affect some of parents' most fundamental human rights."[14]

Id., ¶59 (footnotes by ***Brown County***).

¶16 Given the gravity of the litigation,

> [a] fundamental guarantee of due process of law is the opportunity to be heard[15] "at a meaningful time and in a meaningful manner."[16] "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[17]

Id., ¶64 (footnotes by ***Brown County***).

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[11] ***In re D.L.S.***, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983).

[12] ***Santosky***, 455 U.S. at 753; *see* ***Lassiter***, 452 U.S. at 24-32; ***Lassiter***, 452 U.S. at 59-60 (Stevens, J., dissenting); *see also* ***Quilloin v. Walcott***, 434 U.S. 246, 255 (1978); ***Smith v. Org. of Foster Families***, 431 U.S. 816, 845 (1977); ***Moore v. City of East Cleveland***, 431 U.S. 494, 499 (1977) (plurality opinion).

[13] ***Lassiter***, 452 U.S. at 27 (quoting ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972)).

[14] ***Evelyn C.R.***, 246 Wis. 2d 1, ¶20, 629 N.W.2d 768; *see* ***D.L.S.***, 112 Wis. 2d at 184, 332 N.W.2d 293; ***Minguey v. Brookens***, 100 Wis. 2d 681, 689, 303 N.W.2d 581 (1981).

[15] ***Grannis v. Ordean***, 234 U.S. 385, 394 (1914) (civil case).

[16] ***Armstrong v. Manzo***, 380 U.S. 545, 552 (1965) (civil case).

[17] ***Joint Anti-Fascist Refugee Comm. v. McGrath***, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (civil case).

¶17 ***Brown County*** further instructs that a trial court's discretionary decision "violates basic concepts of due process if the circuit court denied [the parent] the opportunity to be heard, that is, if it denied her the ability to present a defense…." ***Id.***, ¶68. That is exactly what occurred here.

¶18 The State and the guardian ad litem contend that there are distinctions to be drawn between the circumstances in ***Brown County*** and those present here. Namely, they argue that Denettria's psychologist was allowed to testify, while in ***Brown County***, the expert witness was prevented from giving an expert opinion; the expert witness in ***Brown County*** was testifying at the grounds phase of the termination trial, while Denettria's psychologist testified at the dispositional phase; and finally, that the matters the defense psychologist would have addressed were largely undisputed. This court is not persuaded.

¶19 First, Denettria has a right to present a defense in both phases of the termination proceeding. Further, while Denettria's psychologist was allowed to testify, she was hobbled in her assessment and unable to render an opinion on certain key areas because of the lack of information. Indeed, the defense psychologist's report reflects this omission: "Since this psychologist has not evaluated the children involved in this case and has not had the opportunity to observe the children interacting with their mother, no recommendations can be made regarding whether or not reunification should or should not occur." Contrast that with the court-appointed psychologist's opinion that "the prognosis for successful reunification [of Denettria with her children] is less than optimal in this situation." Denettria's psychologist was "significantly disadvantaged" by the lack of information made available to her. Finally, as to their argument that the matters the psychologist would have testified to were largely undisputed, although the State and the guardian ad litem acknowledge that Denettria had an ongoing

relationship with Marsaide and they were aware of Marsaide's resistance to be adopted, they viewed these facts as not significant enough to forestall terminating Denettria's parental rights. Even the trial court observed that what was in Marsaide's best interest was a close issue in this case. Had Denettria had the opportunity to present a countering view and a more positive view of the future, the trial court may well have decided this case differently. That said, the trial court's refusal to permit the defense psychologist, key to Denettria's defense against termination, to have access to the same information as the State's court-appointed psychologist, violated Denettria's due process rights. Consequently, this court reverses and remands this matter for a new dispositional hearing consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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