COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-2188

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

IN THE INTEREST OF MACALA M. E.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MARION L. M.,

RESPONDENT-APPELLANT,

RYAN L. E.,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Marion L. M. appeals from an order terminating her parental rights to Macala M.E.[2] Marion argues that the trial court failed to make a finding that her conduct undermined her ability to function as a parent and, therefore, she was denied substantive due process. Because this court concludes that the trial court made the necessary findings, the termination order is affirmed.

¶2 The County filed a petition to terminate Marion's parental rights on grounds of abandonment, *see* WIS. STAT. § 48.415(1), continuing need of protection or services, *see* WIS. STAT. § 48.415(2), and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(6). A jury found that grounds existed to terminate Marion's parental rights for abandonment and continuing need of protection and services. The trial court held a dispositional hearing and ultimately terminated Marion's parental rights. This appeal followed.

¶3 Marion argues that she was denied substantive due process because the trial court failed to find that her conduct undermined her ability to function as a parent. Whether Marion was denied substantive due process is an issue of law this court reviews de novo. *See* ***State v. Patricia A. P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995) (where the facts are undisputed, the application of the United States Constitution to those facts is a question of law appellate courts review de novo).

¶4 The parties agree on the applicable legal standards, which this court recently restated in ***State v. Kelly S.***, 2001 WI App 193. Interpreting WIS. STAT.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The parental rights of Macala's father, Ryan L.E., are not at issue on this appeal.

§§ 48.424 and 48.427(2) and our supreme court's decision in ***B.L.J. v. Polk County Dept. of Soc. Servs.***, 163 Wis. 2d 90, 470 N.W.2d 914 (1991), ***Kelly S.*** described the trial court's role once the fact-finder determines that there are grounds to terminate a parent's rights:

> [First, t]he trial court's function is to determine whether the parent's conduct undermines his or her ability to function as a parent. Some parental conduct may show that the parent is less fit than other parents, but if the ability to parent is not seriously affected by the conduct, then the first test is not met. On the other hand, if the parental conduct is of such force that the ability to parent is compromised, then the first test has been met and the court moves to the second test, which is the best interests standard. And there, the question more precisely is whether the inability to function as a parent is so serious that further contact between the parent and child will be seriously detrimental to the child.

Kelly S., 2001 WI App 193 at ¶9. The court referred to this as a "two-part sequential test." ***Id.*** at ¶10.

¶5 Although the parties agree that ***Kelly S.*** states the correct legal standard, they disagree whether the trial court made the necessary finding that Marion's conduct undermines her ability to parent. This court agrees with the County that, although the court did not explicitly use the language employed in ***Kelly S.***,[3] it implicitly made the finding.

¶6 As the County notes, ***Kelly S.*** and ***B.L.J.*** both recognized that a trial court may implicitly make the requisite findings. ***Kelly S.*** stated:

> It is true that the trial court did not frame its analysis in exactly the way the ***B.L.J.*** decision requires. But this does

[3] This is not surprising because the court of appeals did not issue its decision in ***State v. Kelly S.***, 2001 WI App 193, until two months after the dispositional hearing in this case.

> not necessarily mean, however, that we must reverse and remand for the trial court to do the analysis over. In fact, we use ***B.L.J.*** as authority for this point.

Kelly S., 2001 WI App 193 at ¶11. ***Kelly S.*** went on to quote ***B.L.J.***, where the mother's counsel argued that there was no independent finding of parental unfitness and remand was appropriate:

> From the comments of the circuit court it is clear that the court was convinced her unfitness was sufficiently egregious to warrant termination. There would be no point in sending this case back to the circuit court for a specific, declaration to that effect.
>
> ….
>
> [T]he circuit court here made "unmistakable but implicit findings" of parental unfitness such as to warrant termination of parental rights.

Kelly S., 2001 WI App 193 at ¶11 (quoting ***B.L.J.***, 163 Wis. 2d at 109).

¶7 This court in ***Kelly S.*** held that, based on its review of the trial court's decision, it could conclude that the court made unmistakable but implicit findings that the parent's actions affected her ability to parent and that it was to such an extent that the child's safety and welfare would be seriously jeopardized by continuing the parent-child relationship. ***Id.*** at ¶12. The same conclusion is justified here.

¶8 At the dispositional hearing, the trial court began its oral decision with the following statement:

> I now turn my attention to 48.427(2) which provides me with the statutory authority that if at this stage of the proceedings I were satisfied the evidence in the record does not warrant the termination of parental rights it is within my power to dismiss the proceeding at this time.
>
> I'm satisfied that the evidence heard by the jury and all the matters called to my attention musters to the level in

> which as I now turn to 48.426 were I satisfied that those criterion were met, the facts of this case would warrant me entering an order terminating parental rights.

¶9 The circuit court proceeded with a specific discussion of the best interests standard and also spoke directly to Marion about her conduct and her ability to function as a parent, especially in light of her mental illness, problems with alcohol and drugs and periods of incarceration. The court noted that the psychologist who examined Marion testified that Marion may need to be coerced into getting treatment for mental illness and substance abuse. The court stated:

> I know of one system in the world where you can be coerced into taking mental health treatment or alcohol treatment and that's the State Prison System. …
>
> [What it] is about you, [Marion], that is toxic, and I'll use that term because it is poisoning you and it is poisoning people around you … cannot be addressed unless you're in a coercive setting.
>
> What I'm really faced with is do I have this six-year-old child waiting in limbo for the day if it ever comes that you are able to transform yourself into someone with whom this child can have a relationship and not be poisoned. That is what this record suggests strongly to me because the record suggests that not only are you unable to protect yourself but you would be unable to protect this child ….

¶10 This statement, as well as the remainder of the sentencing transcript, convinces this court that Marion was not denied substantive due process because the circuit court implicitly found that Marion's conduct undermines her ability to function as a parent. Marion has not challenged the court's exercise of discretion in any other respect. Accordingly, this court affirms the order terminating her parental rights.

By the Court.—Order affirmed.

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

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