

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2001

Cornelia G. Clark
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.

No. 01-1692

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO PRESTIN T.B.,
A PERSON UNDER THE AGE OF 18:**

**SHEBOYGAN COUNTY DEPARTMENT OF
HEALTH & HUMAN SERVICES,**

PETITIONER-APPELLANT,

v.

JULIE A.B.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 SNYDER, J.¹ The Sheboygan County Department of Health and Human Services (Department) appeals from an order of the trial court dismissing a petition to terminate Julie A.B.'s parental rights to Prestin T.B. The Department argues that the trial court applied the wrong legal standard in dismissing the petition. We disagree and affirm the order of the trial court.

FACTS²

¶2 On October 12, 1999, the Department received a referral alleging neglect of Prestin (d.o.b. 04/11/98) by his mother Julie. The referral indicated that Julie was homeless, suffered from addictions to both drugs and alcohol, and often left Prestin under the supervision of people who were under the influence of drugs and alcohol. A second referral was received on January 20, 2000, making similar allegations. A social worker made contact with Julie and Prestin on January 21, 2000, and after the social worker observed their living conditions, Prestin was removed from the residence and placed in foster care.

¶3 On February 21, 2000, after Prestin was placed in foster care, Julie was sentenced to six months in jail for her fourth operating a motor vehicle while intoxicated charge. During the next six months, Julie incurred four felony charges; one charge was for battery to a police officer, and three charges were for

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

² Neither party has consistently provided in the briefs on appeal citations to the record to corroborate all the facts set out in those briefs. An appellate court is improperly burdened where briefs fail to properly and accurately cite to the record. *Meyer v. Fronimades*, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). We therefore hold the parties to those facts undisputed in their briefs. The parties will not be heard on reconsideration to challenge facts that this court properly gleaned from briefs without citation to the record.

failure to report to jail or escape from custody. During the times Julie was on escape status, she was unavailable for visits with Prestin.

¶4 A hearing was held on April 14, 2000, to determine whether Prestin should be declared a child in need of protection or services (CHIPS). Julie failed to appear at this hearing and Prestin was formally declared to be in need of protection or services. During the next several months the Department made numerous attempts to reunite Julie and Prestin, but all were unsuccessful because of Julie's inconsistency about keeping appointments and her various incarcerations during this period.

¶5 On December 5, 2000, the Department initiated termination of parental rights proceedings while continuing to work with Julie to improve her parenting skills. On March 6, 2001, a trial was held on whether to terminate Julie's parental rights. The jury was asked to determine whether the Department had made reasonable efforts to provide the services ordered by the court, whether Julie had failed to meet the conditions for return and whether there was a substantial likelihood that Julie would not meet those conditions within the next year. At the close of testimony, the jurors unanimously and affirmatively answered all these questions, thereby finding that grounds for termination existed. The trial court found an evidentiary basis for the verdict and therefore found Julie to be an unfit parent.

¶6 A dispositional hearing was held on April 6, 2001. Prior to the dispositional hearing, a social worker filed an addendum to the court report indicating that Prestin's foster parents had expressed an interest in adopting him. In addition, the social worker noted that Prestin had spent almost half his life in foster care and would likely remain in foster care for a lengthy period of time if

Julie's parental rights were not terminated. Both the Department and the guardian ad litem recommended a termination of parental rights. However, the trial court declined to terminate Julie's parental rights. The trial court found that the CHIPS order in this matter ran simultaneously to Julie's incarceration, and that since her release from jail, Julie had entered a drug and alcohol rehabilitation program, engaged in regular visitation with Prestin, and had nearly completed a parenting program. The trial court found that Julie's parental unfitness did not warrant termination of parental rights and therefore dismissed the petition. The Department appeals this dismissal.

DISCUSSION

¶7 It is well established that the decision whether to terminate parental rights is committed to the trial court's discretion, *Mrs. R. v. Mr. and Mrs. B.*, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981), as is the determination of the child's best interests. *David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). The trial court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and application of the correct standard of law. *Id.*

¶8 WISCONSIN STAT. § 48.424 addresses the fact-finding portion of a termination of parental rights proceeding and states, in relevant part:

(1) The purpose of the fact-finding hearing is to determine whether grounds exist for the termination of parental rights in those cases where the termination was contested at the hearing on the petition under s. 48.422.

....

(3) If the facts are determined by a jury, the jury may only decide whether any grounds for the termination of parental rights have been proven. The court shall decide what disposition is in the best interest of the child.

¶9 After a jury has found evidence supporting termination of parental rights, the trial court must then determine whether such evidence is sufficiently egregious to support a termination of parental rights. *B.L.J. v. Polk County DSS*, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991). WISCONSIN STAT. § 48.427 addresses the dispositions available to the trial court and states, in relevant part:

(1) Any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court. After receiving any evidence related to the disposition, the court shall enter one of the dispositions specified under subs. (2) to (4) within 10 days.

....

(2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.

(3) The court may enter an order terminating the parental rights of one or both parents.

WISCONSIN STAT. § 48.426 addresses the factors to be considered by the trial court in determining the appropriate disposition:

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.

(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.

¶10 In arriving at the appropriate disposition, the court must first contemplate whether the parental unfitness is so great that it undermines the ability to parent. *State v. Kelly S.*, 2001 WI App 193, ¶1, No. 01-0328. The trial court must then consider whether that inability to parent is seriously detrimental to the child. *Id.*

¶11 Here, the Department argues that the trial court utilized the wrong legal standard in arriving at its decision. We disagree. After examining the exhibits and the record, the trial court correctly stated:

Here's the legal issue: Is the evidence of unfitness so egregious as to warrant termination of parental rights?... A finding of unfitness that warrants termination is not merely a find [sic] that termination is better for the child, "but essential to their safety or welfare, in some very serious and important respect."

That is the correct legal standard under *B.L.J.*, 163 Wis. 2d at 103.

¶12 The trial court implicitly acknowledged that Julie's alcoholism affected her ability to parent, as required by *Kelly S.*

I am concerned about the more long-term problem, which is her alcoholism. I'm satisfied she's been an alcoholic since at least 1990....

So, [Julie], I think your alcoholism is chronic. I think it will be difficult for you to deal with it. I think if you do, you will meet the conditions of return.

But the trial court also determined that Julie had started a jail sentence almost simultaneously with the issuance of the CHIPS order that contained the conditions of return:

It's very difficult to meet those conditions while in jail and she spent most of that time in jail....

I think the true test of unfitness is what she does after she has the ability to attempt to meet those conditions upon release from jail. We have some evidence of what that might be. Since being released ... she has started the Genesis [an AODA] program; she has regularly visited with her child, as that visitation is available to her; she's participated in and almost completed a parenting program.

The trial court specifically found that the termination of contact between Julie and Prestin was not essential to Prestin's safety or welfare.

¶13 While the trial court did not use the exact terminology set forth in *Kelly S.*, a trial court is not required to use "magic words" in effectuating its adjudication. See *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993). The trial court utilized the proper legal standard in arriving at its decision. We cannot say that the trial court erroneously exercised its discretion in declining to terminate Julie's parental rights.

CONCLUSION

¶14 The trial court applied the appropriate legal standard and did not erroneously exercise its discretion in refusing to terminate Julie's parental rights to Prestin. We affirm the order of the trial court.

By the Court.—Order affirmed.

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

