DIVISIONS III & IV

CA05-522

AUGUST 30, 2006

ROLINDA KIGHT
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
APPELLEE

APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT
[NO. JV-2003-40]

HON. LINDA P. COLLIER, JUDGE

DISSENTING OPINION ON DENIAL OF PETITION FOR REHEARING

SAM BIRD, Judge, dissenting. I respectfully disagree with the majority's decision to deny appellant's petition for rehearing. A review of the pertinent history of this case is necessary for a full understanding of this dissent. On July 31, 2003, the Circuit Court of Faulkner County entered orders terminating the parental rights of Rolinda Kight to her two children. Kight appealed those orders to this court. In *Kight v. Arkansas Department of Human Services*, ___ Ark. App. ___, ___ S.W.3d ___ (June 30, 2004) (*Kight I*), after concluding that we were "left with a firm conviction that a mistake has been made" by the trial court in terminating Kight's parental rights, we reversed the trial court and remanded the matter to the trial court "with instructions ... to continue reunification services." The Department of Human Services (DHS) sought rehearing in the supreme court, which was denied.

On November 23, 2004, the trial court convened a review hearing to consider the status of the case. At that hearing, DHS argued that our reversal of the July 31, 2003, orders terminating Kight's parental rights had no effect on an earlier order of the court that had

suspended reunification services. DHS's argument is reflected in the following colloquy between the court, DHS's attorney (Finkenbinder), the attorney ad litem (Kendrick), and Kight's attorney (Heimbaugh):

THE COURT: What is your position, Mr. Finkenbinder, about reunification services? What are you asking for?

MR. FINKENBINDER: Your Honor, the last order of the court suspended reunification - suspended reunification services. The order of the Court of Appeals only reversed the termination order. What that means is, and the Department's view is, that all orders prior to the termination order remain in effect.

THE COURT: You're going to have to break that down into simple language. Which means what?

MR. FINKENBINDER: Which means that all the orders prior to the termination remain in effect. The case didn't go away. All the Court of Appeals did was say that the termination is reversed, so all the previous orders about drug testing and things of that nature remain in effect. The Court had already ordered no reunification.

MS. KENDRICK: Your Honor, the no-reunification order was not appealed, at all, or even addressed, so I would assume that it is still in effect. I mean, with her given the chance, you know, she can do what she can do now and she has a new attorney. But until - I don't know it doesn't make a lot of sense.

THE COURT: I tell you what, I'm going to give Ms. Heimbaugh a chance to look into this. All of those briefs are in my office and you can have them all.

MS. HEIMBAUGH: All right. Because I need to see why the TPR was overturned. If it was overturned for something like no reunification services, then that argument's moot.

THE COURT: Well, let's put this out for three or four weeks and let Ms. Heimbaugh have an opportunity to go over all the documents and I'll give her all the briefs that I have in my office, as well as the mandate from the Court of Appeals.

The court continued the hearing until January 18, 2005, and announced that the hearing on that date would "be a hearing on whether or not there would be reunification." Before the hearing was adjourned, DHS advised the court that it would be filing a petition for no-reunification services or another petition for termination of parental rights, or both. The court announced that there would be no visitation between Kight and her children until after the January 18 hearing "because I think, depending on the outcome of that hearing, we'll either start fresh or we'll not start fresh ...." Six days later, on November 29, 2004, DHS filed another petition to terminate Kight's parental rights.

On February 3, 2005,[1] the court again convened to consider this matter. DHS announced that the purpose of the hearing was for the court to hear evidence on DHS's November 29, 2004, petition to terminate Kight's parental rights, while Kight argued that DHS's new termination petition should not be considered because reunification services had not been resumed as directed by this court's mandate, and that the termination petition should be dismissed. The court denied Kight's motion to dismiss the termination petition filed on November 29, 2004, and proceeded to hear evidence on it.

By orders signed February 10 and entered February 14, 2005, the Faulkner County Circuit Court granted DHS's November 29, 2004, petition, again ordering that Kight's parental rights to her two children be terminated. Kight appealed from those orders, arguing principally that the trial court had not followed the mandate of this court's June 30, 2004, opinion that reversed the trial court's termination of Kight's parental rights and directed that

[1] The January 18, 2005, hearing was continued at Kight's request because her mother was having surgery.

reunification services be continued. In *Kight v. Arkansas Department of Human Services*, ___ Ark. App. ___, ___ S.W.3d ___ (March 8, 2006) (*Kight II*), a three-judge panel of this court affirmed the trial court's second termination of Kight's parental rights. By a vote of four to two, this court has now decided to deny Kight's petition for rehearing. It is our denial of rehearing from which I dissent.

The reason for my dissent is quite simple: On June 30, 2004, we held that the trial court's decision to terminate Kight's parental rights to her two children was "clearly erroneous," and we remanded the case with specific instructions to the trial court to "continue reunification services." Instead of doing what we unambiguously directed it to do, the trial court held a hearing to examine the meaning of our decision. At that hearing, DHS's attorney made the absurd argument that our June 30, 2004, reversal of the termination of Kight's parental rights and our express direction to "continue reunification services" *did not* have the effect of reversing a pre-termination order of the trial court that had suspended reunification services to Kight.[2] Instead of ordering that reunification services be resumed pursuant to our mandate, the trial court decided that it should hold a hearing to decide "whether or not there should be reunification." Then, on the date scheduled for the "reunification" hearing, the court, instead of considering the issue of reunification services, proceeded to hear evidence, over Kight's objection, on DHS's second parental termination petition filed November 29, 2004. Following that hearing, the trial court again terminated Kight's parental rights to her two children.

The majority of this court acknowledges that the trial court is bound by our decision in *Kight I* as the law of the case. Nonetheless, even while expressly recognizing that the trial

[2] I have searched the record of both *Kight I* and *Kight II* but do not find an order of the trial court that suspended reunification services by DHS to Kight's children.

court declined to order the continuation of reunification services as required by our mandate, the majority has decided to affirm the trial court's second termination of Kight's parental rights.

The majority justifies its decision to disregard the law of the case by pointing out that Kight does not now challenge the sufficiency of the evidence upon which the trial court based its second decision to terminate her parental rights. I disagree that Kight was obligated to challenge the sufficiency of the evidence that resulted in the second termination of her parental rights in order to obtain a reversal of the trial court's decision. In *Wal-Mart Stores, Inc. v. Regions Bank Trust Department*, 356 Ark. 494, 497, 156 S.W.3d 249, 252 (2004), our supreme court, quoting from *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843), stated:

> The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the Supreme Court.

Furthermore, in *Dolphin v. Wilson*, 335 Ark. 113, 119, 983 S.W.2d 113, 116 (1998), our supreme court also cited with approval from 5 Am. Jur. 2d § 791 where it is stated that "[a]ny proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void."

Even more troubling is the majority's attempt to rationalize its decision by noting that Kight's children have been out of her home for more than three years and, therefore, "cannot be returned to the home in a reasonable amount of time," even though the majority observes that "the delay in this case is primarily attributable to ADHS and the trial court in erroneously terminating Kight's rights in the first place ...." The result of this reasoning by our court is that, simply by virtue of the lapse of time, DHS will ultimately prevail in every case in which

the trial court commits error that is reversed on appeal and DHS chooses to ignore our mandate on remand.

Simply put, upon our remand of this case to the trial court with directions to "continue reunification services," the trial court was without jurisdiction to do anything but to order the continuation of services by DHS with the goal of reuniting Kight with her children. The court was not empowered to examine "whether" reunification services should be provided, and clearly the court lacked jurisdiction to consider a new petition by DHS seeking to terminate Kight's parental rights. Under *Dolphin*, *supra*, any proceedings conducted by the trial court that were contrary to the mandate were null and void. Kight's appeal challenging the trial court's jurisdiction under the doctrine of the law of the case was sufficient to also challenge the validity of the court's orders that terminated her parental rights contrary to this court's June 30, 2004, mandate, without having to also challenge whether there was sufficient evidence to support the trial court's unauthorized action.

With this court's opinion in *Kight II*, coupled with our denial of Kight's petition for rehearing, the trial courts are now at liberty to ignore this court's mandates in parental-termination cases, the rule of the law of the case is dead, and trial courts are free to take whatever action they may deem appropriate, notwithstanding our mandates' specific directives to the contrary.

I would grant the petition for rehearing and again remand this case to the trial court with instructions to comply with the mandate in *Kight I,* pursuant to the law of the case. I am authorized to say that Judge Hart joins in this dissenting opinion.