COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1481 **Cir. Ct. No. 2006TP36**

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

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

WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CORY J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Cory J. appeals from an order terminating his parental rights to his daughter, Koryiana J. The circuit court found Cory an unfit parent on three grounds: that his daughter was a child in need of protection and services (CHIPS) for six months under WIS STAT. § 48.415(2), that he had abandoned her for three months under § 48.415(1)(a)2., and that he had abandoned her for six months under § 48.415(1)(a)3. Cory claims that each of these grounds is invalid because the court erred in making two statutorily-required factual findings. Regarding Koryiana's continuing CHIPS status, he submits that contrary to the circuit court's finding, the Waukesha County Department of Health and Human Services did not make "reasonable efforts" to provide court-ordered services. Regarding the abandonment grounds, Cory claims that he had "good cause" for failing to communicate with his daughter during the relevant periods. We find ample evidence in the record to support the court's finding that the Department made "reasonable efforts" to provide services to Cory, particularly in light of Cory's lack of cooperation with the Department. Because we uphold the termination on the continuing CHIPS grounds, we need not address the issue of "good cause," since it pertains only to the abandonment grounds.

¶2 Koryiana was born in December 2003 to Cory and Angela I. In October 2004, Koryiana and her young half-sister were left unattended in a bathtub, and Koryiana nearly drowned. At the hospital, Cory and Angela were both arrested on outstanding warrants, and so the Department took custody of the two girls and placed them in an undisclosed foster home. The Department also initiated CHIPS proceedings and, on March 21, 2005, the court found Koryiana in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

need of protection and services and ordered her foster-home placement continued. The CHIPS order provided Cory with seven conditions of return:

1. Show that you are interested in your child.
2. Show that you are interested in your child by becoming adjudicated as a father.
3. Have regular and successful visits with your child.
4. Have a safe, suitable and stable home.
5. Stay in touch and cooperate with your worker.
6. Complete a parenting assessment.
7. Complete a parenting education program/class.

Additional conditions were later added: that Cory attend a family assessment, that he complete an AODA (alcohol and other drug abuse) assessment and programs, that he complete a psychological evaluation and recommended follow-through, and that he attend a literacy program.

¶3 In July 2006, the Department filed a petition for the termination of Cory's and Angela's parental rights. The court held several days of hearings, at the conclusion of which it terminated Cory's parental rights on continuing CHIPS and abandonment grounds.[2]

¶4 A court may terminate parental rights based on continuing need of protection or services where it finds: (1) that the child has been adjudged CHIPS and placed outside the home pursuant to a court order containing termination warnings, (2) that the agency responsible for the child's care has made a

[2] Angela's parental rights to her two children were also terminated; her separate appeals are Nos. 2007AP1516 and 2007AP1517.

"reasonable effort" to provide the services ordered by the court, (3) that the child has remained placed outside the home for six months or more and the parent has failed to meet the conditions of return, and (4) that there is a substantial likelihood that the parent will not meet the conditions of return within nine months of the fact-finding hearing. WIS. STAT. § 48.415(2)(a)1.-3. On appeal, Cory has not challenged the court's findings that Koryiana was adjudged CHIPS and placed outside the home pursuant to an order containing the requisite warnings, that she was out of the home for more than six months and that he failed to meet the conditions for return, and that he was substantially likely not to do so within nine months. Rather, his sole contention related to the CHIPS ground for termination is that the Department failed to make a "reasonable effort" to provide him the services ordered by the court.

¶5 At the fact-finding hearing, the Department had the burden to show the facts necessary for termination by clear and convincing evidence. *See* ***Odd S.-G. v. Carolyn S.-G.***, 194 Wis. 2d 365, 375, 533 N.W.2d 794 (1995). The circuit court's finding that the Department put forth a "reasonable effort" is one of fact, and we will not overturn it unless it is clearly erroneous. *See* ***State v. Raymond C.***, 187 Wis. 2d 10, 14, 522 N.W.2d 243 (Ct. App. 1994) (old "diligent effort" standard presents a question of fact).

¶6 The statute defines "reasonable effort" as

> an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

WIS. STAT. § 48.415(2)(a)2.a. Cory claims that the Department did not make a reasonable effort to provide services because its efforts failed to account for the "characteristics of the parent or child" and "other relevant circumstances." He submits that his relevant characteristics are his "age, residence, intellectual limitations, illiteracy and financial resources." The section of Cory's brief devoted to this argument seems to be primarily directed at showing that the Department should have done more to facilitate visitation between Cory and Koryiana.[3] Specifically, Cory notes that he was incarcerated during a portion of the relevant period and states that he could not write to the Department to request visitation with his daughter. Thus, he claims, the Department should have sent the caseworker to visit him or set up a call between him and his daughter without him having to ask for it. Likewise, after Cory was released, the Department denied him visitation with his daughter; Cory again states that the Department "should have taken steps to set up telephone calls and supervised visits."

¶7 Cory does not explain how the Department's actions constitute a failure to make a reasonable effort to provide court-ordered services. We will assume that his argument relates to the part of the CHIPS order that specified that "visitation between Koryiana [and] both of her parents shall be supervised at the

[3] There is also some discussion of Cory's responsibility and the lack of "black marks" on his record as a parent. We will not comment on this claim except to note that we cannot see what it has to do with whether or not the Department made a reasonable effort to provide court-ordered services to Cory.

discretion of the Department" and to the condition of return calling for Cory to "have regular and successful visits" with Koryiana.[4]

¶8 The Department's caseworker testified that she denied Cory visitation of his daughter at first because he was incarcerated and afterwards because he failed to work on his conditions of return. Given that the CHIPS order explicitly placed visitation within the discretion of the Department, the Department's exercise of that discretion would not appear to constitute a lack of "good faith effort" to provide services.

¶9 But more importantly, even if we interpret the condition of return requiring Cory to have "regular and successful visits" with his daughter to constitute a "service ordered by the court," we agree with the circuit court that the Department made a reasonable effort to provide this service to Cory. Cory seizes on the "characteristics of the parent" part of the definition of "reasonable effort," and seems be claiming that the Department had to put forth *all* of the effort to make sure that Cory got the services he may have needed, regardless of Cory's actions. But the statutory definition of "reasonable effort," besides referring to the "characteristics of the parent" also takes into account the "level of cooperation of the parent." WIS. STAT. § 48.415(2)(a)2.a. Cory is asking us to reverse the circuit court's finding that the department put forth reasonable efforts because the

[4] We note that although Cory was incarcerated for some of the duration of the CHIPS order, this is not a case like ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845. In that case, the supreme court held that a parent's incarceration, in and of itself, could not support a finding of parental unfitness. ***Id.***, ¶49. The court further held that a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit. ***Id.*** The court in this case found that Cory had failed to meet numerous conditions of return, most of which had nothing at all to do with his brief incarceration.

Department did not go as far as Cory believes it should have to arrange for contact between him and his daughter. But in view of Cory's failure to cooperate with the Department's efforts, we cannot say that the Department's efforts were not reasonable. *See* ***Raymond C.***, 187 Wis. 2d at 15 (inquiry under previous "diligent effort" standard must consider the totality of the circumstances).

¶10 The record is rife with examples of Cory's failure to take advantage of the Department's assistance in meeting his conditions of return. He attended one session of a literacy class but never showed up again because, he claims, he did not receive as much tutoring as he had expected. He received eleven referrals to AODA treatment programs in both Waukesha and Milwaukee, but only signed up to participate on the day of the fact-finding hearing. He did not complete his parenting education program. He stayed in touch with his social worker only sporadically, despite her attempts to stay in touch with him. He did not complete a psychological evaluation, despite the fact that the Department made four referrals and gave him bus tickets for transportation. And, of course, all of these failures amounted to a failure to take advantage of visitation on the terms that the Department was offering. As the court noted, the social worker "was shepherding him through the process and it doesn't appear to be any lack of understanding of what he was supposed to do[,] it's just she could not get him to do the things he was supposed to do. Only Cory [J.] could do that."

¶11 Cory objects that to consider his behavior in the "reasonable effort" analysis is to shift the burden of proof to him, to require him to show that he made "reasonable efforts." But the burden on Cory was not a courtroom burden of production or persuasion—it was the Department that brought forth the testimony about his noncooperation—but one of action. The circuit court found that the reason Cory did not receive services is not because the Department did not try to

give them, but because Cory refused to take them. This finding is not clearly erroneous, and the statute plainly allows it to be taken into consideration in determining whether the Department's efforts were "reasonable." We therefore uphold the circuit court.

By the Court.—Order affirmed.

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