COURT OF APPEALS
DECISION
DATED AND FILED

January 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2408 **Cir. Ct. No. 2006TP25**

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

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

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RICHARD C., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Richard C., Jr. appeals from an order terminating his parental rights to Richard C. III (Ricky). Richard contends that the court lost competency to proceed when a court commissioner set the dispositional hearing on the underlying adjudication of Ricky as a child in need of protection or services beyond the statutory thirty-day time limit. Richard also contends that the TPR proceeding was tainted by improper references to termination and adoption in front of the jury. We hold that Richard's challenge to the CHIPS disposition is an improper collateral attack and that his request for discretionary reversal should be denied. We therefore affirm the order of the circuit court.

BACKGROUND

¶2 Ricky was born to Lolita V. on June 30, 2005. By consent decree on September 20, 2005, Richard was adjudicated the father.[2] Richard, who has been diagnosed with chronic schizophrenia and alcoholism, was placed under emergency detention at Aurora psychiatric hospital from November 27 to December 9, 2005. This detention followed Richard's call for help, where he reported that he was hearing voices telling him to kill Lolita, Ricky, and himself. Richard was subsequently placed in a supervised apartment pursuant to a WIS. STAT. ch. 51 commitment.

¶3 On December 6, 2005, Ricky was removed from the home due to Lolita's inability to care for him. A CHIPS petition was filed in Walworth county

[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.

[2] Ricky was placed outside of the home from July 25 to August 31, 2005. He was then returned home.

circuit court, pursuant to WIS. STAT. § 48.13(10). Circuit Court Commissioner David Reddy held a fact-finding hearing on February 27, 2006, and both parents admitted to the facts alleged in the petition. During the hearing, Commissioner Reddy acknowledged that the CHIPS dispositional hearing must be held within thirty days. The attorneys present checked calendars and indicated several dates they would not be available. Commissioner Reddy's clerk then contacted the circuit court judge's calendar clerk to obtain available dates. Both Lolita and Richard, by their attorneys, along with the guardian ad litem and the corporation counsel, agreed to "waive the time limits." Commissioner Reddy scheduled the CHIPS disposition for April 12, 2006.

¶4 Following the April 12 hearing, the circuit court signed a dispositional order placing Ricky outside of the home on grounds he was in need of protection or services. The order included several conditions of return for both the mother and the father. For example, Richard was to demonstrate an ability to manage his alcohol and drug issues and Lolita was to develop coping strategies to compensate for any identified cognitive limitations as they related to the ability to safely parent Ricky. Both parents were to demonstrate the ability to meet Ricky's developmental needs, to have successful family interactions, and to manage any identified mental health issues.

¶5 On December 28, 2006, the State filed a petition to terminate the parental rights of Richard and Lolita to their son, Ricky. As grounds for termination, the State alleged that Ricky was in continuing need of protection or services under WIS. STAT. § 48.415(2)(a)1. The matter was tried to a jury in May 2007 and, after four days of testimony, the jury found that grounds existed for termination. On June 26, following a dispositional hearing, the circuit court

entered an order terminating the parental rights of Richard and Lolita to their son, Ricky. Richard appeals.

DISCUSSION

Competency of the circuit court in CHIPS proceeding

¶6 At a May 9, 2007 motion hearing, Richard moved to dismiss the TPR petition on grounds that the court commissioner exceeded his powers and duties when he set the CHIPS dispositional hearing beyond the thirty-day time limit. He argued that the parties could not waive the time limit and that, nonetheless, court commissioners are not authorized to grant continuances or extensions. He renews these arguments on appeal. Specifically, he contends that the circuit court lost competency to proceed when the court commissioner set the dispositional hearing beyond the time limit mandated by WIS. STAT. § 48.30(6)(a).

¶7 The County responds that Richard cannot collaterally attack the circuit court's competency to proceed to disposition in the CHIPS matter by appealing from the TPR order. It directs us to ***Oneida County DSS v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652, for the proposition that "a judgment is binding on the parties and may not be attacked in a collateral action unless it was procured by fraud." Where the parties "had ample opportunity to litigate the trial court's competency" they are precluded from doing so in subsequent litigation. ***Schoenwald v. M.C.***, 146 Wis. 2d 377, 395, 432 N.W.2d 588 (Ct. App. 1988).

¶8 Accepting for purposes of argument that the court commissioner improperly granted a continuance beyond the thirty-day time limit and that the commissioner lacked the authority to order a continuance, we agree with the

County that Richard is not entitled to challenge the matter here. The TPR proceedings, though related, are distinct actions. A TPR petition does not automatically flow from a CHIPS disposition. When a CHIPS order is entered, the termination of parental rights is contingent on the future behavior of the parents and whether the County determines that the parents met conditions of return.

¶9 In ***Schoenwald***, we held that "because the parents could have litigated the trial court's competency to extend the dispositional order in 1986 and failed to do so either before the trial court at that time or by an appeal, they are precluded from raising the question in this litigation." ***Schoenwald***, 146 Wis. 2d at 396. Here, Richard never objected to the continuance at the CHIPS hearing; in fact, he stated that the extra time would be beneficial to him. Furthermore, Richard never appealed from the CHIPS order.[3] We conclude that Richard is now precluded from challenging the competency of the court at or after the dispositional phase of the CHIPS proceedings.

New trial in the interest of justice

¶10 Richard rests his next argument on two questions that his trial attorney asked during the fact-finding phase of the termination proceedings. The questions referenced Ricky's possible adoption and the termination of Richard's parental rights. Richard argues that, because the decision to terminate was not

[3] A CHIPS dispositional order issued pursuant to WIS. STAT. § 48.335(5) may be appealed as of right because it disposes of the entire matter in litigation as to one or more of the parties. *See* WIS. STAT. § 808.03(1); *see also* ***Schoenwald v. M.C.***, 146 Wis. 2d 377, 395 n.7, 432 N.W.2d 588 (Ct. App. 1988). Richard's appeal from the CHIPS order would have had to have been initiated within the time period specified in WIS. STAT. RULE 809.30.

before the jury, putting those questions to witnesses in front of the jury was error and requires a new trial in the interest of justice. Whether to grant a new trial in the interest of justice requires us to invoke our discretionary reversal power under WIS. STAT. § 752.35. We will reverse a final order if we determine that the real controversy has not been fully tried or if there has been a miscarriage of justice. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). We exercise this power only in exceptional cases. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

¶11 Richard first complains about the following question posed by his attorney to a witness for the County: "And certainly if this child's rights were terminated and there is an adoption and usually by a different person other than the temporary foster home, there would be yet another change that this child would go from his present placement to a new home?" Both the County's attorney and the guardian ad litem objected to the question but the court overruled them and requested further clarification from the witness. Richard next points to the following question his attorney asked of him: "In conclusion, Richard, is there anything else you would like to tell the jury why you do not feel that your parental rights should be terminated?" The guardian ad litem again objected and the question was rephrased. Richard asserts that the mention of the termination of his rights and the potential adoption of his child were impermissible because a jury decides only whether grounds exists for termination and the court subsequently decides the disposition. *Cf.* ***I.P. v. State,*** 157 Wis. 2d 106, 116-17, 458 N.W.2d 823 (Ct. App. 1990) (consideration of "bests interests of the child" improperly placed before the jury because best interests standard applies only at the dispositional stage of proceeding).

¶12 The County asserts that no testimony was received on the issue of termination or adoption, and therefore reversal under WIS. STAT. § 752.35 is unwarranted. *See* ***Cleveland***, 237 Wis. 2d 558, ¶21. It points out that if the mere mention of "termination of parental rights" warrants reversal, reversal would be required in all TPR cases that employ the pattern jury instructions. *See* WIS JI—CHILDREN 300. The County emphasizes that the alleged errors came in the form of questions from Richard's own attorney and, further, that the circuit court cured any possible jury confusion by instructing the jury as follows:

> Now I want to underline—and I think we have told you that this hearing is only part of the process that may result in the termination of parental rights. You will not be asked to decide if [the parents'] parental rights should be terminated. As I said, this is a fact finding process.
>
> Your responsibility then is to determine whether the grounds for termination as alleged in the petition have been proven. In doing so *you should not consider what the final result will be because we do not know*. I will have another hearing. I will hear other experts and then a decision will be made. (Emphasis added.)

¶13 We have reviewed the record and the arguments of the parties and ascertain no exceptional circumstances to warrant discretionary reversal. The court instructed the jury on its role in the proceedings and emphasized the difference between the fact-finding phase and the dispositional phase. The real issue in this case was tried and the errors complained of do not shake our confidence in the outcome. In any event, if error occurred, Richard's counsel invited it. We will not review invited error. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

CONCLUSION

¶14 Richard did not object to or appeal from the final CHIPS order and cannot now collaterally attack that order by seeking relief from the TPR order. Furthermore, Richard cannot complain about error he induced. His attorney's references to termination of parental rights and adoption were met with objections from other counsel and with clarification from the court to the jury. We therefore refuse to exercise our WIS. STAT. § 752.35 power to reverse.

By the Court.—Order affirmed.

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