COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2009

David R. Schanker
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.

Appeal Nos. **2008AP2704**
2008AP2705
2008AP2706
2008AP2707
2008AP3012
2008AP3013
2008AP3014
2008AP3015

Cir. Ct. Nos. **2007TP65**
2007TP66
2007TP67
2007TP68
2007TP65
2007TP66
2007TP67
2007TP68

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

NO. 2008AP2704

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MERLIN W.,

RESPONDENT-APPELLANT,

RAE ANN W.,

RESPONDENT.

NO. 2008AP2705

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MERLIN W.,

RESPONDENT-APPELLANT,

RAE ANN W.,

RESPONDENT.

NO. 2008AP2706

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MERLIN W.,

RESPONDENT-APPELLANT,

RAE ANN W.,

RESPONDENT.

NO. 2008AP2707

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MERLIN W.,

RESPONDENT-APPELLANT,

RAE ANN W.,

RESPONDENT.

NO. 2008AP3012

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RAE ANN W.,

RESPONDENT-APPELLANT,

MERLIN W.,

RESPONDENT.

NO. 2008AP3013

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RAE ANN W.,

RESPONDENT-APPELLANT,

MERLIN W.,

RESPONDENT.

NO. 2008AP3014

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RAE ANN W.,

RESPONDENT-APPELLANT,

MERLIN W.,

RESPONDENT.

NO. 2008AP3015

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RAE ANN W.,

RESPONDENT-APPELLANT,

MERLIN W.,

RESPONDENT.

APPEALS from orders of the circuit court for Brown County: LARRY JESKE, Judge. *Affirmed; attorney sanctioned.*

¶1 PETERSON, J.[1] Merlin W. and Rae Ann W. appeal orders terminating their parental rights to Delylla W., Shawndel W., Merlin W. III, and Marlie W. They argue there was insufficient evidence to support the orders. We disagree and affirm. We further sanction Rae Ann's attorney, Jesse Johansen, for falsely certifying to this court his brief conformed to the requirements of WIS. STAT. RULE 809.19(8)(b) and (c).

BACKGROUND

¶2 Merlin and Rae Ann have four children: Delylla, Shawndell, Merlin III, and Marlie. In August 2005, the circuit court entered CHIPS (child in need of protection or services) orders, finding the children were "receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized." WIS. STAT. § 48.13(8). At the time, both Merlin and Rae Ann were incarcerated. The CHIPS orders placed the children in foster care, and enumerated several conditions necessary for Merlin and Rae Ann to be reunited with the children. Among other things, the orders required Merlin and Rae Ann to complete any recommended alcohol or other drug abuse (AODA) programs, cooperate with their social workers, and establish a safe, suitable, and stable home.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Rae Ann was released from jail shortly after the CHIPS orders were entered and initially lived with various family members and in shelters. During this time, she was involved in a domestic altercation with her sister and was later convicted of battery. In July 2006, with the assistance of the Brown County Human Services Department, Rae Ann obtained subsidized housing in a three bedroom rental house, which she shared with another woman. In February 2008 she was convicted of armed robbery after hitting a man in the head with a hammer after helping her housemate engage in an act of prostitution. Rae Ann was sentenced to eight years' incarceration.

¶4 Merlin remained incarcerated until July 2007. Less than half a year later, he was reincarcerated because he tested positive for marijuana on three separate occasions and failed to report to his probation officer.

¶5 On June 26, 2007, the Department filed petitions to terminate Merlin and Rae Ann's parental rights, alleging the children were in continuing need of protection or services under WIS. STAT. § 48.415(2). The petition also stated the federal Indian Child Welfare Act (ICWA) applied to the children. Merlin and Rae Ann are both members of the Menominee Tribe.

¶6 A jury trial was held in March 2008. Amy Dingeldein, the Department social services worker assigned to the case, testified about the services she had provided to the parents. Among other things, she testified she regularly maintained contact with Merlin in prison, arranged monthly phone calls between Merlin and his children, and investigated AODA programs available in the various

facilities where he was housed. She testified she helped Rae Ann obtain subsidized housing, gave her employment leads, and arranged AODA counseling and parenting classes for her.

¶7 Barbara Grignon of Menominee Tribal Social Services testified about the Tribe's involvement in the matter. She testified that at the Department's request she attempted to find Menominee foster homes for the children. She also testified that the Tribe supported the Department's petition to terminate Merlin and Rae Ann's parental rights, and that she believes the children would suffer serious emotional or physical damage if returned to their parents.

¶8 The jury found grounds existed for terminating the parental rights of both Merlin and Rae Ann. It also found the Department had satisfied the requirements of ICWA. In August 2008, the court issued a decision and orders terminating Merlin and Rae Ann's parental rights. The parents filed separate appeals which we consolidated on our own motion.

DISCUSSION

¶9 WISCONSIN STAT. § 48.415(2) governs the involuntary termination of parental rights on the basis of a child being in need of continuing protection or services. The statute requires proof that a child has been removed from the parental home under a CHIPS order and the parents have failed to meet the conditions established for the safe return of the child.

¶10 This case also involves the ICWA. The ICWA requires, among other things, "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family," and the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § § 1912(d) and (f).

¶11 Merlin and Rae Ann do not challenge the finding that grounds exist to terminate their parental rights under WIS. STAT. § 48.415(2). Instead, they challenge the Department's compliance with the ICWA. They argue there was insufficient evidence to prove: (1) the Department made active efforts to prevent the breakup of the Indian family; (2) the return of their children would likely result in serious emotional or physical damage to the children; and (3) the Department attempted to place the children in foster care with Menominee families.

¶12 When reviewing a challenge to the sufficiency of the evidence, we consider all credible evidence and reasonable inferences from the evidence in the light most favorable to the verdict. WIS. STAT. § 805.14(1). We will affirm unless there is no credible evidence to sustain the verdict. ***Id.***

1. Active Efforts

¶13 All of the parties agree the following passage from an Alaska Supreme Court case provides a useful illustration of what constitutes "active efforts" under 25 U.S.C. § 1912(d):

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it

> to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring the plan be performed on its own.

A.A. v. State Dept. of Family & Youth Servs., 982 P.2d 256, 261 (Alaska 1999). The parties disagree, however, about the application of this standard to the facts. We agree with the Department that there is credible evidence its efforts were sufficient under the ICWA.

¶14 At the outset, we note the incarceration and reincarceration of both parents for substantial periods of time between the CHIPS orders and the termination hearing significantly limited the services the Department could provide them.

> A parent's incarceration significantly affects the scope of the active efforts that the State must make to satisfy the statutory requirement. While "[n]either incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts," the practical circumstances surrounding a parent's incarceration—the difficulty of providing resources to inmates generally, the unavailability of specific resources, and the length of incarceration—may have a direct bearing on what active remedial efforts are possible. Thus, while the State cannot ignore its ICWA duties merely because of [the parent's] incarceration, [that] incarceration is a significant factor in our evaluation of the adequacy of the State's efforts in this case.

Id. (citation and footnotes omitted). Accordingly, we review the evidence in light of the challenges posed by Merlin's and Rae Ann's various periods of incarceration during the CHIPS orders.

¶15 Merlin argues social worker Dingeldein "merely monitored programs available for him in prison rather than requesting the prison make them available for him or recommending he participate in them." This argument is without basis.

¶16 Despite Merlin's incarceration, both Dingeldein and Merlin testified Dingeldein regularly maintained contact with him in prison, kept him apprised of the conditions necessary for the return of his children, sent him forms so that he could inform her of his activities, contacted the prison system to obtain information about available programs, and coordinated monthly telephone calls with his children. Further, the evidence demonstrates Merlin's lack of cooperation and behavioral problems substantially impeded Dingeldein's efforts. Merlin testified he refused to complete an AODA assessment at one correctional facility because it was not a quality program in his view. Instead, he appears to suggest he "g[ot] in a little bit of trouble" because he wanted to be transferred to the Stanley Correctional Institute, where there were no treatment programs. He refused to sign a release permitting Dingeldein to access his institutional records, failed to return the condition forms to Dingeldein, and sometimes missed phone calls with his children due to being placed in segregation for bad behavior. Once released, Merlin underwent an AODA assessment, but did not comply with his treatment plan. He was briefly placed into custody after failing two drugs tests, and reincarcerated after failing a third test less than a month later.

¶17 Rae Ann's argument appears to be that Dingeldein's assistance to her was not tailored to the ICWA's requirement that the Department make active

efforts to prevent the breakup of the family. The evidence presented at the hearing simply does not bear this out.

¶18 Dingeldein's testimony established she undertook the following actions to help Rae Ann meet the conditions of the CHIPS orders. Among other things, she assisted Rae Ann in applying for subsidized housing by helping her obtain her family's birth certificates and social security cards, and by making telephone calls to the housing case manager to speed up the process. She informed Rae Ann of job postings and gave her bus passes for transportation. She also referred Rae Ann to various institutions for psychological assessments, AODA treatment, and parenting programs. She then kept in touch with Rae Ann's instructors and counselors regarding Rae Ann's progress.

¶19 Further, as with Merlin, Rae Ann's incarceration inhibited the Department's ability to provide her with rehabilitative services. Rae Ann testified that since the CHIPS order, she had been back in jail three or four times. Also as with Merlin, Dingeldein's efforts were complicated by Rae Ann's lack of cooperation. Dingeldein testified that she had difficulty keeping track of Rae Ann, and that Rae Ann failed to show up for psychological evaluations, did not complete AODA treatment, and missed several visits with her children. Thus,

there is more than ample evidence to support the conclusion that the Department made active efforts to prevent the breakup of the family.[2]

2. Likelihood the children would suffer serious damage if returned to their parents

¶20 The ICWA proscribes the termination of parental rights in the absence of a "determination, supported by evidence beyond a reasonable doubt, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (emphasis added). Merlin and Rae Ann argue Grignon was not qualified to testify about her opinion that the children would likely suffer serious damage if returned to their parents. Thus, they argue the Department did not present sufficient evidence to prove the return of their children would be harmful.

¶21 Merlin and Rae Ann waived this argument because they failed to object to the admissibility of the testimony at trial. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Even if the argument had not been waived, Grignon was qualified to testify that the children would likely suffer serious damage if returned to their parents.

[2] Rae Ann's argument devolves into speculation toward the end of her brief. She argues, without citation, that "[t]he intent of Brown County was to terminate the rights of Rae Ann from the beginning of these proceeding[s]." WISCONSIN STAT. § 809.19(1)(e) requires the argument section of an appellate brief contain citations to the parts of the record relied upon.

¶22 Although the ICWA does not define qualified expert witness, the Bureau of Indian Affairs (BIA) has issued non-binding guidelines addressing this issue:

> Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
>
> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (1979).

¶23 Grignon testified she has a bachelor of science degree, is an elder with the Menominee Tribe, has been a social worker with the Tribe for sixteen years, and is regularly involved in reviewing and making recommendations regarding the rights of parents of Menominee children. She further testified she is familiar with the customs, culture, and childrearing practices of the Menominee Tribe, and has testified in the past as an expert witness under the ICWA. These qualifications fit squarely within the guidelines established by the BIA.

¶24 The testimony of Merlin and Rae Ann's own witness, Dr. Frank Cummings, provides further evidence supporting Grignon's conclusion. On cross-examination Cummings was asked: "[I]f the children were returned to the parents today, where they live, would there be serious physical or emotional harm resulting to the children?" Cummings replied, "I would think so, yes."

3. Efforts to place the children with Menominee families

¶25 Merlin and Rae Ann argue the Department made insufficient efforts to place the children in foster care with a Menominee family in accordance with the preference established by the ICWA. However, making these efforts is not a criterion for determining whether a parent's rights may be terminated. Merlin and Rae Ann are correct that the ICWA requires a state to give preference in foster care placements to relatives, other members of the tribe, and other Indian tribes. 25 U.S.C. § 1915(b). However, the state agency's compliance with these adoptive preferences is irrelevant to whether the parent's rights may be terminated.

¶26 Even if it were relevant, the evidence shows the Department worked closely with Grignon to find appropriate foster placements. The record contains several letters describing Grignon's efforts to place the children with relatives or other Menominee families. In a July 2005 letter, she explained that she contacted Merlin's relatives, but each was unwilling, unable, or unsuitable. In a letter to Rae Ann, Mary Husby, the director of Menominee Tribal Social Services, wrote that (1) Grignon's investigation of relatives had been unsuccessful; (2) all of the foster homes on the reservation were full; and (3) there were no foster homes available

with other tribes. Grignon again wrote the Department in 2006, explaining that while the Tribe would like to place the children, "we are unable to assist with locating placement of these children here in the community. We lack the resources."

4. Adoptability

¶27 Merlin makes one additional argument unrelated to the ICWA: that the court's conclusion Shawndel was adoptable was speculation and not supported by the record.[3] This argument is untenable. First, as Merlin concedes, the likelihood of adoption is merely one factor for courts to consider. Second, during the disposition hearing, Shawndel's foster parent acknowledged she might be an adoption resource. Thus, not only is a finding on the likelihood a child will be adopted not outcome determinative, but even if it were, the court's conclusion here was supported by sufficient evidence.

5. Rae Ann's brief

¶28 Attorney Jesse Johansen submitted a brief on behalf of Rae Ann that was largely unhelpful to this court. The brief was essentially a copy of the brief submitted by Merlin's attorney. Attorney Johansen's paraphrasing, reordering of paragraphs, and rewording of sentences appears to be a representation to this court

[3] WISCONSIN STAT. § 48.426(3) directs courts to consider numerous factors when determining whether to terminate parental rights. Among these considerations is the likelihood a child will be adopted if the parent's rights are terminated. WIS. STAT. § 48.426(3)(a).

that the brief he prepared is unique from the one submitted earlier by Merlin's attorney. Attorney Johansen's brief was also riddled with typographical and grammatical errors, compounding the court's difficulty in discerning a coherent argument. This demonstrates a marked disregard for the time and attention required by the court to properly consider each appeal.

¶29 Attorney Johansen's brief also contains a false certification. He certified the "brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has 54 pages." WISCONSIN STAT. RULE § 809.19(8)(c)(1) specifies a brief in monospaced font shall not exceed fifty pages. Moreover, Attorney Johansen's brief is not in monospaced font, but in proportional serif font. When proportional serif font is used, counsel must certify the length does not exceed 11,000 words. WIS. STAT. RULE 809.19(8)(c)(1) and (8)(d).

¶30 We have previously observed that "filing a false certification with this court is a serious infraction." ***State v. Bons***, 2007 WI App 124, ¶24, 301 Wis. 2d 227, 731 N.W.2d 367. Doing so not only violates WIS. STAT. RULE 809.19(8)(d), it also violates SCR 20:3:3(a). This rule provides, "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal." Attorney Johansen attested that he complied with the rules of appellate procedure when he did not. Such an attestation is a false statement. ***Bons***, 301 Wis. 2d 227, ¶24.

¶31 WISCONSIN STAT. RULE 809.83(2) provides that failure to follow the rules of appellate procedure is grounds to impose a penalty on counsel or take any other action the court considers appropriate. We sanction Attorney Johansen and direct that he pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Orders affirmed; attorney sanctioned.

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