COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
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 No. 2014AP761 **Cir. Ct. No. 2012TP300**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

QUEENTESTA H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

¶1 FINE, J. Queentesta H. appeals the order terminating her parental rights to Majesty Q. H., her daughter. The order was entered after a jury found on two special-verdict forms, as material, that: (1) (a) Majesty was a child in

continuing need of protection or services, (b) Queentesta H. did not "meet the conditions established for the safe return" of Majesty to Queentesta H.'s home, and (c) there was "a substantial likelihood that Queentesta [H.] will not meet these conditions within the nine-month period following the conclusion" of the termination-of-parental-rights hearing; and (2) Queentesta H. had abandoned Majesty by not visiting or communicating with her "for a period of three months or longer." The trial court answered "yes" to the following first questions on each of the verdict firms:

> *First Verdict Form*: "Has Majesty [] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders *containing the termination of parental rights notice required by law*?"
>
> *Second Verdict Form*: "Was Majesty [] placed, or continued in a placement, outside Queentesta [H.]'s home pursuant to a court order which *contained the termination of parental rights notice required by law*?"

(Emphasis added.) The only issue Queentesta H. raises on this appeal is whether the trial court erred by answering the first question on each of the special verdict forms rather than submitting those questions to the jury because, Queentesta H. contends, a jury should have determined whether the notices referred to in the two questions had "the termination of parental rights notice required by law." She does not argue that any other finding made by the trial court's answer to those questions was error. Stated another way, she does not contest on this appeal that there was any dispute that: (1) Majesty *had* "been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders"; or (2) Majesty *was* "placed, or continued in a placement, outside Queentesta [H.]'s home pursuant to a court order." Her only objection on this appeal is that the trial court should have

let the jury determine whether the court orders had "the termination of parental rights notice required by law." We affirm.

I.

¶2 As both parties recognize, the State must warn parents whose children are removed from their custody that not complying with conditions for the safe return of the children could lead to the termination of parental rights to the children. The statute on a child in need of protection or services provides, as material:

> **(1)** Whenever the court orders a child to be placed outside his or her home, … or denies a parent visitation because the child … has been adjudged to be in need of protection or services … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation.
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home or denies visitation under sub. (1) shall notify the parent or parents … of the information specified under sub. (1).

WIS. STAT. § 48.356. The statute for a finding of "abandonment" similarly requires "[t]hat the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2)." WIS. STAT. § 48.415(1)(a)2.

¶3 The parties agree that Majesty was removed from Queentesta H.'s home twice with court orders that purported to comply with these provisions: A court order dated November 1, 2011, and, following Majesty's return to Queentesta H.'s home, a court order dated April 2, 2012. Queentesta H. does not

argue on this appeal that either the circuit court's oral warnings or the November 1, 2011, written notice did not comply with the statutes. Rather, Queentesta H. contends that the April 2, 2012, written order was not sufficiently specific to give fair warning of what she had to do to regain Majesty's custody.

¶4 The forms are two printed pages each and are headed: "Notice Concerning Grounds to Terminate Parental Rights." (Bolding omitted.) Each form has the same thirteen major groupings broken down into subgroups. The major groupings are:

- "Abandonment."
- "Continuing Need of Protection or Services."
- "Continuing Need of Protection or Services (Unborn child)."
- "Failure to Assume Parental Responsibility."
- "Continuing Parental Disability."
- "Continuing Denial of Periods of Physical Placement or Visitation."
- "Child Abuse."
- "Relinquishment."
- "Incestuous Parenthood."
- "Homicide or Solicitation to Commit Homicide of Parent."
- "Parenthood as a Result of Sexual Assault."
- "Commission of a Serious Felony Against One of Your Children."

- "Prior Involuntary Termination of Parental Rights to Another Child."

(Bolding omitted.) To the left of each category group is a box for a checkmark or an "x." There are also boxes in some of the subgroups. The November 1, 2011, "Notice Concerning Grounds to Terminate Parental Rights" (bolding omitted) has the following boxes checked:

- "Abandonment" (bolding omitted) and two of the subgroups, which explain the applicable acts that make up "abandonment": "You have failed to visit or communicate with your child for: three months or longer after your child has been placed, or continued in a placement outside your home by a court order." (Formatting altered.)

- "Continuing Need of Protection or Services" (bolding omitted), with one of the two subgroups also checked, which explains the applicable acts that make up "continuing need of protection or services."

- "Failure to Assume Parental Responsibility" (bolding omitted) and two lines without check boxes that explain the applicable acts that make up "failure to assume parental responsibility."

¶5 As noted, Queentesta H. does not contend that the November notice did not comply with the statutes. Rather, she complains that the notice dated April 2, 2012, did not comply with the statutes because, she argues, every check box was marked with an "x" even though many of the groups and subgroups had nothing to do with her relationship with Majesty. Thus she contends that the trial court erred when it answered "yes" to the first question on each of the two verdict

forms rather than let the jury answer those questions because the April notice was the last notice she got before commencement of this termination-of-parental-rights case.

¶6 When the trial court asked Queentesta H.'s trial lawyer whether she objected to the State's request that the trial court answer "yes" to the verdicts' first questions, the lawyer responded in full:

> Your Honor, I'm going to oppose that motion. I think if we are giving the jury a directed verdict form, that they should have to answer all of the questions themselves and have discussions about all the answers; because I think that it could lead to them being confused, or at least somebody being unclear if the Court answers any questions. So I would ask the Court to just allow the jury to decide all of the questions on the special verdict forms.

¶7 Queentesta H. makes three arguments on appeal in support of her umbrella contention that the trial court erred when it answered "yes" to those two questions: (1) the notice's warnings were "not legally sufficient"; (2) the notice's warnings "were inherently confusing and did not satisfy the requirements of due process"; and (3) the supreme court "has not sanctioned the granting of a directed verdict on an element" in a termination-of-parental-rights case. (Uppercasing and bolding omitted.) We address these contentions in turn.

II.

A. *Legal Sufficiency of the April 2, 2012, Warning.*

¶8 As we have seen, Queentesta H. did not, and does not on appeal, argue that the November 1, 2011, notice, was legally insufficient. Rather, she focuses on the April warning, which she says gave her *too* much information with scenarios that were not applicable to her and Majesty. ***Cynthia E. v. LaCrosse***

County Human Services Dep't, 172 Wis. 2d 218, 227–228, 493 N.W.2d 56, 60–61 (1992), where a similar contention was made, defeats her argument:

> To comply with sec. 48.356(2), the written orders need only have contained the same information as the oral notice under sub. (1) contained. At the dispositional and extension hearings, the court orally informed Cynthia E. that her parental rights could be terminated if her children remained in continuing need of protection or services. Cynthia E. does not assert that this oral notice failed under sub. (1).
>
> The written orders contained the same information. The "Warning to Parents" attached to the written dispositional and extension orders contained a summary of sec. 48.415(2), Stats., in language a lay person could understand. That warning told Cynthia E. she could lose her parental rights if her children remained in continuing need of protection or services. To be sure, the warning contained more. Besides containing notice of continuing need of protection or services, the warning contained notice of abandonment, continuing parental disability, continuing denial of physical placement, and child abuse. But, even accepting Cynthia E.'s argument that continuing need of protection or services is the "specific" applicable ground required under sec. 48.356(1), Stats., the fact that the written orders contained more than that does not mean the orders did not comply with sec. 48.356(2). Section 48.356(2) does not say written orders shall contain the information specified in sub. (1) and nothing more. Because sec. 48.356(2) is unambiguous, we cannot look beyond its words and infer that the legislature would have wanted us to read it that way.

Here, too, Queentesta H. did not before the trial court, and does not on appeal, contend that she received deficient oral warnings. Moreover, as Queentesta H. concedes, the November 1, 2011, order was consistent with her view of its legal sufficiency, and that order focused on abandonment in addition to the child-in-need-of-protection-or-services ground. Thus, the November notice also sufficed, at least for the "abandonment" ground for the notice requirement in WIS. STAT. § 48.415(1)(a)2 in this termination-of-parental-rights case. *See* ***Rock County***

Dep't of Social Services v. K.K., 162 Wis. 2d 431, 435, 469 N.W.2d 881, 883 (Ct. App. 1991) ("We conclude that, in termination cases for abandonment under sec. 48.415(1), Stats., only a single order need include the warnings.").

B. *Due Process*.

¶9 Queentesta H. also argues on appeal that the excess information provided by the April 2, 2012, warning was, to use the words in her main appellate brief, "inherently confusing and did not satisfy the requirements of due process." (Uppercasing and bolding omitted.) Yet, she did not raise that issue before the trial court, which could have taken testimony to determine whether Queentesta H. was confused, and if so, to what extent. Significantly, as Queentesta H. notes in her appellate briefs, ***Cynthia E.*** recognized that an argument could be made, if appropriate, that the notice gave so much information that it could be confusing. *See* ***Cynthia E.***, 172 Wis. 2d at 230, 493 N.W.2d at 62. Despite this, there is nothing in the Record that supports a view that Queentesta H. *was* confused by the April 2, 2012, notice. Thus, this case is paradigm for applying the general rule that we will not decide an appeal on grounds that were not asserted before the trial court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997). We apply it here.

C. *Directed Verdict*.

¶10 A trial court may grant a directed verdict in a termination-of-parental-rights case "'where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.'" ***Door County Dep't of Health & Family Services v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999) (quoted source omitted). Moreover, "[s]ummary judgment on the existence of grounds for

termination is proper, in appropriate cases, where there is no genuine issue of material fact in dispute regarding the grounds and the moving party is entitled to judgment as a matter of law." ***Racine County Human Services Dep't v. Latanya D.K.***, 2013 WI App 28, ¶17, 346 Wis. 2d 75, 91, 828 N.W.2d 251, 258–259. Given the law we have already set out in Part II. A., no reasonable and impartial jury could reach any conclusion but that "yes" should be the answer to the first questions in each of the special verdicts. Thus, the trial court did not err in granting a directed verdict on those elements. But, as we have seen, Queentesta H. argues that the Wisconsin supreme court has not sanctioned such a procedure.

¶11 Queentesta H. relies on ***Walworth County Dep't of Health & Human Services v. Andrea L. O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168, which upheld a jury's verdict underlying the termination of Andrea L. O.'s parental rights. There, the lawyers stipulated in open court that she had received the requisite notices under WIS. STAT. §§ 48.356(2) and 48.415(1), but the trial court submitted the question to the jury anyway. ***Andrea L. O.***, 2008 WI 46, ¶¶2–3, 309 Wis. 2d at 163–164, 749 N.W.2d at 170. Significantly, ***Andrea L. O.*** not only approved of ***Scott S.***, *see* ***Andrea L. O.***, 2008 WI 46, ¶37, 309 Wis. 2d at 175–176, 749 N.W.2d at 176, but also opined that where an element is "expressly provable by the official documentary evidence" that element may be taken from the jury, ***id.***, 2008 WI 46, ¶¶40–41, 309 Wis. 2d at 176–177, 749 N.W.2d at 176. Thus, Queentesta H.'s representation that the supreme court "has not sanctioned the granting of a directed verdict on an element" in a termination-of-parental-rights case unless the parties have so stipulated, seeks a bridge too far.

¶12 Queentesta H. relies mainly on the concurrence in ***Andrea L. O.***, which relies on the concurring judge's earlier dissent. *See* ***id.***, 2008 WI 46, ¶64, 309 Wis. 2d at 184, 749 N.W.2d at 180 (Prosser, J., concurring). Queentesta H.

also relies on the Majority's footnoted response to the concurrence. That footnote, however, merely observed that the Majority did not decide what the concurrence said it had decided. *See* ***id.***, 2008 WI 46, ¶41 n.6, 309 Wis. 2d at 177 n.6, 749 N.W.2d at 176 n.6. In any event, ***Scott S.*** and ***Latanya D.K.*** are still good law, and the trial court did not err in following ***Scott S.***

By the Court.—Order affirmed.

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