COURT OF APPEALS
DECISION
DATED AND RELEASED

January 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-2967
95-2968
95-2969

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

No. 95-2967

IN THE INTEREST OF ALYCIA V. M. E.
a person under the age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANGEL E.,

Respondent-Appellant,

DAVID E.,

Respondent.

No. 95-2968

IN THE INTEREST OF DYLAN J. D. E.
a person under the age of 18:

Nos. 95-2967
95-2968
95-2969

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANGEL E.,

Respondent-Appellant,

DAVID E.,

Respondent.

No. 95-2969

IN THE INTEREST OF DESTINIE S. L. E.
a person under the age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ANGEL E.,

Respondent-Appellant,

DAVID E.,

Respondent.

APPEALS from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(e), STATS.[1] Angel E. appeals from an order terminating her parental rights to her children, Alycia, Dylan and Destinie. The termination followed a trial in which a jury determined that grounds existed for termination based upon continuing need of protection or services under § 48.415(2), STATS.[2] Angel presents the following issues on appeal: (1) whether her due process rights were violated because she was inadequately warned of the grounds upon which her parental rights could be terminated; and (2) whether § 48.415(2)(c) is unconstitutional. We conclude that Angel was denied due process because she received inadequate warnings. We decline, however, to address the constitutionality of § 48.415(2)(c) because Angel has raised that challenge for the first time on appeal.[3] Accordingly, we reverse and remand for a new trial.

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[1] This appeal has been expedited. RULE 809.107(6)(e), STATS. We consolidated this appeal by order dated November 24, 1995.

[2] Section 48.415(2), STATS., provides:

> Continuing need of protection or services may be established by a showing of all of the following:
>
> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders ....
>
> (b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders ... and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

[3] *See* ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 171, 288 N.W.2d 129, 138-39 (1980) (generally we do not review issues raised for the first time on appeal).

BACKGROUND

Angel is the mother of three minor children, Alycia, Dylan and Destinie. A dispositional order finding Alycia in need of protection and services was entered in September 1991. That order was extended in September 1992, September 1993, and in October 1994. Dispositional orders finding Dylan and Destinie in need of protection and services were entered in August 1993. Those orders were extended in August 1994.

When the trial court entered the 1991, 1992 and 1993 dispositional orders or extensions, it warned Angel of the grounds for terminating her parental rights as the law existed before the legislature amended § 48.415(2)(c), STATS.,[4] in 1993. Pursuant to the former statute, the court gave Angel the following warning:

> The parents are hereby notified that grounds may exist for the termination of their parental rights to the child if the child remains outside the home pursuant to this order and any subsequent orders;
>
> A. And the parents fail to visit or communicate with the child for a period of six months or longer; or
>
> B. For a cumulative total period of one year or longer, if the parents substantially neglect, willfully refuse, or are unable to meet the conditions established for the return of the child to the home, if there is a substantial likelihood that the parents will not meet these conditions in the future, and if the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.

[4] Section 48.415(2)(c), STATS., was amended effective May 5, 1994, by 1993 Wis. Act 395, § 25.

The August and October 1994 extensions, however, were entered after the legislature amended § 48.415(2)(c), STATS. Pursuant to this amendment, the trial court warned Angel that grounds for termination may exist if she "failed to demonstrate substantial progress toward meeting the conditions established for the return of the child[ren] to the home and there is a substantial likelihood that [she] will not meet these condition within the 12-month period following the termination of parental rights (TPR) fact-finding hearing."

In December 1994, La Crosse County filed petitions to terminate Angel's parental rights to Alycia, Dylan and Destinie, alleging that the children were abandoned and in continuing need of protection or services. A two-day trial was held in which much of the testimony pertained to Angel's behavior before she was warned of the new grounds for termination. The jury was instructed to determine if grounds for termination existed under the amended statute and found that the children were in continuing need of protection and services. At a later hearing, the trial court accepted the jury's verdict, found Angel to be unfit, and concluded that termination was in the best interest of the children. Angel appeals.

DUE PROCESS

As an initial matter, the guardian ad litem argues that Angel waived her right to review because Angel did not object to the jury instructions at trial. *See* ***State v. Schumacher***, 144 Wis.2d 388, 408 n.14, 424 N.W.2d 672, 680 (1988) (court of appeals lacks the power to review errors when a party fails to object at trial). But Angel did object to the jury instruction when she offered alternative instructions for the grounds for terminating her parental rights. Implicit in a request for one instruction is an objection to a differing one. Consequently, we conclude that she did not waive her right to have this issue reviewed.

Turning to the merits of the appeal, whether Angel was denied due process is controlled by ***In re Jason P.S.***, 195 Wis.2d 855, 537 N.W.2d 47 (Ct. App. 1995). There, we held that a person is deprived of parental rights without due process of law when the parent is warned that such rights could be

terminated on the grounds stated in § 48.415(2)(c), STATS., before its 1993 amendment, but whose rights are terminated on the grounds provided in the new § 48.415(2)(c).

Under § 48.356, STATS., a trial court has a duty to warn a parent of any grounds for termination of parental rights. The purpose of the court's duty to warn is to give a parent every possible opportunity to remedy the situation. ***In re Jeremiah A.***, 194 Wis.2d 628, 645, 534 N.W.2d 907, 913 (Ct. App. 1995). This is so because:

> the power of the state to terminate the parental relationship is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised. The parental right is accorded paramountcy in most circumstances and must be considered in that light until there has been an appropriate judicial proceeding demonstrating that the state's power may be exercised to terminate that right.
>
> It is apparent that the Wisconsin legislature has recognized the importance of parental rights by setting up a panoply of substantive rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well considered, fact-finding process utilizing all the protections afforded by the statutes unless there is a specific, knowledgeable, and voluntary waiver.

In re M.A.M., 116 Wis.2d 432, 436-37, 342 N.W.2d 410, 412-13 (1984) (footnote omitted).

In ***Jason***, we noted that the 1993 amendment to § 48.415(2)(c), STATS., changed the type of conduct for which termination could proceed. Under the old statute, a parent faced termination for culpable conduct or for his

or her inability to meet the conditions established for the return of the children to the home. Under the amended statute, a parent faces termination if he or she fails to demonstrate substantial progress toward meeting the conditions established for the children's return. The amendment eliminates the reasons why a parent has failed to make substantial progress. This change in § 48.415(2)(c) is not merely one of degree, "[i]t is a change in quality of the very nature of the acts leading to termination." ***Jason***, 195 Wis.2d at 864, 537 N.W.2d at 50. As we said in ***Jason***:

> The change in the type of conduct for which termination is possible changes the burden on the State. The ground under the new law is far easier to establish than the grounds under the old law. Under the new law, the ground for termination is purely objective: whether there has been a lack of substantial progress. Under the old law, the grounds are more stringent and are partly subjective.

Id. at 864, 537 N.W.2d at 51.

When the State warns a parent that his or her parental rights may be terminated because of the parent's future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure. ***Jason***, 195 Wis.2d at 863, 537 N.W.2d at 50. Angel's trial was held under the amended statute. Thus, the issue was whether Angel had failed to demonstrate substantial progress toward meeting the conditions established for the return of the children to her home and whether there was a substantial likelihood that she would not meet these conditions within the twelve-month period following the trial. But much of the evidence presented at trial pertained to Angel's behavior before she was warned of the change in the law. At that time, however, all she knew was that termination could proceed if she acted culpably or was unable to meet the conditions established for the return of the children to her home. Had she been differently warned, Angel might have acted more cautiously, knowing it is now easier for the State to terminate her parental

rights. Consequently, we conclude that Angel, like the parent in ***Jason***, was deprived of her parental rights without due process of law.

But the guardian ad litem urges us to conclude that this error was harmless because no reasonable possibility exists that the differing statutory language contributed to the termination of Angel's parental rights. She points to evidence presented at trial showing Angel's failure to demonstrate substantial progress toward meeting the conditions for the return of the children. She contends that the jury could have concluded from the evidence and, in particular, Angel's own admissions, that Angel substantially neglected, wilfully refused or was unable to meet the conditions for the return of the children to her home.

An error is harmless if there is no reasonable possibility that it contributed to the verdict. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Because of the fundamental right involved, we are not confident that a jury, properly instructed, would find grounds for termination on the evidence presented at trial.

Lastly, the guardian ad litem argues that if we reverse the order, we should remand for a new trial based upon § 48.415(2)(c), STATS., before it was amended. She argues that such a remedy would be in the best interests of the minor children as it would allow the matter to proceed to a new trial as quickly as possible. Angel also argues that if we reverse, a new trial should be held based upon the former statute.

The evil pointed out in ***Jason*** is that when a parent is warned of the grounds for termination under the statute before it was amended and the termination trial proceeds are under the amended statute, the parent is denied due process. Considering only the arguments briefed by the two parties, we see no reason why a new trial under the statute as it existed before it was amended may not be held. Accordingly, we reverse and remand for a new trial.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.