

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 29, 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.

No. 95-3273

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF JOSHUA D.S.,
a person under the age of 18:**

**LA CROSSE COUNTY DEPARTMENT
OF HUMAN SERVICES,**

Plaintiff-Respondent,

v.

CANDICE P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Reversed and remanded.*

EICH, C.J.¹ Candice P., the mother of Joshua D.S., appeals from an order terminating her parental rights. The order followed a jury determination that grounds existed for termination under § 48.415(2), STATS.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

Candice P. raises two issues on appeal: (1) whether she was deprived of due process when she was notified of the grounds for termination of parental rights stated in § 48.415(2) before its amendment, but her rights were terminated on the grounds stated in a revised version of the statute; and (2) whether she received ineffective assistance of counsel when her attorney failed to object to the jury instructions based on the new grounds for termination.

We conclude that Candice P. was denied due process because her parental rights were terminated based on the amended § 48.415, STATS. We reverse and order a new trial because the real controversy has not been tried. *See* § 752.35, STATS. As a result, we need not decide her ineffective assistance of counsel claim.

BACKGROUND

Candice P. is the mother of Joshua D.S. A dispositional order finding Joshua in need of protection and services was entered in April 1993. One year later, the trial court entered an additional order extending the original disposition to April 1995.

At both dispositional hearings, the trial court informed Candice P. orally and in writing of the applicable grounds for termination of parental rights under § 48.415(2)(c), STATS. The notices, restating the language contained in § 48.415(2)(c) then in effect, warned Candice P. that her rights could be terminated if a court found that Joshua was in need of continuing protection and services because:

- (3) ... the child has been outside the home for a cumulative total period of one year or longer pursuant to [dispositional orders], the parent has substantially neglected, willfully refused or been unable to meet 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 in the future.

Subsequent to the notices, the legislature amended § 48.415, effective May 5, 1994.² The new grounds permit termination where:

- (c) ... the child has been outside the home for a cumulative total period of one year or longer pursuant to [dispositional orders] ... and ... 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.

The La Crosse County human services department filed a petition for termination of Candice P.'s parental rights in April 1995. The jury found Joshua to be a child in need of continuing protection and services after being instructed on the grounds in the amended § 48.415(2)(c), STATS. Candice P. did not object to the instructions and the trial court entered an order terminating Candice P.'s parental rights.

DUE PROCESS

Under § 48.356, STATS., a trial court must warn a parent of any grounds for termination of parental rights in order to give a parent every possible opportunity to remedy the situation. *In re Amanda A.*, 194 Wis.2d 628, 645, 534 N.W.2d 907, 913 (Ct. App. 1995). The state's power to terminate a parent's rights "is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised." *In re M.A.M.*, 116 Wis.2d 432, 436, 342 N.W.2d 410, 412 (1984).

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

In *In re Jason P.S.*, 195 Wis.2d 855, 862-63, 537 N.W.2d 47, 50 (Ct. App. 1995), we held that a parent's rights were improperly terminated when the parent was warned that her parental rights could be terminated on the grounds stated in § 48.415(2)(c), STATS., before the 1993 amendment, but her rights were terminated on the revised grounds provided in the amended § 48.415(2)(c). We concluded that such a procedure violated the parent's right to due process of law. *Id.* at 864-65, 537 N.W.2d at 51.

We noted in *Jason* that the amendment to § 48.415(2)(c), STATS., changed the type of conduct for which termination could proceed by easing the burden on the state to prove the grounds for termination. We saw the change in § 48.415(2)(c) as not merely one of degree but "a change in quality of the very nature of the acts leading to termination." *Id.* at 864, 537 N.W.2d at 50. We said:

The notice ... under the old § 48.415, STATS., told [the parent he or she] faced the loss of ... parental rights only for culpable conduct--substantial neglect or willful refusal--or for inability to meet the conditions established for the return of the child to [the parent].

The ground for termination under the new law requires no showing of neglect, willfulness or inability. Under the new law [the parent] faced loss of ... parental rights, in material part, merely because [the parent] "failed to demonstrate substantial progress toward meeting the conditions established for the return of the child." The reasons for the lack of substantial progress are irrelevant.

Id. at 864, 537 N.W.2d at 50.

When the State substantially changes the type of conduct that may lead to loss of rights without notice to the parent, it applies a fundamentally unfair procedure. *Id.* at 863, 537 N.W.2d at 50. We conclude that Candice P., like the parent in *Jason*, was deprived of her parental rights without due process of law.

Joshua's guardian ad litem (GAL) correctly asserts that we lack the power to review unobjected-to error in jury instructions, except to exercise our discretion under § 752.35, STATS., to order a new trial on the basis that the real controversy was not tried, see *Vollmer v. Luety*, 156 Wis.3d 1, 17, 456 N.W.2d 797, 805 (1990), or to determine whether the party seeking review has had effective assistance of counsel. See *State v. Schumacher*, 144 Wis.2d 388, 408 n.14, 424 N.W.2d 672, 680 (1988).

We conclude that the real controversy has not been tried: whether Candice P.--as she was warned in the notices accompanying the dispositional orders-- substantially neglected, willfully refused or was unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that she will not meet those conditions in the future.

The GAL also suggests that a new trial is not necessary because the error, if any, was harmless. The GAL asserts that, in the face of evidence that Candice P. "failed to meet a single one of [the] conditions or [to make] any progress towards meeting any of [the] conditions," the jury would certainly have found that Joshua was a child in need of continuing protection and services regardless of the standard used.

The test for harmless error is whether no reasonable possibility exists that the error 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, and the gravity of the potential for error, we are not confident that a jury, properly instructed, would find grounds for termination on the evidence presented at trial.

Accordingly, we reverse and remand for a new trial under the statute as it existed before the amendment.³ Because we reverse and remand for a new trial, we need not reach Candice P.'s claim of ineffective assistance of counsel.

³ The GAL suggests that this disposition, reversal for a new trial based on the old law, would also be in Joshua's best interests, because it would permit resolution of his placement as quickly as possible.

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

This opinion will not be published. See Rule 809.23(1)(b)4, STATS.