COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2613

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF JOHNATHAN C.R.
A PERSON UNDER THE AGE OF 18:

ASHLAND COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LISA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ashland County: MICHAEL LUCCI, Judge. *Affirmed.*

HOOVER, J. Lisa R. appeals a judgment terminating her parental rights to Johnathan pursuant to § 48.415(2), STATS. She contends that once she requested a jury trial the record must reflect a knowing, voluntary and

intelligent waiver of that right, and that the Department of Human Services (DHS) failed to comply with § 48.38, STATS. She also contends that DHS failed to act with due diligence both in providing court-ordered services and by not addressing Lisa's developmental disabilities in either the CHIPS order or the permanency plan. She argues that as a result DHS did not make reasonable efforts to reunite Johnathan with Lisa.[1] This court rejects each argument and affirms.

On April 25, 1995, the court entered a dispositional order adjudging Johnathan to be in need of protection or services because Lisa was unable to provide necessary care. The order was subsequently extended in May 1996. Johnathan remained in foster care from the initial date of removal through the trial date in March 1997.

In May 1996, Lisa appeared with her attorney, Martin Lipske, for an initial appearance on the petition to terminate parental rights. Through her attorney, Lisa filed a signed request for a jury trial. The initial appearance was adjourned several times; however, Lisa later renewed her request for a jury trial at an adjourned initial appearance.

On November 12, 1996, a scheduling conference was held telephonically. Lisa did not appear. Her attorney stated that he would discuss with her whether she wanted to withdraw her request for a jury trial and that he would notify the court. A two-day jury trial was scheduled for December 26 and 27. On November 14, 1996, the trial court reiterated the trial date by letter.

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[1] In the statement of issues, Lisa raises two additional arguments: whether DHS failed to prove by clear and convincing evidence that Lisa could not learn to provide adequate parenting skills if given appropriate services, and whether termination was in Johnathan's best interests. However, Lisa fails to address these issues in her brief. We need not address issues raised but not briefed. ***In re Estate of Balkus,*** 128 Wis.2d 246, 255 n. 5, 381 N.W.2d 593, 598 n. 5 (Ct. App. 1985). They are therefore deemed abandoned. ***Reiman Assocs. v. R/A Adver.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

The next item in the record is another letter from the court, dated December 19, 1996. It states that the request for jury trial had been withdrawn and the trial was scheduled for January 31, 1997. There is no official record of Lisa's withdrawal of her jury trial demand.

Lisa argues that the right to a jury trial is protected by the State Constitution. *See* WIS. CONST. art. I, § 5. She further asserts that this right is reflected in § 805.01, STATS., requiring her waiver of a jury trial in a TPR case to be made knowingly, voluntarily and intelligently on the record. That section reads in relevant part:

> (3) … The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered on the record, consent to trial by the court sitting without a jury.

Lisa argues that because there is no record of her waiving her demanded jury trial, the judgment of the trial court should be summarily reversed.

The right to a jury trial in TPR cases is provided by §§ 48.422(4) and 48.31(2), STATS.[2] Article I, § 5, of the Wisconsin Constitution guarantees the right to a jury trial. It is, however, only that right as it existed at the time the constitution was drafted in 1848. ***Upper Lakes Shipping v. Seafarers' Int'l Union***, 23 Wis.2d 494, 503, 128 N.W.2d 73, 77 (1964). Lisa fails to cite, and this court does not find, authority supporting the contention that a jury trial right

[2] Lisa's argument that § 805.01, STATS., requires a parent to withdraw a jury trial request on the record fails because ch. 48, STATS., controls the right to jury trial in TPR cases, not ch. 805. A specific statutory scheme takes precedence over a more general provision. *See* ***Schlosser v. Allis-Chalmers Corp.***, 65 Wis.2d 153, 161, 222 N.W.2d 156, 160 (1974).

existed in 1848 in actions involuntarily terminating parental rights. Accordingly, the right afforded by ch. 48 is purely statutory.[3]

Certain rights are so fundamental that they must be waived only by the person upon whom they are conferred. *See* ***State v. Albright***, 96 Wis.2d 122, 129-30, 291 N.W.2d 487, 491 (1980). This rule, however, applies to *constitutional* rights, not those provided by statute such as the one at issue here. Moreover, a parent waives the right to a jury trial in a TPR proceeding if not requested at the initial appearance. Section 48.422(4), STATS. Waiver can therefore be accomplished by omission; it need not be recorded. Finally, nothing in either §§ 48.422(4) or 48.21(2), STATS., requires a parent who has demanded a jury trial to later withdraw the request on the record. This court holds that a right to a jury trial in a termination of parental rights case is a statutory, not constitutional right that may be waived by omission or on behalf of the parent.

In addition, Lisa asserts that DHS failed to comply with the permanency planning requirements outlined in § 48.38, STATS., and that as a matter of law such failure demonstrates a lack of due diligence, barring an action to terminate parental rights. She presents a number of alleged procedural insufficiencies in the permanency plan that she contends constitute a lack of due diligence. She raised, however, only two of these arguments at trial: failing to file the permanency plan within sixty days as required by § 48.38(3), and whether the plan discussed services that were investigated and considered but were not

[3] *Cf.* ***In re N.E.***, 122 Wis.2d 198, 203-04, 361 N.W.2d 693, 696 (1985) (discussing a juvenile's previous right under § 48.30, STATS., to a jury trial in the adjudicatory phase of a delinquency proceeding). There are numerous examples of procedural rights that are statutory in nature, but not constitutionally protected. *See* ***State v. Neave***, 117 Wis.2d 359, 369-71, 344 N.W.2d 181, 186-87 (1983), *overruled on other grounds*, ***State v. Koch,*** 175 Wis.2d 684, 499 N.W.2d 152 (1993).

available, as mandated by § 48.38(4)(e). This court concludes that the other objections to the permanency plan have not been preserved for appeal. *See* ***State v. Rogers***, 196 Wis.2d 817, 825-26, 539 N.W.2d 897, 900-01 (Ct. App. 1995).

Neither of Lisa's remaining objections to the permanency plan is persuasive. First, no authority supports the contention that failing to timely file the permanency plan constitutes a lack of due diligence as a matter of law. Rather, case law demonstrates that failing to file a permanency plan within sixty days does not deprive the court of jurisdiction in ch. 48, STATS., proceedings. ***In re Scott Y.***, 175 Wis.2d 222, 229, 499 N.W.2d 218, 221 (Ct. App. 1993).

> First, we note that sec. 48.43 (sic) does not deal with subject matter jurisdiction and sec. 48.13 does not list the timely filing of a permanency plan as a prerequisite for jurisdiction over children alleged to be in need of protection or services. Second, as the county notes, preparing a permanency plan is an administrative requirement that does not involve the court, is not part of the court procedures governed by Subchapter V and does not arise out of the court's jurisdiction.

Id. at 228, 499 N.W.2d at 221. Thus, the § 48.38, STATS., permanency plan is an administrative requirement that does not implicate the court's jurisdiction. Further, neither § 48.14, STATS. (jurisdiction over other matters relating to children), nor § 48.415(2), STATS. (continuing need of protection or services as grounds for termination), requires compliance with § 48.38 procedures as a prerequisite for subject matter jurisdiction.

Second, the County conceded that the permanency plan did not contain a discussion of services investigated and considered but that were not available as required by § 48.38(4)(e), STATS. No authority exists to support the contention that failure to include such a discussion bars a TPR action as a matter

of law. The court concluded that the omission of any language to this effect in the plan did not rise to the level of justifying a dismissal of the action. It noted, "If no unavailable or inappropriate services were investigated and considered, then there would be nothing to include as a discussion of those services in the permanency plan." This court agrees. The omission was a technicality that did not affect the substance of the issue, whether to terminate Lisa's parental rights. The TPR action against Lisa is not barred by such an omission.

Finally, Lisa contends that DHS failed to comply with the dispositional order with due diligence because it did not provide Lisa with a parent aide and failed to address or accommodate her disabilities in either the CHIPS petition or the permanency plan. Both the original CHIPS dispositional order and Extension/Revision order required DHS to provide a parent aide to work with Lisa in her home. Lisa also asserts that the parental worker's assistance was insufficient and limited, and that she received no aid after the summer of 1995. She further asserts that DHS failed to address or accommodate her developmental disabilities by not evaluating and incorporating her learning style into its services.

The agency responsible for the care of the child and the family must make a diligent effort to provide court-ordered services. *See* § 48.415(2)(b)2, STATS. Diligence is defined as "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case." Section 48.415(2)(b)1, STATS. Whether DHS made a diligent effort to provide court-ordered services is a fact sensitive inquiry that must consider the totality of circumstances as they exist in each case. *See* ***In re D.P.***, 170 Wis.2d 313, 331-32, 488 N.W.2d 133, 140 (Ct.

App. 1992). Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS.

The trial court made a number of findings with regard to the services provided to Lisa. Regarding the parent aide, it found:

> After the order social services provided extensive services including supervised visitation of once to as much as three times a week with the assistance of a parent aide. A parent aide was also provided to work with Lisa [] in her home. Sometimes the petitioner, Janelle Moe, acted as the parent aide, but most often, Roxanne Piper (sic) met with Lisa as much as three times a week for at least an hour on each occasion. This was done on a one-to-one basis for 6 to 8 weeks to assist and help her with respect to her parenting. During these sessions, the aide provided advice and correction as well as the assistance in parenting and responding to the child's needs.
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> ….
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> The services of a parent aide continued throughout 1996 and into 1997, which were provided through supervised visitation.

Further, the court found that DHS made a diligent effort to provide all services ordered by the court when it stated: "[T]he level of services provided by social services for the past two years has been extensive in light of the particular characteristics of the parent and child and the extent of cooperation of the parent."

The court's findings are not clearly erroneous, but are instead supported by the record. Moe testified that DHS offered "a lot" of services to Lisa and that she knew that Sawyer County had offered Lisa "many, many" services in its earlier contacts with her and none had been helpful. She further knew of no available services that would ever make Lisa a viable parent. In addition, Francis Felix, the Ashland County supervisor of the children and family unit of DHS, testified that he thought all the services needed were offered, and there was no

need for alternative services. The court's findings regarding the parent aide worker are supported by Moe's and the parent aide worker's testimony. In light of this evidence, the trial court's findings are not clearly erroneous and will not be upset.

In conclusion, ch. 48, STATS., does not require a parent to withdraw a jury trial request on the record, failure to comply with the requirements of § 48.38, STATS., does not bar a TPR action as a matter of law, and the court's finding that DHS acted with due diligence in providing court-ordered services and addressing Lisa's developmental disabilities is not clearly erroneous.

By the Court.—Order affirmed.

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