COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3256 **Cir. Ct. No. 01-TP-79**

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

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

YOLANDA M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Yolanda M. appeals an order of the circuit court terminating her parental rights to her son, Corteze M. Yolanda argues that (1) she was denied due process because it was impossible for her to meet the conditions in the permanency plan due to her incarceration; (2) the evidence was insufficient to prove that the Rock County Department of Human Services (the department) made reasonable efforts to provide the services ordered by the court; and (3) the court failed to find that Yolanda was an unfit mother before determining that her parental rights should be terminated.

Background

¶2 Corteze was born on January 6, 2001. At the time of his birth, his mother, Yolanda, was incarcerated in the Rock County Jail, awaiting sentencing in a criminal proceeding. Yolanda used cocaine and heroin during the first trimester of her pregnancy. Corteze was born with permanent damage to his kidney and lungs attributable to Yolanda's prenatal drug use. Corteze was taken into protective custody on the day he was born, pursuant to a temporary order.

¶3 On January 19, 2001, Yolanda was sentenced to confinement for approximately four years. Under truth-in-sentencing, she will be incarcerated until February 2005. On May 17, 2001, after a CHIPS[2] dispositional hearing, the circuit court entered an order finding Corteze in need of protection or services because he was receiving inadequate care while his mother was incarcerated,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] CHIPS is an acronym for "child in need of protection or services." *See* WIS. STAT. § 48.13.

under WIS. STAT. § 48.13(8). The circuit court ordered Yolanda to comply with four return conditions, and warned Yolanda, pursuant to WIS. STAT. § 48.356(2):

> If the child remains outside of your home for six months or longer, and if you have failed to meet the conditions established in the permanency plan, and if there is a substantial likelihood that you will not meet the return conditions within the twelve-month period following the fact finding hearing in the termination case, and if the department makes a reasonable effort to provide the services which I have ordered, then the legal relationship between you and the child may be terminated by the court.

The court ordered the following return conditions:

> 1. The mother must be available to parent the child.
>
> 2. The mother must remain drug and alcohol free. The mother will submit to drug screens at any time, at the department's request. A refusal to submit to a drug screen will be considered a positive screen.
>
> 3. The mother must maintain a safe and stable living environment, suitable for children, which is drug and alcohol free.
>
> 4. The mother must demonstrate the ability to meet the child's physical, medical, and emotional needs on a daily basis.

The court also ordered the following plan for services to be provided by the department:

> 1. The mother … will successfully complete a parenting program approved by the department.
>
> 2. The mother … will complete a drug and alcohol assessment and follow all treatment recommendations.
>
> 3. The family will not change service providers unless prior approval is obtained from the department.
>
> 4. The family will sign and maintain in effect appropriate releases of information to enable the service providers to furnish information freely to the department and the child's guardian ad litem.

> 5. The department will provide background information and updates on family dynamics to the service providers as needed.

Since near the time of his birth, Corteze has been living with foster parents who have expressed an interest in adopting him.

¶4 On November 19, 2001, Rock County filed a petition to terminate Yolanda's parental rights to Corteze. The petition alleged that Corteze was in continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2). At a fact-finding hearing, a social worker from the department testified that she provided Yolanda with monthly updates on Corteze's progress, maintained regular contact with Corteze's foster parents, maintained contact with Corteze's service providers, and spoke with Yolanda's Department of Corrections social worker once a month. Following the fact-finding hearing, the jury unanimously found that (1) the department made a reasonable effort to provide the services ordered by the court; (2) Yolanda failed to meet the return conditions; and (3) there was a substantial likelihood that Yolanda would not meet those conditions within the twelve-month period following the conclusion of that hearing.

¶5 After a dispositional hearing on August 26, 2002, the circuit court commented:

> So all of those factors lead me to find that it would be the—that [Yolanda] under the circumstances is an unfit parent and leads me back to the standard that the court must rely upon here, that being the best interests of the child. And clearly it's, in my opinion, in—the best interests of this child would be … a termination of parental rights ….

The circuit court then ordered that Yolanda's parental rights be terminated.

Discussion

¶6 Parents facing the involuntary termination of parental rights have statutory procedural rights. When a child is removed from a parent, the parent has a right to be informed "of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home." WIS. STAT. § 48.356(1).[3] WISCONSIN STAT. § 48.415 details potential grounds for the involuntary termination of parental rights. Section 48.415(2) provides:

> Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child 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 under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).

[3] WISCONSIN STAT. § 48.356 provides:

> **(1)** Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears 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 or expectant mother 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 or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

> 2. a. In this subdivision, "reasonable effort" means 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 or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe 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.

¶7 To provide a parent faced with losing parental rights under WIS. STAT. § 48.415(2) the ability to remedy the situation, "the court must inform the parent of the possible grounds and then give him or her guidance on how the children may be returned to the home." ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 644-45, 534 N.W.2d 907 (Ct. App. 1995). If an agency or a person authorized under WIS. STAT. §§ 48.25 or 48.835 seeks to terminate parental rights, that person must file a petition stating the grounds for terminating parental rights. WIS. STAT. § 48.42. The parent is then entitled to a fact-finding hearing to determine whether grounds to terminate parental rights exist. WIS. STAT. §§ 48.422(2), 48.424. If the court or jury finds that grounds exist, "the court shall find the parent unfit" and hold a dispositional hearing to determine the best interests of the child. *See* WIS. STAT. §§ 48.424(4), 48.426, 48.427.

Whether a Permanency Plan that is Unattainable Due to a Parent's Incarceration Violates Due Process

¶8 Yolanda correctly states it was impossible for her to meet the return conditions due to her incarceration. It follows, according to Yolanda, that the notice provided under WIS. STAT. § 48.356(2) "was meaningless because … it did not provide her with 'guidance on how [Corteze] may be returned home.'" In addition, Yolanda argues that the fact-finding hearing on whether she had met those conditions and was likely to meet them during the year after the hearing was "equally meaningless." Yolanda concludes that basing "termination of parental rights on return conditions that were impossible … violates the principle of fundamental fairness[] and the intent of the legislature."

¶9 The department responds that Yolanda objects to the fairness of the return conditions too late. The department argues that "the time to assert that objection was at the dispositional hearing in the CHIPS proceeding" because it would have been obvious at that time that Yolanda would be unable to comply with the return conditions. Separately, the department responds that, under Yolanda's argument, every termination petition involving a parent under an extended sentence of confinement would be automatically unfair. According to the department, if termination proceedings were precluded while a parent is incarcerated, children would have to wait unreasonable periods of time before termination proceedings could be initiated. The department contends that such a result is contrary to the intent of the legislature, as expressed in WIS. STAT. § 48.01(1)(a), which reads, in part:

> The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize *the importance of eliminating the need for children to wait unreasonable*

> *periods of time* for their parents to correct the conditions that prevent their safe return to the family.

(Emphasis supplied.)

¶10 First, we agree with the department that the proper time for Yolanda to have raised her due process argument was prior to the fact-finding hearing under WIS. STAT. § 48.424. The issue has therefore been waived. This argument is raised for the first time on appeal. So far as we can discern, the principles unpinning waiver apply here, and Yolanda has not explained why waiver should not apply. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) ("Contemporaneous objection gives the trial court an opportunity to correct its own errors, and thereby works to avoid the delay and expense incident to appeals.... Moreover, the waiver rule prevents a party from deliberately setting up the record for appeal by sitting silently by while error occurs and then seeking reversal if the result is unfavorable." (citations omitted)).

¶11 Moreover, even if we were to consider Yolanda's argument on the merits, we would affirm the decision of the circuit court. Both parties agree that due process rights attach to any attempt to terminate parental rights. "A judicial proceeding terminating parental rights implicates a parent's fundamental rights." ***T.M.F. v. Children's Serv. Soc'y of Wis.***, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983). A "parent's interest in the companionship, care, custody, and management of his or her child [is] 'cognizable and substantial' and that the integrity of the family is subject to constitutional protection through the due process clause of the state and federal constitutions." ***Id***.

¶12 Thus, we must consider whether Yolanda's inability to comply with the return conditions due to her incarceration deprives Yolanda of due process.

We begin by noting that Yolanda does not argue that the procedure for terminating a parent's rights is unfair; she only contests the application of the procedure to her specific situation. In our view, the procedure is fair. Parents have the right to notice of alleged deficiencies, an opportunity to remedy those deficiencies, a fact-finding hearing at which to contest whether those deficiencies have been remedied, and a dispositional hearing to determine the best interests of the child. In this case, it is Yolanda's incarceration that renders her unable to avail herself of these procedural safeguards. Yolanda's inability to meet the conditions is an inability of her own making. Apparently Yolanda would put the matter in limbo for the remainder of her four-year confinement. This result is contrary to the legislative scheme, which emphasizes "the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family." WIS. STAT. § 48.01(1)(a). We conclude that no due process violation occurred.

Whether the Evidence was Sufficient to Support the Finding that the Department Made Reasonable Efforts to Provide Court-Ordered Services

¶13 Yolanda claims that the evidence was insufficient to sustain the jury's finding that the department made a reasonable effort to provide the services ordered by the court. Under WIS. STAT. § 48.415(2), the department must make a reasonable effort to provide the services ordered by the court.

> "[R]easonable effort" means 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.

WIS. STAT. § 48.415(2)(a)2.a. "Whether the [department] 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." ***State v. Raymond C.***, 187 Wis. 2d 10, 15, 522 N.W.2d 243 (Ct. App. 1994). "The credibility and weight of individual testimony are determinations for the jury. Appellate review of a jury's findings is limited to whether the record contains any credible evidence that under any reasonable view supports the verdict and removes the issue from the realm of conjecture." ***D.B. v. Waukesha County Human Servs. Dep't***, 153 Wis. 2d 761, 770, 451 N.W.2d 799 (Ct. App. 1989) (citations omitted).

¶14 Yolanda concedes that the court ordered the department to perform only one task: that "[t]he department will provide background information and updates on family dynamics to the service providers as needed." Yolanda argues that the department failed to provide any evidence that it provided background information and updates on family dynamics to Yolanda's service provider, the Department of Corrections (DOC). According to Yolanda, although a department social worker testified that she spoke to Yolanda's DOC social worker once a month, there was no testimony that the conversations provided background information and updates on family dynamics. We disagree and conclude that sufficient evidence existed on which a jury could find the department made reasonable efforts to provide court-ordered services.

¶15 The department correctly notes that the jury heard testimony that the department social worker provided monthly updates to Yolanda regarding Corteze, monitored Corteze's progress, maintained regular contact with Corteze's foster parents, maintained contact with Corteze's service providers, and spoke monthly with Yolanda's prison social worker. The jury could reasonably infer from this testimony that the department social worker provided background information and updates on Yolanda's family dynamics to the DOC social worker in their monthly conversations.

Whether the Circuit Court Determined that Yolanda was an Unfit Parent

¶16 Yolanda argues that the circuit court committed reversible error when it improperly found her to be an unfit parent based on considerations of the best interests of the child. Pursuant to WIS. STAT. § 48.424(4), "[i]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit.… The court shall then proceed immediately to hear evidence and motions related to the [disposition of the petition]." "'Unfitness' is an absolute requirement before parental rights may be terminated…. Parental rights may only be terminated if the parent is unfit. Then a disposition looking to the best interest of the child takes place." ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 110, 470 N.W.2d 914 (1991).

¶17 Yolanda argues that although the circuit court stated, "[Yolanda] under the circumstances is an unfit parent," this finding was improperly based on considerations pertaining to the child's best interest. According to Yolanda, this is true because at the dispositional hearing the circuit court discussed the "statutory factors governing [the court's] decision as to the best interest of the child" at length before finding Yolanda unfit, demonstrating that the unfitness finding was impermissibly based on the best interests of the child.

¶18 Accepting as true that the unfitness finding may not be based on the best interests of the child, we reject Yolanda's interpretation of the record. The circuit court stated:

> So all of those factors lead me to find that it would be the—that [Yolanda] under the circumstances is an unfit parent and leads me back to the standard that the court must rely upon here, that being the best interests of the child. And clearly it's, in my opinion, in—the best interests of this child would be … a termination of parental rights ….

Although this statement came after a consideration of the factors governing the best interests of the child, we think it reasonably clear the court was making a separate, albeit parenthetical, finding that Yolanda was an unfit parent. The phrase "leads me back" demonstrates that the circuit court deviated from the best-interests-of-the-child factors, and then returned to the best interest of the child in order to make the ultimate disposition in this case. Furthermore, Yolanda's reading does not give the circuit court the benefit of the doubt. We start with the presumption that a judge knows and correctly applies the law. *See* ***Arave v. Creech***, 507 U.S. 463, 471 (1993) (when sentencer is a judge rather than a jury, the reviewing court presumes the judge knew and applied any existing narrowing construction).

By the Court.—Order affirmed.

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