COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2004

Cornelia G. Clark
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 Nos. 04-0158
04-0159
04-0160
04-0161
04-0162

Cir. Ct. Nos. 03TP000003
03TP000004
03TP000005
03TP000007
03TP000008

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

04-0158
IN RE THE TERMINATION OF PARENTAL RIGHTS TO STERLING H., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ELAINE H.,

RESPONDENT-APPELLANT.

04-0159
IN RE THE TERMINATION OF PARENTAL RIGHTS TO CARMEN H., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ELAINE H.,

RESPONDENT-APPELLANT.

04-0160

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ELAINE H.,

RESPONDENT-APPELLANT.

04-0161

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CASANDRA D.F., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ELAINE H.,

RESPONDENT-APPELLANT.

04-0162

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ELAINE H.,

RESPONDENT-APPELLANT.

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

¶1 DEININGER, P.J.[1] Elaine H. appeals orders terminating her parental rights to five of her six children.[2] Elaine's only argument on appeal is that we should exercise our discretionary reversal authority under WIS. STAT. § 752.35 and direct that a new fact-finding hearing be held because, in Elaine's view, the real controversy was not fully tried. We decline to so order and, accordingly, affirm the appealed orders.

BACKGROUND

¶2 The background facts are largely undisputed. At the time of the fact-finding hearing, Elaine's six children, ranging in age from two years to eleven years, were in out-of-home placements pursuant to orders entered under WIS. STAT. § 48.345, pertaining to children in need of protection or services (CHIPS). The children had been taken into protective custody when Elaine and her husband

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Her rights to the sixth child were not terminated because the father's rights were not terminated, and as to that child, an extension of a CHIPS (child in need of protection or services) disposition was ordered.

were arrested and incarcerated for delivering crack cocaine. After the children had remained in out-of-home placements pursuant to the CHIPS orders for some ten months, the Rock County Department of Human Services filed petitions to terminate Elaine's parental rights (TPR), alleging as grounds that the children were in continuing need of protection and services, pursuant to WIS. STAT. § 48.415(2).

¶3 The allegations of the petition were tried to a twelve-person jury in July 2003. At that time, Elaine was incarcerated in the Rock County jail awaiting a potential probation revocation. She had been placed on five years probation for the cocaine delivery offense. During her probation, while her children were in foster placements pursuant to the CHIPS orders, Elaine had moved to Chicago, where she claimed to have family resources to assist her in meeting her probation conditions and those set forth in the CHIPS disposition. Elaine did not maintain consistent contacts with her probation officer and the children's social worker, and she was subsequently arrested and incarcerated in Indiana. After she was returned from Indiana, she was placed in a treatment program in Madison as an alternative to revocation of her probation. She was terminated from that program for rules violations about two months prior to the fact-finding hearing.

¶4 During the fact-finding hearing, the jury heard testimony from a probation officer, social worker, and Elaine herself, regarding Elaine's activities during the preceding eighteen months. Although Elaine had some contacts with her children, she did not keep in touch with them on a regular basis and missed several scheduled visits without explanation. The verdict in each case was comprised of four questions:

> 1. Has [the child] 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?
>
> 2. Did the Rock County Department of Human Services make a reasonable effort to provide the services ordered by the court?
>
> 3. Has Elaine [H.] failed to meet the conditions established for the safe return of each child to her home?
>
> 4. Is there a substantial likelihood that Elaine [H.] will not meet those conditions within the twelve-month period following the conclusion of this hearing?

The trial court, without objection, directed a "yes" answer to the first question, and jurors answered "yes" to the remaining three. The jurors were unanimous on the second and third questions, but there were two dissenting votes on question four regarding Elaine's likelihood of meeting the conditions for the return of her children within twelve months following the TPR hearing.

¶5 A dispositional hearing followed six weeks later. At the hearing, Elaine argued that her rights should not be terminated due to two "new developments." First, instead of having her probation revoked, she received a second alternative to revocation requiring her to participate in the "Recap Program" at the Rock County jail. Second, she had also undergone an extensive psychological evaluation, the results and report of which were introduced at the dispositional hearing. The trial court, after considering the best interests of the children and the factors set forth in WIS. STAT. § 48.426, directed that Elaine's parental rights to all five children be terminated. The court concluded that, notwithstanding the new information presented to it at disposition, any possibility of Elaine's rehabilitation as a parent was many months, if not years, in the future. The court said this:

> This could be ongoing until the youngest children are substantially older than they are now, or the older children could be beyond their majority. I don't thinks it's fair for those children or in their best interest to be required to wait for [Elaine H.] to get treatment that she clearly needs and would clearly benefit from, but I'm not convinced that it will happen in the short time frame that would be of benefit to the children. She has avoided any services for the 20 months the department has been involved with her, and I don't see any reason why she would all of a sudden decide to get that treatment now. And that coincides with her being in RECAP. That's another four to six months. It puts yet more delay toward her getting any of this help or any of this treatment.

¶6 The court subsequently entered orders terminating Elaine's rights to five of her children, and she appeals each of those orders.[3]

ANALYSIS

¶7 Elaine's sole contention on appeal is that a reversal in the interest of justice, pursuant to our discretionary authority under WIS. STAT.§ 752.35, is merited because of the new information that was presented to the court at the dispositional hearing, information that was not available or presented to jurors at the time of the fact-finding hearing. Specifically, Elaine notes that there were two dissenting jurors on the question of whether she would be able to meet the conditions for the return of her children within twelve months following the hearing, demonstrating that this was the "most important aspect of the case." She argues that because jurors were not aware of the information that she was not revoked from probation and sent to prison, and that she had been diagnosed as

[3] The rights of the fathers of these children were also terminated, apparently by default, and no issue with respect to the termination of the fathers' rights are before us in this appeal.

suffering from certain psychological maladies for which she was willing to obtain treatment, the real controversy was not tried.

¶8 Elaine points out that, at the dispositional hearing, the trial court's focus was, properly, on the best interest of the children, but that at the fact-finding hearing her rights as a parent were "paramount." *See* ***Sheboygan County DHSS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. Thus, although she does not challenge the trial court's discretionary determination that a termination of her rights to all five children was in their best interest, Elaine contends that the facts that she would not be sent to prison and that a "roadmap to recovery" was set out in the newly obtained psychological evaluation, would have been very important considerations for jurors at the fact finding. Elaine acknowledges that there was "very little dispute" with respect to the first three elements required for termination under WIS. STAT. § 48.415(2), but she maintains that the real contest was over the fourth, to which the new information was directly relevant. Finally, even though she is not required to convince us that, had jurors heard the information at issue, there might have been a different outcome, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990), Elaine suggests that this is so because two jurors dissented on the fourth question.

¶9 The Department devotes most of its arguments in its response brief to refuting two claims that Elaine does *not* make—that her due process rights were violated and that there was no credible evidence to support the verdict. Because Elaine makes neither argument, much of the Department's response is not overly helpful to our analysis. The Department does, however, point out that Elaine could have requested a continuance of the fact-finding hearing on the ground that a decision on her probation status would be forthcoming within a month or so of the TPR fact finding. Although it does not explicitly make the argument, the

Department's point seems to be that Elaine may have deemed it in her interest to have the TPR fact finding before the outcome of the revocation proceedings was known, and she should not now be given a new hearing because the probation outcome was more favorable to her than she may have anticipated. The Department also notes that the fact that Elaine was suffering from depression was brought out at the fact-finding hearing, and nothing prevented her or her trial counsel from obtaining the evaluation presented at disposition prior to the fact-finding hearing.

¶10 We have reviewed the record of the fact-finding proceeding and we are satisfied that the real controversy in this case was fully tried. Jurors were not told that a revocation of probation was a certainty, rather that the possible results of Elaine's revocation proceedings included a four month placement as an alternative to revocation and a continuation of her probation. The Department argued to jurors that regardless of the results of the revocation proceedings, Elaine's history showed that she would not be able to meet the conditions for return within twelve months following the hearing:

> From my position, it doesn't matter what happens to her revocation. Things are not going to be any different a year from now except the kids will be out of her care for another year, not knowing where's mom now, if I call my mother can I find her, is she going to come and see me, what's going on.

The children's guardian ad litem argued in a similar vein, telling jurors that regardless of Elaine's future probation status, her history while the children were in the Department's custody demonstrated that there was no substantial likelihood of her meeting the conditions for their return within twelve months ("[W]hen people try to predict the future what do they look at? … They look at past behavior.").

¶11 In short, given the evidence and arguments, we cannot conclude that jurors were not able to consider the likelihood of Elaine's meeting the conditions for the return of her children within twelve months if she were placed in a treatment program as an alternative to being revoked from probation. Elaine's counsel argued to the jury that she could complete her alternative program "in three to four months, and that will give her time above and beyond to work toward meeting the conditions of return in this case." The fact that her specific fate is now known does not mean the real controversy was not tried, especially given the fact that her alternative treatment program is of a duration similar to that discussed at trial. (In fact, it appears that her actual revocation alternative encompasses some four to six months, and will thus consume an even greater portion of the year following the TPR hearing than what Elaine's counsel argued.)

¶12 As to the issue of Elaine's suffering from depression and related problems and her willingness to undergo treatment for them, we agree with the Department that jurors were made aware that she had treatment needs, and they heard her testify to her intention to address them. In addition to stating her willingness to participate in a four-month "criminal thinking" program, Elaine testified that she had been depressed "mostly all the time" since her children were removed from her care, that she was willing to undergo an assessment for depression and that she would follow any treatment recommendations.

¶13 We cannot conclude that the fact that an assessment was subsequently conducted, producing specific recommendations which Elaine said at the dispositional hearing she would pursue, would have added substantially to the testimony her counsel elicited from her at trial. We thus fail to see how the absence of the report prevented the real controversy from being fully tried. Moreover, we note, as did the trial court, that the treatment recommendations in

the report ran to several pages, presenting an imposing (and time-consuming) treatment regimen. Had jurors been informed of the contents of the report, they might well have concluded that Elaine's treatment needs were more extensive than she could possibly resolve within a year of the hearing.

¶14 We agree with Elaine that the critical time for a parent to marshal and present information regarding the parent's treatment needs, prognosis and future plans is the fact-finding hearing, because thereafter, the focus at disposition shifts to the children, their needs and their futures. It is also true that a parent's circumstances may change after a fact-finding hearing, and new information may come to light that might be relevant if the TPR fact-finding hearing were conducted at a later time. We are not persuaded, however, that we are required, in the interest of justice, to set aside these termination orders and direct a new fact-finding hearing because new and arguably relevant evidence could now be presented to jurors. As the supreme court has explained, "the law generally prefers that controversies once decided on their merits remain in repose." ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 393, 260 N.W.2d 727 (1978).

¶15 The jurors in this case were asked to determine whether, as of July 2003, based on all of the evidence presented, there was a substantial likelihood that Elaine would meet the conditions for regaining the custody of her children within twelve months of the hearing. Jurors were informed of Elaine's history, her continuing legal difficulties, and her past unwillingness or inability to address her rehabilitative needs with respect to her ability to parent her children. That Elaine was subsequently given another opportunity to participate in a fairly lengthy rehabilitative program in lieu of being sent to prison, and that a psychologist had identified particular needs and made specific treatment recommendations for her, are not facts so starkly different than those presented to the jury as to permit us to

conclude that the real controversy regarding the existence of grounds under WIS. STAT. § 48.415(2) to terminate Elaine's parental rights was not fully tried.

¶16 Our authority under WIS. STAT.§ 752.35 is a power that we exercise sparingly and only in the most exceptional cases. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). This is not such a case.

CONCLUSION

¶17 For the reasons discussed above we affirm the appealed orders.

By the Court.—Orders affirmed.

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