

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 01, 2005

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. 2005AP1896
2005AP1897
2005AP1898**

**Cir. Ct. Nos. 2003TP404
2003TP405
2003TP406**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT 1**

**NO. 2005AP1896
CIR. CT. NO. 2003TP404**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NICOLE M.,

RESPONDENT-APPELLANT.

NO. 2005AP1897
CIR. CT. NO. 2003TP405

**IN RE THE TERMINATION OF PARENTAL
RIGHTS TO JOSEPH T.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NICOLE M.,

RESPONDENT-APPELLANT.

NO. 2005AP1898
CIR. CT. NO. 2003TP406

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NICOLE M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Nicole M. appeals from orders terminating her parental rights to Christopher M., Joseph T. and Ariana M.² Nicole argues that the orders should be reversed because: (1) when she stipulated to the ground for termination, the trial court failed to take testimony in support of the ground; and (2) there is insufficient evidence to support a finding that she failed to assume parental responsibility for the children. *See* WIS. STAT. § 48.415(6) (2003-04).³ We affirm the orders.

BACKGROUND

¶2 Nicole and Otis T. are the biological parents of Christopher, Joseph and Ariana. Nicole was fifteen when she became pregnant with Christopher, and at the time was in foster care herself, having been removed from her home under a CHIPS petition.⁴ Nicole gave birth to Christopher in December 1997, when she was sixteen. For four months, she and Christopher continued to live at Nicole's foster home. However, Nicole failed to comply with the household rules. On several occasions she left home for a night or two—sometimes alone, sometimes with Christopher—to spend time with Otis. In April 1998, Christopher was placed in foster care. Pursuant to subsequent CHIPS orders, Nicole had to meet numerous conditions before Christopher would be returned to her care.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

² The parental rights of the children's biological father are not at issue in this appeal and will not be addressed.

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

⁴ Nicole's biological father was deceased, and the parental rights of Nicole's biological mother were terminated when Nicole was either fifteen or sixteen.

¶3 Until Nicole turned eighteen, she lived in several foster homes. She continued her relationship with Otis. When she turned eighteen, she and Otis moved in together. It is undisputed that during this time, Otis physically abused Nicole.⁵ In July 1999, the police were called when Otis hit Nicole and bit her cheek. According to Nicole, that is the last time that Otis physically abused her, although in the future he continued to damage her property.

¶4 In June 2000, Joseph was born. Otis continued to live with Nicole, but she told social workers that he no longer did so. A parent assistant, assigned by the social workers, periodically helped Nicole with Joseph, unaware that Otis was still living in the home. On several occasions, Nicole left Joseph with Otis while Nicole went to work. She returned to find Joseph in an unchanged diaper and concluded that Otis “wasn’t doing a great job” providing care. Although Otis no longer physically abused Nicole, he continued to destroy her property. Nicole testified: “He would cut up my couches and squirt dishwashing liquid on my walls and chocolate syrup on my couch and break things in the house, but he didn’t any longer hit me.” Nicole testified that sometimes when this occurred, Joseph was in his room in his crib.

¶5 In November 2000, Christopher was returned to Nicole. One condition for Christopher returning to the home was that Otis could not live there. However, unknown to social workers, Otis continued to live with Nicole and the boys. During this time, Nicole allowed Otis to discipline Christopher. She testified that on one occasion, she saw Otis punish Christopher for spilling

⁵ This was not the first time that Otis had physically abused Nicole. She testified that on at least one occasion Otis slapped her while she was pregnant with Christopher.

spaghetti sauce. Otis grabbed the child by the neck, which resulted in some bruising and a scratch. Nicole later testified that she did not intercede: “I just allowed [Otis] to punish [Christopher] in the way he chose.” This incident led to the removal of both Christopher and Joseph in June 2001, when social workers noticed the bruises and scratch on Christopher’s neck, and bruises on his bottom.

¶6 While Christopher and Joseph remained in foster care, Nicole continued to see Otis. In December 2001, Ariana was born. Although Otis no longer lived with Nicole, he came to visit Nicole periodically. In 2002, Nicole lied to social workers, a court-appointed psychologist and the trial court about this continued contact. In August 2002, believing that Otis was no longer in the home, the State returned Joseph and Christopher to Nicole’s care, marking the first time that she had all three children in her care at the same time.

¶7 Approximately one week later, while the boys were visiting a former foster parent, Nicole and Otis went to the blood center to donate plasma. They left Ariana in the back seat of their vehicle for forty-five minutes. Nicole testified that Otis was supposed to go back to the vehicle, but he insisted on waiting with her, and said that the baby would be fine because she was sleeping. A passer-by saw the baby crying in the vehicle and called police. From the blood center Otis saw that the police were at the vehicle. Nicole finished giving plasma and would not let Otis return to the vehicle with her, as she knew that contact with him violated the conditions of placement. Nicole returned to the vehicle and spoke with the police. She was ultimately convicted of criminal child neglect in conjunction with this incident.

¶8 Despite the incident where Ariana was left in the vehicle, all three children remained placed with Nicole. The social worker increased the number of

hours the parental assistant was in Nicole's home. However, two weeks after the vehicle incident, Otis called the social worker from Nicole's home. Because the social worker had caller-identification on her telephone, she knew that Nicole was having unauthorized contact with Otis. All three children were removed from the home on August 27, 2002, and have never returned. They were all placed in the same foster home, which ultimately became a potential adoptive home for them.

¶9 In June 2003, the State filed petitions to terminate the parental rights of both Nicole and Otis. With respect to Nicole, the State alleged as grounds for termination that Nicole had failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6), and that there was a continuing need of protection or services (continuing CHIPS), *see* WIS. STAT. § 48.415(2). Nicole contested the petition.

¶10 In June 2004, the State moved to dismiss the continuing CHIPS ground; this motion was granted. The State later brought a motion to reinstate this ground. The trial court heard argument in October 2004 and granted the State's motion. However, as the parties discussed resolution at the close of that hearing, the trial court adjourned the hearing to the next day so the parties could continue discussing settlement options.

¶11 On October 6, 2004, the parties appeared and announced that they had reached a settlement. Pursuant to the agreement, the State would move to dismiss the continuing CHIPS ground, and Nicole would be "stipulating, or not contesting" the allegation that she failed to assume parental responsibility for her children. Nicole would still be able to contest the best interests phase of the proceedings. If Nicole was unsuccessful, the State and GAL would not object to her asking the court for relief from judgment so that she could then consent to the termination of her parental rights.

¶12 Nicole testified in response to detailed questions from the State and the trial court about her understanding of the agreement. This testimony included the following exchange with the State:

[THE STATE]: Is it my understanding that today you are agreeing that if we went to trial on this matter [the State] would be able to prove that you have failed to assume parental responsibilities for these children?

[MOTHER]: Yes.

[THE STATE]: And you understand that that means that you've never had a substantial parental relationship with them?

[MOTHER]: Yes.

[THE STATE]: And that means that you haven't exercised significant responsibility for their daily supervision, education, protection, or care?

[MOTHER]: Yes.

The trial court asked Nicole questions about her decision to proceed directly to the dispositional hearing, and also reiterated the substance of Nicole's stipulation:

THE COURT: In this case, what you're stipulating to, or agreeing to is that the State could, if we had the trial, either to a jury or to me, could prove the ground of failure to assume parental responsibility. Do you understand that?

MOTHER: Yes, I do.

¶13 Although the trial court and State questioned Nicole about her decision, no live testimony was offered by her or any other witness in support of the factual basis for Nicole's stipulation to the ground for termination. With respect to establishing the facts, the parties had the following exchange:

[THE STATE]: Judge, I'm planning on – [Nicole] has actually been deposed twice in this case, and I'm filing the originals of both deposition transcripts to serve as the factual basis for the stipulation, if no one objects.

[NICOLE'S ATTORNEY]: I do not object.

[GAL]: No objection.

The trial court then proceeded to question Nicole and ultimately found that Nicole was stipulating to the ground of failure to assume parental responsibility, and that this stipulation was made knowingly, voluntarily and intelligently. The trial court did not discuss anything in the depositions or make any findings about the factual basis for the failure to assume parental responsibility ground for termination.

¶14 The case proceeded to a dispositional hearing, which involved five days of testimony over a period of four months. Ultimately, the trial court found that termination was in the children's best interests. Although Nicole was offered the opportunity to voluntarily terminate her parental rights, she declined and the trial court entered an order terminating her parental rights. This appeal followed.

DISCUSSION

¶15 Nicole asserts that the termination orders should be reversed because the trial court failed to follow the correct statutory procedure when it accepted her stipulation. Specifically, Nicole complains that the trial court did not take testimony that would establish a factual basis for the stipulation.

¶16 WISCONSIN STAT. § 48.422(3) provides that if the petition for termination of parental rights "is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." Section 48.422(7) provides:

Before accepting an admission of the alleged facts in a petition, the court shall:

(a) Address the parties present and determine that the admission is made voluntarily with understanding of the

nature of the acts alleged in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

(bm) Establish whether a proposed adoptive parent of the child has been identified....

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

Nicole asserts that the trial court erred when it failed to “hear testimony” as required by § 48.422(3) and make the inquiries required under § 48.422(7)(c). She does not argue that her stipulation was unknowing or involuntary, or made under duress.

¶17 In response, the State argues that the acceptance of the two deposition transcripts satisfies WIS. STAT. § 48.422(3) and (7)(c), and joins the GAL in strenuously arguing that Nicole waived her right to challenge the factual basis for her stipulation to the ground for terminating her parental rights when she actively participated in the stipulation and never challenged the factual basis for termination until this appeal.

¶18 Although the State and the GAL present a convincing case for waiver, we decline to decide this case based on waiver. We also need not decide whether submission of the deposition transcripts satisfies WIS. STAT. § 48.422(3) and (7)(c), because even if the trial court failed to follow the correct procedure, a factual basis exists to affirm the orders. Our supreme court has recognized that even where the trial court errs by failing to hear testimony in support of the allegations in the petition as required by WIS. STAT. § 48.422(3), a party “cannot

rely on this error to reverse the termination proceedings” if the party “was not prejudiced by the circuit court’s failure to comply with the statute.”⁶ *Waukesha County v. Steven H.*, 2000 WI 28, ¶¶56-57, 233 Wis. 2d 344, 607 N.W.2d 607. *Steven H.* affirmed the termination orders at issue, relying on the fact that when the entire record was examined, a factual basis for several of the allegations in the petition could be “teased out” of the testimony of witnesses at other hearings. *Id.*, ¶58.

¶19 Nicole acknowledges that *Steven* allows this court to “examine the entire record to determine whether any legal error in failing to comply with [WIS. STAT.] § 48.422 may be cured.” However, she disputes that the record supports a finding that she failed to assume parental responsibility.

¶20 The failure to assume parental responsibility ground for termination is found in WIS. STAT. § 48.415(6), which provides:

(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed

⁶ The court also noted its “grave concerns about the circuit court’s failure to follow the procedure set forth” in WIS. STAT. § 48.422(3). *Waukesha County v. Steven H.*, 2000 WI 28, ¶60, 233 Wis. 2d 344, 607 N.W.2d 607. This court echoes those concerns and urges trial courts, as well as parties, to carefully follow the procedures outlined in the statutes. Doing so will most effectively ensure that the rights of parents are protected and eliminate one basis for reversal, which unnecessarily prolongs the process to the detriment of the children and parties involved.

concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶21 Nicole seizes on the word “never” in WIS. STAT. § 48.415(6)(a) and asserts that there is no evidence to support a finding that Nicole never accepted and exercised significant responsibility for the children’s daily needs. She argues:

The depositions support the opposite conclusion, that [Nicole] did have a substantial parental relationship with each of her children. She provided daily care, support and supervision for her three children during significant periods of time. She actively pursued conditions for the return of her children and maintained regular contact with them.

¶22 Nicole’s argument fails for two reasons. First, she ignores the fact that this court’s role is not to weigh the evidence. If there is any evidence to support a finding that Nicole failed to assume parental responsibility, this court will affirm the finding. *See Steven*, 233 Wis. 2d 344, ¶58.

¶23 Second, Nicole reads the statute too narrowly. We explained in *State v. Quinsanna D.*, 2002 WI App 318, ¶32, 259 Wis. 2d 429, 655 N.W.2d 752, that the mere fact that a child lives with a parent does not preclude a finding that the parent failed to assume parental responsibility:

Wis. Stat. § 48.415(6)(b) provides that a “substantial parental relationship” consists of “the acceptance and exercise of significant responsibility” for not only the “daily supervision” of a child, but also “the acceptance and exercise of significant responsibility” for, among other things, the “protection and care of the child.” Here, the jury reasonably could have inferred that, because Quinsanna’s “daily supervision” of [her children] included her daily exposure of them to her own drug use and drug

house, she had not exercised “significant responsibility” for their “protection and care.”

(Citations omitted.)

¶24 Based on *Quinsanna D.*, the relevant inquiry for this court is whether there are facts in the record from which a fact finder could infer that Nicole did not exercise “significant responsibility” for the children’s “protection and care.” *See id.*, quoting WIS. STAT. § 48.415(6)(b). We conclude that those facts exist.

¶25 There is evidence found in both of Nicole’s depositions and in the transcripts of the dispositional hearing that supports a finding that Nicole did not exercise significant responsibility for her children’s protection and care. First, until Nicole turned eighteen, she herself was a foster child, and the foster parents actively provided care to Christopher. Even after Nicole turned eighteen she still relied on the assistance of a parent assistant provided by the State. Thus, Nicole was not always providing care for her children.

¶26 Second, even when Nicole lived alone with each of her children, there is evidence that she allowed them to be abused and neglected, and to witness abuse. Christopher and Joseph were removed from the home after the parent assistant found a scratch and bruising on Christopher. One year later, when all three children were briefly placed with Nicole, she left Ariana alone in a vehicle for forty-five minutes, leaving one witness to later opine that the child could have easily died in the heat. Nicole also continued to allow Otis to live in the home, despite warnings that this jeopardized the children’s placement and endangered them. These facts form a basis for a factual finding that Nicole failed to assume parental responsibility for her three children. We conclude, therefore, that Nicole

was not prejudiced by the trial court's failure to comply with the statutory procedure, *see Steven H.*, 233 Wis. 2d 344, ¶57, and that the orders should be affirmed.

By the Court.—Orders affirmed.

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

