COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1952

Cir. Ct. Nos. 2008TP24
2008TP25
2008TP26

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DEANTE R., MAKAYLA R., AND KYLEIGH R., PERSONS UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

JEANNA R. AND HOUSTON R.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Walworth County Department of Health and Human Services appeals from an order dismissing the termination of parental rights petitions filed against Jeanna R. and Houston R. The County contends that the circuit court erred when it dismissed the petitions during the case-in-chief because the court incorrectly concluded that the required TPR warnings had not been provided to the parents. It argues that remand for further proceedings is required due to missing transcripts and an improperly timed motion to dismiss. We disagree and affirm.

BACKGROUND

¶2 On August 14, 2008, the County filed petitions seeking to terminate Jeanna's and Houston's parental rights to each of their four children.[2] As grounds for termination, the County alleged that Houston had abandoned the children as defined in WIS. STAT. § 48.415(1)(a) and that the children were in continuing need of protection or services (CHIPS) under § 48.415(2). With regard to Jeanna, the County alleged that the children were in continuing need of protection or services under § 48.415(2).

¶3 Events leading to the filing of the TPR petition are as follows. In May and June of 2006, the County received several reports that the children were not being supervised, with specific examples of neglect and one instance of documented abuse. On June 20, the children were taken into temporary physical

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] A separate petition seeking termination against both parents was filed for each child. This appeal concerns the three oldest children only.

custody and placed in foster care. On June 22, the County filed a CHIPS petition, alleging abuse to one of the children, the risk of abuse to the others, and neglect of all three.

¶4 On August 18, 2006, the circuit court adjudicated the children to be in continuing need of protection or services and ordered placement outside the home. The orders contained conditions for the return of the children, and included the required TPR warnings, which were signed by both Jeanna and Houston.

¶5 The dispositional orders were revised January 17, 2007.[3] The revised order changed the conditions of return for Houston and gave joint custody of the children to Jeanna and the County. It also required Jeanna and Houston to make bi-weekly telephone calls and attend monthly meetings with their social worker to discuss their progress on meeting the conditions. No TPR warnings were attached to the revised order.

¶6 A subsequent revision, effective May 11, 2007, gave the County the discretion to allow or prevent contact between the children and extended family, and it barred contact between the extended families and foster homes because the foster homes reported they were receiving threats from the family. No TPR warnings were attached to this revision. Another revision was ordered in September 2007 and, again, no TPR warnings were attached. It is undisputed that the children were placed outside the home by the August 18, 2006 CHIPS

[3] This is the date of the hearing that led to the revised orders dated January 22, 2007. The parties employ both the hearing date and the signing date to refer to the revision. We will refer to the revised order as the January 22, 2007 order, and we understand the terms to be consistent across all three children's files.

adjudication and that each of the revised dispositional orders continued the placement outside the home.

¶7 The County filed the TPR petitions on August 14, 2008, alleging that Jeanna and Houston had not met the conditions of return and that there was a substantial likelihood that they would not meet them within the nine-month period following the fact-finding hearing in the case. The case proceeded to a fact-finding hearing before a jury on March 30, 2009. The first step in a TPR proceeding is the fact-finding hearing to determine whether grounds exist for termination. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 768. During this stage, the rights of the parents are paramount. ***Id.*** If the petitioner proves by clear and convincing evidence that grounds for termination exist, the second step is the dispositional phase where the best interests of the children are paramount. ***Id.***, ¶¶22-23. Here, the proceedings were in the fact-finding stage.

¶8 On the second day of the hearing, Walworth County Clerk of Courts Sheila Reiff testified regarding the CHIPS history, the original dispositional order of August 2006, and the subsequent revised orders. She confirmed that the August 2006 order included the required TPR warnings, but that none of the subsequent revised orders had the warnings attached.

¶9 On the third day of trial, Houston filed a motion to dismiss the petitions. He argued that under WIS. STAT. §§ 48.356(2) and 48.415(2), both the original disposition order and any subsequent revisions must contain TPR warnings. The County responded that Houston improperly moved to dismiss in the middle of the trial. It further argued that the only order placing the children outside the home was the August 2006 order, which did contain the required TPR

warnings. The circuit court concluded that under § 48.415(2)(a)1. and ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, "the statutory language says that [TPR] warnings are to be attached on revisions that continue placement outside the home and it has to be the last order before filing [a petition for] termination of parental rights." The court granted the motion to dismiss the petitions. The County moved for reconsideration and was denied. The County then moved the court of appeals for remand because a portion of the official transcript from the second day of trial was not available.[4] We denied the motion, and the County now appeals from the circuit court's order dismissing the TPR petitions.

DISCUSSION

¶10 The County presents three primary arguments, although it offers one as a justification for not fully developing the others. The County asserts that it cannot adequately advocate its position because of the missing trial transcript. It contends that the missing testimony is needed to show the "purpose of the TPR warnings and the fact that Houston was not required to follow the January 2007 revision." Essentially, the County argues that the missing testimony would show that the revised orders did not require the TPR warnings because they did not implement substantive changes to the original August 2006 order.

¶11 An appellant must demonstrate a "colorable need" for a complete transcript, which means the missing portion, if available, would demonstrate a reviewable error. *See* ***State v. Perry***, 136 Wis. 2d 92, 101, 401 N.W.2d 748

[4] The court reporter indicated that a box of notes was missing and the backup disk was defective.

(1987). Whether a transcript is sufficient to serve its necessary purpose on appeal is a question of law. ***Id.*** at 97. Here, the substantive appellate issue is not whether Jeanna and Houston were aware of the TPR warnings or whether they were meeting the conditions of return as modified; rather, the issue is whether providing TPR warnings with the August 2006 dispositional order was sufficient when measured against the relevant statutes and case law. We are convinced the issue can be reviewed on the record provided. Therefore, we move to the County's two remaining appellate issues.

¶12 First, the County argues that the circuit court improperly heard and ruled on Houston's motion to dismiss in the middle of the County's case-in-chief.[5] Arguing that such a motion should have been made at least ten days prior to trial, the County directs us to WIS. STAT. § 48.297(2) for the proper motion procedure in a contested TPR:

> Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition or invalidity in whole or in part of the statute on which the petition is founded shall be raised not later than 10 days after the plea hearing or be deemed waived. Other motions capable of determination without trial may be brought any time before trial.

¶13 The parents respond by observing that the motion to dismiss challenged the sufficiency of the evidence, a proper midtrial consideration. *See*

[5] The County also asserts that, because jeopardy attaches when the jury is selected and sworn, *see* WIS. STAT. § 48.317, the legislature "did not intend for parents to bring dispositive motions in the middle of a court or jury trial." Such motion practice, it argues, would "most certainly … delay proceedings, and defeat[] the general purpose of [WIS. STAT.] § 48.01[.]"[5] It asserts that the midtrial motion deprived the County of the ability to "avoid any double jeopardy issues." The County fails to develop its double jeopardy argument and therefore we do not address it.

WIS. STAT. § 805.14. Houston did not challenge the institution of the proceedings or the adequacy of the petition; rather, he argued that the County, based on uncontested testimony by the County's witness, had failed to demonstrate compliance with the statutes. While Houston acknowledges that such a motion challenging the sufficiency of the evidence is typically made at the close of the petitioner's case, he emphasizes that allowing the County to continue could not have cured the deficiency here. In other words, Houston moved for dismissal at the point in the trial where he believed the County could no longer meet its burden of proof.

¶14 We conclude that the circuit court properly considered the motion to dismiss before the close of the County's case. We reach this conclusion for three reasons. First, although WIS. STAT. § 805.14 permits a defendant to move for dismissal on the ground of insufficiency of the evidence at the close of the petitioner's evidence, it does not prohibit such a motion earlier in the proceedings. Second, circuit courts have inherent authority to make certain rulings, including the authority to dismiss a case, in the orderly administration of justice. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 580, 297 N.W.2d 808 (1980) ("general control of the judicial business before it is essential to the court if it is to function"). Third, to accept the County's proposition, we would have to agree that testimony demonstrating what may be an incurable deficiency of proof could not provoke a prompt motion to dismiss. That would be an absurd procedural rule.[6]

[6] The County argues that it should have had the opportunity to question the parents "to find out whether or not they were confused by the subsequent orders, whether they even read the subsequent orders, or if they spoke to caseworkers about the conditions." There is no suggestion here that the County could have produced proof that the TPR warnings were attached to the revised orders. Thus, this is not a situation where the circuit court preempted the County's opportunity to prove that TPR warnings were attached.

¶15 The County's final argument is that the motion to dismiss was wrongly decided. The test for granting a motion to dismiss for insufficiency of the evidence is whether there is any credible evidence to support a finding in favor of the petitioner when all the credible evidence and reasonable inferences therefrom are considered in the light most favorable to the petitioner. ***Christianson v. Downs***, 90 Wis. 2d 332, 334-45, 279 N.W.2d 918 (1979); WIS. STAT. § 805.14(1). Where, as here, we are asked to determine whether the TPR warnings provided were sufficient when measured against WIS. STAT. §§ 48.356(2), 48.415(1) and 48.415(2), we are presented with a question of law for our de novo review. *See* ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 645, 469 N.W.2d 845 (1991). These statutes state in relevant part:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home ... because the child ... has been adjudged to be in need of protection or services ... the court shall orally inform the parent or parents who appear in court ... of any grounds for termination of parental rights under [WIS. STAT. § 48.415] which may be applicable and of the conditions necessary for the child ... to be returned to the home ....
>
> **(2)** In addition to the notice required under sub. (1), *any written order* which places a child ... outside the home ... shall notify the parent ... of the information specified under sub. (1).

Sec. 48.356(2) (emphasis added).

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment … shall be established by proving any of the following:
>
> **….**

> 2. That the child has been placed, or continued in a placement, outside the parent's home by *a court order* containing the notice required by s. 48.356(2) … and the parent has failed to visit or communicate with the child for a period of 3 months or longer.
>
> ….
>
> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. 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 … 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 ... containing the notice required by s. 48.356(2) ….

Sec. 48.415 (emphasis added).

¶16 Our supreme court has addressed the inconsistency between WIS. STAT. § 48.356(2), which requires "any written order" to include TPR warnings, and the language in WIS. STAT. § 48.415(2), which provides that "one or more court orders" for placement or continued placement outside of the home on CHIPS grounds must contain the TPR warnings. *See* ***Steven H.***, 233 Wis. 2d 344, ¶30. As the County points out, the ***Steven H.*** court expressly rejected earlier case law that stated the TPR warnings were required with every dispositional order:

> We agree with the [***D.F.R. v. Juneau County DSS***, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), and ***Marinette County v. Tammy C.***, 219 Wis. 2d 206, 579 N.W.2d 635 (1998)] cases that the possibility of permanent loss of parental rights persuaded the legislature to adopt a rigorous procedure, including the statutory notice provided in WIS. STAT. § 48.356(2). We do not agree with the court of appeals in [***D.F.R.***] that the statutory notice must be given "*each time* an order places a child outside his or her home" in order to continue a termination of parental rights proceeding. [***D.F.R.***], 147 Wis. 2d at 499 (emphasis added). Although WIS. STAT. § 48.356(2) reads that "any order" placing a child outside the home is to include the statutorily prescribed notice, § 48.415(2) reads that "one or more orders" placing a child outside the home is to include

> the statutorily prescribed notice. Reading §§ 48.356(2) and 48.415(2) together, and in light of the legislative purpose expressed in § 48.01(1)(a) by the 1995 revisions in the Children's Code, we conclude that these statutes do not require the statutorily prescribed written notice to be in *every order* placing a child outside the home.

Steven H., 233 Wis. 2d 344, ¶29 (footnote omitted).

¶17 The supreme court concluded that, while every order continuing placement outside of the home will not trigger the WIS. STAT. § 48.356 duty to warn, "if the last order issued at least six months before the filing of the petition involuntarily terminating parental rights contains the written notice," the petitioner has provided adequate notice. ***Steven H.***, 233 Wis. 2d 344, ¶31. Here, there were at least three revised dispositional orders that followed the original August 2006 order, which first placed the children outside the home and provided the TPR warnings. The subsequent orders continued placement outside the home but did not contain the TPR warnings. The circuit court reviewed the evidence in the light most favorable to the County, but found it lacking. It held:

> [T]he statutory language says that warnings are to be attached on revisions that continue placement outside the home and it has to be the last order before filing termination of parental rights. There were no written warnings attached…. [T]he hearing was January 17th and the order was signed on January 18th and filed on January 22nd, that's the order we're talking about, doesn't have the warnings. And it clearly says that the provisions of the dispositional order which placed the children outside the home remain in full force and effect and that sounds like continued in a placement outside the home.

There is no dispute that the last order issued did not contain the warnings. Even under the ***Steven H.*** court's liberal interpretation of the statutory mandate, the County failed to provide the required TPR warnings to Jeanna and Houston. The

circuit court properly dismissed the petitions for failure to warn regarding the CHIPS grounds for termination.[7]

By the Court.—Order affirmed.

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

[7] The County asserts that under ***Rock County DSS v. C.D.K.***, 162 Wis. 2d 431, 469 N.W.2d 881 (Ct. App. 1991), it met its duty to warn Houston that his parental rights may be terminated on abandonment grounds under WIS. STAT. § 48.415(1)(a)2. In ***C.D.K.***, the court held that only a single dispositional order or revised order need contain the TPR warnings when abandonment is alleged. ***C.D.K.***, 162 Wis. 2d at 438-39. Houston concedes this point. However, in ***C.D.K.*** the County filed separate petitions alleging CHIPS grounds and abandonment grounds for termination of C.D.K.'s parental rights to his two children. ***Id.*** at 436. After the fact-finding hearing, the jury returned special verdicts find that C.D.K. had abandoned his children and that the children were in continuing need of protection and services. ***Id.*** at 437. Upon reconsideration, the circuit court dismissed the petitions for failure to warn. ***Id.*** On appeal, we reversed the circuit court, holding that "[b]ecause one of the grounds relied on by the trial court for termination … was abandonment" and one of the orders contained the required TPR warnings, the termination of C.D.K.'s parental rights on abandonment grounds should not have been dismissed. ***Id.*** at 440. Here, the County filed a single petition to terminate the parental rights of both Jeanna and Houston on CHIPS grounds, and included in that same petition the abandonment allegation against Houston. The single petition against both parents with inconsistent grounds alleged against each, distinguishes this case from ***C.D.K.*** The circuit court properly dismissed the petition for failure to warn on the CHIPS grounds, and it cannot be resuscitated on abandonment grounds. We observe that the County seeks to reinstate the entire petition rather than asking to preserve the abandonment portion. A ruling on the abandonment allegation against Houston would be moot, having no practical impact on the case and, importantly, the children. An issue is moot when its resolution will have no practical effect on the underlying controversy. ***State ex rel. Riesch v. Schwartz***, 2005 WI 11, ¶11, 278 Wis. 2d 24, 692 N.W.2d 219. We therefore decline to address the abandonment issue further. Nothing in this opinion prohibits the County from filing new petitions to terminate parental rights, if it believes grounds exist now or in the future.