

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2011

A. John Voelker
Acting 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. 2011AP529
2011AP530
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2009TP59
2009TP60**

**IN COURT OF APPEALS
DISTRICT IV**

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER F.,

RESPONDENT-APPELLANT.

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Jennifer F. appeals orders of the circuit court terminating her parental rights to Lazzerick A. and Kassaiya A. Jennifer contends that the circuit court violated WIS. STAT. § 48.422(3) by failing to hear testimony in support of the allegations in the petitions to terminate her parental rights prior to accepting her no contest pleas to those allegations. I conclude that the court erred in failing to hear testimony in support of those allegations; however, I further conclude that Jennifer was not prejudiced by that error. Accordingly, I affirm.

BACKGROUND

¶2 The Dane County Department of Human Services (hereafter Dane County) petitioned to terminate Jennifer's parental rights to Lazzerick and Kassaiya on the basis that Lazzerick and Kassaiya were in continuing need of protection or services under WIS. STAT. § 48.415(2).² In December 2009, Jennifer

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² WISCONSIN STAT. § 48.415(2) provides as follows:

48.415 Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights.... Grounds for termination of parental rights shall be one of the following:

....

(2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:

(continued)

and Dane County entered into agreements to “hold [] open” the cases until May 2010. Under the terms of the agreement, Jennifer agreed to plead no contest to the petitions to terminate her parental rights to Lazzerick and Kassaiya. Jennifer also agreed that she would comply with a number of conditions, including the requirements that she maintain absolute sobriety and submit to random testing for

(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).

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 9-month period following the fact-finding hearing under s. 48.424.

(am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13(3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356(2).

2. That the conditions that led to the child’s placement outside his or her home under each order specified in subd. 1. were caused by the parent.

drug and alcohol testing. The agreements provided that if Jennifer complied with the terms of the agreements, the court would dismiss the termination petitions against her with prejudice. However, if Jennifer violated the agreement in any manner, the circuit court would find her to be an unfit parent and the matters would proceed to dispositional hearings where the court might terminate her parental rights. The circuit court accepted Jennifer's pleas, and adopted the parties' hold open agreement.

¶3 In March 2010, Dane County filed motions with supporting affidavits alleging that Jennifer had violated the terms of the hold open agreement. The motions alleged that on five occasions Jennifer had either failed to call in about or appear for required random urinalysis testing. Jennifer agreed that she had violated the terms of the agreement, but stated that she wished to contest disposition.

¶4 In November 2010, a dispositional hearing was held to determine whether Jennifer's parental rights to Lazzerick and Kassaiya should be terminated. Following the hearing, the circuit court found that it was in each child's best interests to terminate Jennifer's parental rights, and orders terminating her parental rights to those children were entered. Jennifer appeals.

DISCUSSION

¶5 Jennifer contends the circuit court violated WIS. STAT. § 48.422(3) by failing to hear testimony in support of the allegations in the termination petition prior to accepting her no contest pleas to those allegations and, therefore, the orders terminating her parental rights to Lazzerick and Kassaiya should be reversed. I agree that the court failed to comply with the requirements of WIS.

STAT. § 48.422(3). However, as I will explain, the court’s error does not warrant reversal of the orders terminating her parental rights.

¶6 WISCONSIN STAT. § 48.422(3) provides that “[i]f the petition [to terminate 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).” In *Waukesha County v. Steven H.*, 2000 WI 28, ¶56, 233 Wis. 2d 344, 607 N.W.2d 607, the supreme court held that if the allegations in a petition to terminate parental rights are not contested, WIS. STAT. § 48.422(3) *requires* a county to “call a witness to testify in support of the allegations in the petition.” *Waukesha County*, 233 Wis. 2d 344, ¶56 (emphasis added). A circuit court errs if it fails to do so. *Id.*

¶7 It is undisputed that in the present case the circuit court failed to hear testimony in support of the allegations of the petitions to terminate Jennifer’s parental rights prior to accepting Jennifer’s no contest pleas to those allegations. However, the court’s failure to comply with the requirements of WIS. STAT. § 48.422(3) does not warrant automatic reversal of the orders terminating her parental rights. For an appellate court to overturn the orders of termination, the court’s error in failing to hear testimony supporting the allegations in the petitions must have been prejudicial to Jennifer. *Id.*, ¶57.

¶8 In *Waukesha County*, the supreme court concluded that a circuit court’s failure to comply with WIS. STAT. § 48.422(3) was not prejudicial when “[a] factual basis for several of the allegations in the petition [could] be teased out of the testimony of other witnesses at other hearings when the entire record [was]

examined.” *Id.*, ¶58. Nothing in *Waukesha County* limits the “teas[ing] out” to testimony taken before the fact-finding hearing.³ *See id.*

¶9 As in *Waukesha County*, a factual basis for several of the allegations in the petition “can be teased out” of the testimony in the record. *Id.*

¶10 The petitions alleged that grounds for the termination of Jennifer’s parental rights of Lazzerick and Kassaiya existed under WIS. STAT. § 48.415(2). The petition stated, in support of that basis for termination, that Jennifer has “failed to maintain a safe and stable home and legal source of income, she has failed to abstain from the use of alcohol The DCDHS has made reasonable efforts in attempting to provide services to Jennifer and there is a substantial likelihood that she will not meet those conditions of return within the 12 months following the fact-finding hearing.”

¶11 Witnesses testified at the disposition hearing that Lazzerick and Kassaiya had been placed and continued in placement out of home, except for a brief period of time, since December 2007. Witnesses also testified that Jennifer had been unsuccessful in maintaining her sobriety, had failed to make all her appointments for alcohol and drug testing, had failed to seek treatment for her alcohol problems since her release from jail in November 2009 until two weeks prior to the disposition hearing, and had failed to maintain a residence for the children. Additionally, Jennifer provided no defense to the factual allegations in the petitions.

³ *See* WIS. STAT. § 48.424 (governing fact-finding hearings).

¶12 It is clear from my independent examination of the entire record that a factual basis for several of the allegations in the petitions to terminate Jennifer's parental rights are present. Accordingly, there are insufficient grounds to justify overturning the circuit court's orders of termination in this case. *See Waukesha County*, 233 Wis. 2d 344, ¶60. I therefore affirm.

By the Court.—Orders affirmed.

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

