COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2015

Diane M. Fremgen
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 No. 2015AP1298
2015AP1299
2015AP1300

Cir. Ct. No. 2014TP18
2014TP19
2014TP20

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

E. P.,

RESPONDENT-APPELLANT.

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STATE OF WISCONSIN,

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

E. P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA LYNN GRASSL BRADLEY, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] E. P. appeals from orders terminating his parental rights to his three adopted children: T. P. (child 1), T. P. (child 2), and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

J. P. (child 3).[2] A jury found as grounds for termination of E. P.'s parental rights that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2).[3]

¶2 E. P. argues that the orders should be reversed and the petitions to terminate parental rights dismissed because, according to E. P., the case "prematurely" proceeded on the grounds of continuing need of protection or services (continuing CHIPS) and, therefore, violated his right to due process. Alternatively, E. P. argues he is entitled to a new trial in the interest of justice because, according to E. P., there was an "unfair presentation of some evidence." For the reasons set forth below, I reject E. P.'s arguments and affirm.

BACKGROUND

¶3 E. P. began serving as a foster parent for the children around 2004 and 2005. E. P. adopted the children in 2007.

¶4 In 2008, the children were removed from E. P.'s care and placed under CHIPS orders. E. P. fulfilled the conditions of return in 2009 and the children were returned to him.

[2] Two of the children have the same initials. For ease of discussion, we refer to the children individually from eldest to youngest as child 1, child 2, and child 3.

[3] The jury also found a second ground for termination of E. P.'s parental rights—that E. P. failed to assume parental responsibility for the children under WIS. STAT. § 48.415(6). Because we affirm the first continuing CHIPS ground, we need not address E. P.'s argument concerning the second ground for termination of parental rights. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (WI App 2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶5 In August 2012, the children were again removed from E. P.'s care when a neighbor contacted the police after the neighbor allegedly heard "slapping noises" and "screaming and crying" coming from inside E. P.'s home. The children have not been under E. P.'s care since August 2012.

¶6 In April 2013, a circuit court found the children in need of protection or services and, based upon that finding, entered CHIPS orders placing the children in foster care. E. P. appealed the CHIPS orders. This court affirmed the orders on September 3, 2014 and that decision became final on October 3, 2014 when the period for filing a petition for review ran.

¶7 In February 2014, the State filed a petition for termination of E. P.'s parental rights to each of the children on the basis that E. P. "failed to assume parental responsibility, as defined by Wis. Stats. sec. 48.415(6)." In April 2014, the State filed amended petitions as to each child and added "continuing CHIPS" as an additional ground for termination of parental rights.

¶8 In August 2014, the State moved to adjourn the jury trial pending E. P.'s appeal of the underlying CHIPS orders, which, as noted above, was decided on September 3, 2014. The circuit court rescheduled the jury trial to begin December 1, 2014.

¶9 On December 1, 2014, the day the jury trial was scheduled to begin, E. P. filed a motion to adjourn the trial, stating that he "intends to commit himself to meeting his conditions of return" and that "he has had insufficient time since the [CHIPS] appeal became final to meaningfully address the conditions of return." E. P. argued in the circuit court that under WIS. STAT. § 48.415, the six-month period for E. P. to work on his conditions of return did not start to run until the

CHIPS order became final on October 3, 2014. The circuit court denied his motion to adjourn and proceeded to trial.

¶10 Special verdict forms were presented to the jury at the end of trial regarding E. P.'s parental rights to each of the children, and asked:

- "Has [the child] been adjudged to be in need of protection or services and placed outside the home for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?"
- "[H]as the Bureau of Milwaukee Child Welfare made reasonable efforts to provide the services ordered by the Court?"
- "[H]as the parent, [E. P.], failed to meet the conditions established for the return of the child(ren) to the home?"
- "[I]s there a substantial likelihood that the parent, [E. P.], will not meet these conditions within the nine-month period following the conclusion of the hearing?"

The circuit court directed verdict as to the first question and answered, "Yes." The jury unanimously answered, "Yes," to each of the remaining questions. The circuit court entered judgment on the verdict and found E. P. unfit as a parent. The court ultimately terminated E. P.'s parental rights to the children, after a dispositional hearing that is not challenged on appeal.

DISCUSSION

¶11 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.*** "[I]f grounds for the termination of parental rights are found by the court or jury, the

court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (quoted sources omitted). The second phase, the dispositional hearing, "occurs only after the fact-finder finds a Wis. Stat. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Id.***, ¶19 (citations omitted).

¶12 E. P. challenges only the first step, establishing the statutory ground of continuing CHIPS for termination of parental rights under WIS. STAT. § 48.415(2). E. P. argues that the orders should be reversed and the petitions to terminate parental rights dismissed because, according to E. P., the case "prematurely" proceeded on the grounds of continuing CHIPS, and, therefore, violated his right to due process. Alternatively, E. P. argues that he is entitled to a new trial in the interest of justice because, according to E. P., there was an "unfair presentation of some evidence." I address and reject each of E. P.'s arguments below.

A. Continuing CHIPS Ground for Termination of Parental Rights

¶13 Resolution of this case requires interpretation of the involuntary termination of parental rights statute and related case law. "The proper interpretation of a statute and case law raises questions of law that we review de novo." ***State v. Starks***, 2013 WI 69, ¶28, 349 Wis. 2d 274, 833 N.W.2d 146. "Whether a statute and the application of a statute are constitutional are … questions of law that we review independently." ***Tammy W-G.***, 333 Wis. 2d 273, ¶16.

¶14 E. P. broadly argues that this case "prematurely" proceeded on the grounds of continuing CHIPS and, therefore, violated his due process "right to appeal a CHIPS order."

¶15 The continuing CHIPS ground for termination of parental rights, WIS. STAT. § 48.415(2), is established by proving the following four elements:

> 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 ...."
>
> 2. "That the agency responsible for the care of the child and the family … 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 …."
>
> 4. "[T]hat 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 …."

¶16 E. P. asserts that when trial commenced on December 1, 2014, he "had been under final CHIPS orders for just under two months" because his appeal of the CHIPS orders was not decided until September 3, 2014 and his right to petition for review did not run until October 3, 2014. E. P. appears to argue, in other words, that the term "orders" as used in WIS. STAT. § 48.415(2) must mean final orders after the parent has exhausted all appellate remedies, and therefore, the calculation of the "6 months or longer" period during which the child has been placed outside of the home pursuant to a CHIPS order does not begin to run until after all appellate remedies are exhausted. E. P.'s interpretation would, in effect, give E. P. six additional months after the CHIPS order became final in October 2014 to work on his conditions of return before the State may petition for termination on the continuing CHIPS ground, despite the fact that the CHIPS

order was entered in June 2013 and that the children were removed from his care in August 2012.

¶17 E. P. erroneously relies upon ***Monroe Cnty. v. Jennifer V.***, 200 Wis. 2d 678, 548 N.W.2d 837 (Ct. App. 1996) for support. In ***Jennifer V.***, the County alleged a different ground for termination of parental rights—that the parent caused death or injury to a child resulting in a felony "conviction." ***Id.*** at 680; *see* WIS. STAT. § 48.415(5)(a). The County moved for summary judgment while the appeal of the conviction was pending. ***Id.*** at 681-82. The term "conviction" was deemed ambiguous as to whether it means a conviction after the appeal as of right has been exhausted. ***Id.*** at 685, 690. This court agreed with the circuit court's interpretation "that a conviction was not a conviction within the meaning of § 48.415(5)(a) until all appellate remedies were exhausted" and affirmed the circuit court's order denying the County's motion for summary judgment and dismissing the petition without prejudice. ***Id.*** at 682, 690-91.

¶18 Our concern in ***Jennifer V.*** was that the *termination* of the parental rights prior to the exhaustion of appellate remedies would lead to troubling consequences. We explained that "[i]f an appeal of a judgment of conviction is pending when the *termination* of parental rights occurs, there is the chance the judgment may be reversed," "[m]eanwhile, the parent's rights would have been terminated and the child possibly already adopted." ***Id.*** at 688-89 (emphasis added). That concern is not present in this case, because E. P.'s parental rights were terminated *after* he had already exhausted all appellate remedies with respect to the CHIPS orders. The right at issue in ***Jennifer V.*** was the fundamental right of parenting. Here, the right that E. P. asserts is to have six additional months to begin working on the conditions of return set out in the CHIPS order. His asserted

right is not comparable to the right recognized in ***Jennifer V.***, and E. P. fails to provide any authority supporting his contention that his asserted right is so fundamental as to be protected by our constitution.

¶19 Thus, ***Jennifer V.*** does not support E. P.'s interpretation that "orders" mean final orders after the parent has exhausted all appellate remedies for the purposes of calculating the "6 months or longer" period. Moreover, adopting E. P.'s interpretation would be contrary to the legislative intent of providing permanence and stability in family relationships and eliminating unreasonable wait times for parents to correct the conditions that prevent children's safe return to the family. *See* WIS. STAT. § 48.01 ("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."). In sum, E. P. fails to demonstrate that the application of WIS. STAT. § 48.415(2) here violated his right to due process.

B. New Trial in the Interest of Justice

¶20 E. P. also argues that he is entitled to a new trial in the interest of justice because, according to E. P., there was "unfair presentation of some evidence." To support his argument for a new trial, E. P. points only to the guardian ad litem's questions at trial concerning the police's search of E. P.'s house for pornographic materials and questions that E. P. asserts "implied that [E. P.] home-schooled [child 1 and child 2] to avoid sending [them] to public school, where marks might be seen." E. P. contends that "the large number of

evidentiary questions will shake out into a much different trial" if a new trial is granted. This argument is not persuasive.

¶21 Generally, this court is "authorized to grant a new trial in the interest of justice if [it is] convinced that a miscarriage of justice has occurred. However, this court ought not grant a new trial unless [it is] convinced to a reasonable certitude that if there were a new trial it would probably effect a different result." ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 86, 443 N.W.2d 50 (Ct. App. 1989) (citations omitted). "The power to grant a new trial in the interest of justice is to be exercised 'infrequently and judiciously.'" ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted).

¶22 E. P. fails to demonstrate to a reasonable certitude that a new trial would probably effect a different result for several reasons. First, the allegedly improper questions by the guardian ad litem constituted a very small portion of the five-day trial, during which the jury heard testimony from numerous witnesses as to E. P.'s parenting history and likelihood of meeting the conditions of return set out in the CHIPS orders within nine months after the trial. Second, the circuit court properly instructed the jury at the end of trial that questions of the attorneys are not evidence:

> Remarks of the attorneys are not evidence. If any remarks suggested certain facts not in evidence, disregard the suggestion.
>
> You should consider carefully the closing arguments of the attorneys, but their arguments, conclusions, and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and answer the questions in the verdict according to the evidence and my instructions on the law. Similarly, *questions of the attorneys are not evidence. If any question suggested certain facts not in evidence, disregard the question.*

¶23 Third, there is ample evidence in the record to support the jury's findings as to the continuing CHIPS grounds for termination of E. P.'s parental rights, particularly the fourth element of proof: "[T]hat 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 …."[4] *See* WIS. STAT. § 48.415(2).

¶24 For example, the conditions of return contained four goals for behavioral change. The services recommended to target behavioral change included a "[p]sych evaluation" and "[f]amily therapy when recommended by the children's therapists." At the time of trial, E. P. had not yet undergone a psychological evaluation. A clinical psychologist testified that she conducted psychological evaluations for the children in 2008 and 2012, that she diagnosed each of the children with "physical abuse of a child," and that she had recommended "that it would be important for [E. P.] and the children to engage in family therapy." The clinical director of a behavioral health clinic where the children were receiving therapy services testified that while the children had been receiving services at the clinic on a weekly basis for approximately eighteen months, E. P. has not "participat[ed] in any joint child and parent therapy," despite the clinic's attempts to have E. P. involved in the children's treatment.

[4] There was also ample evidence supporting the findings as to the other elements: the children were adjudged to be in need of protection or services in April 2013, the Bureau of Milwaukee Child Welfare made reasonable efforts to provide the services ordered by the court, and the children have been placed outside the home for a cumulative period of six months or longer.

¶25 Additionally, the CHIPS order required E. P. to "attend and cooperate with the [Bureau of Milwaukee Child Welfare] Family Planning program and meetings for [the children]." The case manager who has been assigned to this case since August 2012 testified: "To the best of my ability I've notified [E. P.] of appointments [relating to the children] in advance that I've been aware of." When asked whether E. P. has attended various appointments for the children, such as doctors' appointments or teacher parent conferences, the case manager stated, "No."

¶26 In sum, E. P. fails to demonstrate that a jury's findings would differ had the jury not heard the two questions regarding the police's search for pornographic materials and E. P.'s motive for home schooling two of the children.

CONCLUSION

¶27 For the reasons set forth above, I affirm the circuit court's orders terminating E. P.'s parental rights to each of the children.

By the Court.—Orders affirmed.

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