**COURT OF APPEALS DECISION DATED AND RELEASED**

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-0662**

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

**In the Interest of Latrese Renee P., Shauntae Lazon P., Charles Anthony Darnell P. and Shakia Charmaine P., Persons Under the Age of 18:**

**State of Wisconsin,**

**Petitioner-Respondent,**

**v.**

**Gwen L.P.,**

**Respondent-Appellant.**

APPEAL from an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed*.

SCHUDSON, J.[1] Gwen L.P. appeals from the trial court order terminating her parental rights to Latrese Renee P., Shauntae Lazon P., Charles

[1] This appeal is decided by one judge pursuant to § 752.31(2) STATS.

Anthony Darnell P., and Shakia Charmaine P. She argues that the trial court applied improper statutory standards and that the evidence did not support the trial court's finding. This court affirms.

On January 22, 1993, the trial court entered an order finding the four children in need of protection or services and placing the children in foster homes. The dispositional CHIPS order was extended annually until the State petitioned for termination of parental rights on May 15, 1995.

The State alleged grounds for the termination of parental rights under § 48.415(2), STATS., which, in the predecessor version of the statute applicable to the period involved in this case, provided that grounds for termination shall be:

> CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services may be established by a showing of all of the following:
>
> (a) That the child has been adjudged to be 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, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356(2).
> (b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders, the parent has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions in the future.

At the court trial on the termination petition, criteria (a) and (b) were never in dispute. The parties, however, did contest Gwen L.P.'s alleged noncompliance with the conditions for return and the likelihood of her future compliance.

On appeal, Gwen L.P. first argues that the trial court "erred in using the wrong statutory standards" and that its order terminating her parental rights "conflates two different sets of statutory factors."

Whether a trial court has utilized the proper legal standard governing termination of parental rights presents a question of law we decide *de novo*. *See* ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct.App. 1995). Gwen L.P. maintains that the trial court utilized the version of § 48.415(2), STATS., as amended in 1994. While identical in subsections (a) and (b), the amended version of subsection (c) differs from its predecessor and provides:

> (c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders or, if the child had not attained the age of 3 years at the time of the initial order placing the child outside of the home, that the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

Gwen L.P. argues that "[t]he new statutory language not only changes the type of conduct needed to establish termination, but also changes the burden that the State must meet." She contends that "the court's order clearly conflates these statutory standards when it finds that Gwen P. has failed to demonstrate substantial progress toward meeting the conditions of return in that she has substantially neglected, willfully refused or been unable to meet

those conditions." Thus, she maintains, the trial court "failed to make the distinction between the old and new statutory language."

In a narrow sense, the record offers some support for Gwen L.P.'s argument. In both its stated verdicts and written order, the trial court used, in part, the words of the amended statute. It did so, however, in addition to the words of the old statute.

Gwen L.P. raised no objection to the trial court's articulation of the standard. Although at one point on appeal Gwen L.P. argues that the trial court used the wrong standard, she also contends that the trial court conflated the two standards. Notably, however, she never identifies which standard she believes should have applied, or how references to the terminology of both the old and new subsection violated her rights in any way.

Moreover, Gwen L.P. does not dispute the State's argument: that the chronology of her case required application of the old statute; that the State litigated the case utilizing the old statute;[2] and that the old statute establishes a heavier burden on the State than the new statute. *See* ***Patricia A.P.***, 195 Wis.2d at 864, 537 N.W.2d at 51 ("The change in the type of conduct for which termination is possible changes the burden on the State. The ground under the new law is far easier to establish that the grounds under the old law."). Thus, this court concludes that Gwen L.P. has failed to establish that the trial erred in its application of the legal standard for termination under § 48.415(2), STATS.

Gwen L.P. next argues that the trial evidence does not support the trial court's termination order. She maintains that the evidence "demonstrated that [she] was making progress, contradicting the court's finding that she failed to show substantial progress."

A trial court must evaluate the credibility of witnesses and weigh the evidence, *See* ***Blankenship v. Computers & Training, Inc.,*** 158 Wis.2d 702,

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[2] Indeed, Gwen L.P. argues that "the State clearly uses the old statutory criteria in its questioning of the social worker" at the trial.

709, 462 N.W.2d 918, 921 (Ct.App. 1990), and this court will not overturn a trial court's factual findings unless they are clearly erroneous. *See* 805.17(2), STATS. Here, the issue was whether, under the old version of § 48.415(2) STATS., Gwen L.P. "has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child[ren] to the home and there is a substantial likelihood that [Gwen L.P.] will not meet these conditions in the future."

Gwen L.P. argues:

> The evidence at trial showed Gwen P. had made a number of improvements in her life, including completing parenting classes, demonstrating a drug and alcohol free life style, having plenty of food in the house, starting individual counseling, and obtaining medical care for the children currently in her care as shown by their shot records.
>
> The psychological evaluation done in 1992 had two main recommendations before the children could return home. Gwen needed to complete parenting classes and needed to participate in psychotherapy. Since at trial Gwen testified she had completed the classes, only one other condition remained.
>
> Furthermore, at trial the psychologist testified that therapy typically should consist of weekly sessions for a three month period of time. Given the three month time period mentioned by the psychologist, this condition could be easily met within twelve months of the trial.[3]

[3] Here, Gwen L.P. seems to be arguing under the twelve-month standard of the amended §48.415(2), STATS., although elsewhere in her brief she implies that application of the new standard would have constituted error and, as mentioned, she does not dispute the State's argument that the predecessor statute was applied.

> Finally, the trial court erred by ignoring the fact that Gwen's parenting skills have substantially increased by a review of her court history. In 1991, her daughter Shauntae was returned to her. Although Gwen's [four] children [involved in this termination case] were removed in 1992, she had three [other] children [not involved in this case] living with her on the date of trial that had not been removed from her home.

The State responds that "the past and present performance of the parent must be used to gauge the likelihood of future compliance." Summarizing additional evidence, the State therefore argues:

> The evidence as to Gwen L.P.'s likelihood of future non-compliance with the conditions of return was based on both the overwhelming nature of her past non-compliance over a period of nearly three years under conditions of return, as well as extremely strong evidence of her failure to show substantial evidence of compliance on the date of trial.
>
> Her residential pattern remained transient, it was no cleaner than her past residences, which homes were deplorable and hideously filthy. She had no beds for the children and the furnishings were minimal.
>
> Gwen L.P. had barely started alcohol and other drug abuse (AODA) and other counseling on the eve of trial, for which there was no follow-through, and many missed appointments; she was discharged from the Milwaukee Women's Center for failure to show up as recently as October 13, 1995. This followed many years of referrals which Gwen L.P. never utilized.
>
> Testimony of Dr. Suzanne Lisowski, who had performed a psychological evaluation upon Gwen L.P. in 1992, established that the fundamental

> emotional, intellectual and achievement inadequacies observed in 1992 would remain the same if left unaddressed. No testimony was ever provided in the trial to rebut the baseline findings of Dr. Lisowski in 1992 that Gwen L.P. labored under serious intellectual, behavioral, emotional and achievement deficiencies.
>
> She totally failed to co-operate with Mothercare, a home-based assistance program, which failure was as recent as mid-October 1995, just one month prior to trial.
>
> Gwen L.P.'s only completed parenting class was in 1993 which was clearly no longer age-appropriate for children who had since aged two years in development.
>
> Visitation and communication, which had been a chronic problem in Gwen L.P.'s relationship with her children, remained almost non-existent, consisting recently of one visit at MCDHS and one visit in October or November, 1995.
>
> Medical care and vaccinations for the children remained problematic, in that it took public health personnel over a year, in 1995, to gain compliance by Gwen L.P. to obtain vaccinations for the three children residing in her home.
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> Gwen L.P. was also ordered to meet with professional service providers for her children, which conditions had never been met, up to the date of trial.

This court has examined the full trial record. It includes evidence corresponding to the representations and summaries of both parties on appeal. Although the evidence included factors in support of Gwen L.P.'s argument, the evidence also was replete with factors supporting the trial court's findings that Gwen L.P. "has substantially neglected, wilfully refused or been unable to meet

those conditions" and that she "is unlikely to meet any conditions of return in the future and that she is unfit."

*By the Court.*—Order affirmed.

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