COURT OF APPEALS
DECISION
DATED AND RELEASED

December 19, 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.

Nos. 96-1624
96-1625
96-1626
96-1627

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

96-1624

IN RE THE INTEREST OF HOLLY L. O.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A. O.,

Respondent-Appellant.

96-1625

IN RE THE INTEREST OF JEREMY C. T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

Nos. 96-1624
96-1625
96-1626
96-1627

v.

KAREN A. O.,

Respondent-Appellant.

96-1626

IN RE THE INTEREST OF MICHAEL A. T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A. O.,

Respondent-Appellant.

96-1627

IN RE THE INTEREST OF ANDREW J. T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KAREN A. O.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Waupaca County: JOHN A. DES JARDINS, Judge. *Affirmed*.

DYKMAN, P.J.[1] Karen A.O. appeals from orders terminating her parental rights to four of her children: Holly, Jeremy, Michael and Andrew.[2] Karen argues that: (1) the agency responsible for the care of the children did not make a diligent effort to provide the services ordered by the court as required by § 48.415(2), STATS.; (2) the trial court erroneously exercised its discretion when it terminated her parental rights; and (3) she is entitled a new trial because of the misconduct of one juror. We reject her arguments and therefore affirm.

BACKGROUND

On July 17, 1984, the court found Holly to be a child in need of protection or services and ordered six months of supervision. That order expired on January 17, 1985. On April 5, 1988, Holly was again found to be in need of protection or services. She was placed at Tomorrow's Children, a residential treatment facility for children, from August 23, 1988 to October 25, 1988. The order was extended several times, and Holly remained in foster care until August 24, 1990, when she was returned to Karen. The dispositional order terminated on March 7, 1991.

On July 13, 1992, Holly was adjudicated to be a child in need of protection or services because she was the victim of physical abuse at the hands of James T., the three boys' father and Holly's stepfather. On August 12, 1992, the court made a similar finding with regard to Jeremy. Jeremy and Holly were originally placed with Karen. On September 25, 1992, however, Karen voluntarily placed her four children with social services because she was pregnant and unable to care for the children. Karen gave birth to twins on November 7, 1992.

---

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

[2] Holly was born on December 26, 1983, Jeremy on December 30, 1985, Michael on October 1, 1987, and Andrew on May 19, 1990.

On December 12, 1994, the State petitioned to terminate Karen's parental rights to the four children under § 48.415(2), STATS., because of the children's continuing need of protection or services. On April 30, 1996, after a seven-day trial,[3] the jury found that the agency responsible for the care of the children and the family made a diligent effort to provide services ordered by the court. At a May 14, 1996 dispositional hearing, the trial court granted the State's request to terminate Karen's parental rights to the four children, concluding that termination was in the children's best interests. Karen appeals.

DILIGENT EFFORTS

Under § 48.415(2), STATS., the State must show by clear and convincing evidence 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," as well as several other factors. ***In re Torrance P.***, 187 Wis.2d 10, 14, 522 N.W.2d 243, 245 (Ct. App. 1994). "Diligent effort" means a "reasonable, earnest and energetic effort." ***Id.*** at 15, 522 N.W.2d at 245. Karen argues that the jury erred in finding that the county made a diligent effort to improve her parenting skills as required by court order.

We will uphold a jury's finding of fact if any credible evidence, under any reasonable view, supports the finding. ***Foseid v. State Bank***, 197 Wis.2d 772, 782, 541 N.W.2d 203, 207 (Ct. App. 1995). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony. ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Whether an agency has made a diligent effort to provide court-ordered services is a fact-sensitive inquiry that must consider the totality of the circumstances as they exist in each case. ***Torrance P.***, 187 Wis.2d at 14, 522 N.W.2d at 245.

---

[3] This was the second trial in this matter. On February 21, 1995, after a ten-day trial, the jury found grounds to terminate Karen's parental rights to the four children, and on April 5, 1995, the court ordered the termination of Karen's parental rights. We reversed the trial court's orders, however, and remanded for a new trial. *See* ***In re Holly O.***, Nos. 95-3075 through 95-3078, unpublished slip op. (Wis. Ct. App. Feb. 15, 1996).

After reviewing the evidence, we conclude that the jury's finding that the county made a diligent effort to improve Karen's parenting skills is supported by credible evidence. On December 22, 1988, Dr. James Fico, a clinical psychologist, evaluated Karen and concluded that hands-on training, not psychotherapy, would be the best method with which to teach Karen parenting skills. In early 1993, Dr. Max Bowen, another clinical psychologist, evaluated Karen and also concluded that hands-on training would be the best method of training her. He did not think, however, that Karen's problems were treatable.

The county contracted with Family Training Program to provide parenting training to Karen. Family Training Program provided Karen with hands-on parenting training with the four children from April 1993 to November 1993.[4] Laverne Fraevel, a family trainer with Family Training Program, felt that Karen's parenting abilities improved slightly over the course of the training but did not approach the level needed to parent all of her children effectively.

Elaine Bethel, a home consultant for the Department of Human Services for Outagamie County, also provided Karen with parenting training from March 1993 to November 1993. Bethel did not believe that Karen's parenting abilities improved from the training and did not think that Karen showed any progress toward being able to handle all four children at one time.

Karen argues that the county should have conducted parenting sessions with one or two children first and then integrated the other children at a later date. But from March 1993 to August 1993, the county did conduct parenting sessions with only two children present at a time. The county did not have unlimited time, however, with which to attempt to integrate Karen's children into her family. At some point, it needed to determine whether she could handle all four children as well as her twins. It was reasonable for the

[4] Family Training Program continued to visit with Karen and her twins until April 1994.

county to conduct parenting sessions with Karen and all of her children to determine whether she could effectively parent all six children at the same time.

Eventually, the county needed to conclude that Karen's parenting skills could not be improved to the point at which she could care for all of her children and take other actions in the children's best interests. In light of the fact that the psychologist did not believe that Karen's problems were treatable and that Karen showed little or no progress during parenting training, a jury could reasonably conclude that the county's provision of parenting training from March 1993 to November 1993 represented a "reasonable, earnest and energetic effort" to improve Karen's parenting skills. Therefore, the jury's finding is supported by credible evidence.

BEST INTERESTS DETERMINATION

Karen argues that the trial court erroneously exercised its discretion in terminating her parental rights to the children. Specifically, Karen argues that termination is not in the children's best interests because they will have continued anger problems and have poor potential for adoption.

In deciding the appropriate disposition in a termination of parental rights case, the court must consider the factors enumerated in § 48.426, STATS. The best interests of the child is the prevailing factor considered by the court. Section 48.426(2).[5] The trial court's determination of the best interests of

[5] Section 48.426(3), STATS., provides the factors the court must consider in determining the best interests of the child:

> FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was

the child will not be upset unless the decision represents an erroneous exercise of discretion. ***In re Brandon S.S.***, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993). The exercise of discretion requires a rational thought process based on an examination of the facts and application of the relevant law. ***Id.***

In making its determination, the trial court considered the children's anger problems and their prospects for adoption in concluding that termination of parental rights was in their best interests. The court reasoned that for the children to resolve their anger issues with Karen, she would need to make dramatic changes from where she was in the past. Considering Karen's personality and her lack of progress in parenting training, the court concluded that she would not make these dramatic changes. The court also reasoned that the foster families' commitment to the children made adoption a reasonable possibility.[6]

(..continued)

removed from the home.

(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

[6] The foster parents of Jeremy, Michael and Andrew were undecided on adoption at the time of the court's decision to terminate parental rights. Holly's foster parents were not interested in adoption but wanted to provide for her as long as they were able.

The court also considered the other statutory factors for determining the best interests of the children. The court considered the ages of the children and did not believe that age was an important factor unless the children were teenagers, which these children were not. The court did not believe that any of the children had enjoyed a substantial relationship with Karen. Instead, the court thought that the children had developed meaningful, almost permanent relationships with their foster families. The court also did not think that the wishes of the children were as important as some of the other factors.

We believe the record shows that the trial court rationally considered the facts and statutory factors in deciding to terminate Karen's parental rights. Therefore, the trial court did not erroneously exercise its discretion.

JUROR MISCONDUCT

On May 23, 1996, Karen's attorney talked with one of the jurors from the trial. The juror indicated that she was pressured by another juror to decide against Karen because the careers of the social workers and professionals involved would be put in jeopardy if Karen's parental rights were not terminated. Karen moved the trial court to grant a new trial, submitting an affidavit from the juror who had spoken with her attorney. The trial court denied the motion. Karen argues that she should be granted a new trial because the jury improperly considered extraneous prejudicial information.

Section 906.06(2), STATS., makes incompetent most evidence of what jurors say and do during deliberations. ***State v. Marhal***, 172 Wis.2d 491, 495, 493 N.W.2d 758, 760-61 (Ct. App. 1992). Section 906.06(2) allows jurors to testify or submit affidavits, however, with regard to two areas: (1) "whether extraneous prejudicial information was improperly brought to the jury's attention," and (2) "whether any outside influence was improperly brought to bear upon any juror." *See* ***id.*** at 496, 493 N.W.2d at 761.

Karen argues that the information imparted by the juror was extraneous prejudicial information. Information is "extraneous" when it "is both not of record and beyond the jurors' general knowledge and accumulated life experiences." ***Id.*** at 496 n.4, 493 N.W.2d at 761.

In ***Johnson v. Agoncillo***, 183 Wis.2d 143, 162, 515 N.W.2d 508, 516 (Ct. App. 1994), we concluded that information "that a physician's career might be adversely affected by a verdict finding the physician guilty of malpractice" is not extraneous prejudicial information because it is not beyond the jurors' general knowledge and accumulated life experiences. Consistently, we conclude that the juror's statement that the careers of the professionals and social workers involved with Karen's case could be affected if Karen's parental rights were not terminated is also not extraneous prejudicial information. Because the information was not "extraneous," the juror's affidavit is not competent evidence under § 906.06(2), STATS. Therefore, we reject Karen's request for a new trial.

By the Court.—Orders affirmed.

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