COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP2151 **Cir. Ct. No. 2006TP1**

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

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

SPRING M.P.E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Spring M.P.E. appeals an order of the circuit court terminating her parental rights to Christopher P. The court terminated Spring's parental rights based on the prior involuntary termination of her parental rights to her other children, one of the statutory grounds for termination. Spring argues that her right to due process was violated because, after Christopher was adjudged to be in need of protection or services, the CHIPS dispositional order that placed him outside the home failed to give her notice of the prior-termination ground. We conclude that the circuit court correctly rejected that argument, and affirm the court's order.

Background

¶2 Christopher was adjudged to be in need of protection or services (CHIPS) in August 2005. The CHIPS dispositional order placing Christopher outside the home included a "warning for parents" about possible grounds for termination of parental rights, but did not advise Spring that her parental rights to Christopher could be terminated based on the prior involuntary termination of parental rights to another child. Spring's parental rights to her other two children, Autumn and Tyler, were previously terminated in February 2003 and June 2004.

¶3 In January 2006, the Rock County Human Services Department filed a petition to terminate Spring's parental rights to Christopher. As the ground for termination, the Department alleged Spring's prior involuntary termination of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

parental rights to her other children pursuant to WIS. STAT. § 48.415(10).[2] The circuit court terminated Spring's parental rights based on this ground.

Discussion

¶4 The relevant facts are undisputed. Spring's due process argument therefore presents us with a question of law for our *de novo* review. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶5 So far as we can discern, Spring's due process argument consists of essentially two sub-arguments. First, she is arguing that her right to due process was violated because the Department failed to comply with the notice requirement in WIS. STAT. § 48.356. Second, she is arguing that the Department's failure to provide a warning of all possible grounds for termination in the CHIPS order was fundamentally unfair. We address each argument in turn below.

[2] WISCONSIN STAT. § 48.415(10) provides that "[p]rior involuntary termination of parental rights to another child" is a ground for termination, which shall be established by proving all of the following:

> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13(2), (3) or (10).
>
> (b) That, within 3 years prior to the date the court adjudged the child who is the subject of the petition to be in need of protection or services as specified in par. (a), a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

A. WIS. STAT. § 48.356

¶6 Spring first seems to be arguing that her right to due process was violated because the Department failed to comply with the notice requirement in WIS. STAT. § 48.356. For purposes of addressing this argument, we will assume without deciding that a violation of § 48.356 would necessarily raise a due process concern.

¶7 WISCONSIN STAT. § 48.356 provides:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home … or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court … of *any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation.*
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home or denies visitation under sub. (1) shall notify the parent or parents … of the information specified under sub. (1) .

(Emphasis added.) Based on this statutory language, Spring argues:

> This case's dispositional order failed to comply with [the] statutory requirement: for the order did not warn Spring that her parental rights to Christopher could be terminated solely because her parental rights to Autumn and to Tyler had been terminated within the three years preceding the order adjudging Christopher to be a child in need of protection or services.

(Citations omitted.)

¶8 Although Spring's argument based on the language of WIS. STAT. § 48.356 appears attractive at first glance, it fails to account for our decision in

Winnebago County Department of Social Services v. Darrell A., 194 Wis. 2d 627, 534 N.W.2d 907 (Ct. App. 1995). The rationale of ***Darrell A.*** applies here and leads us to conclude that the Department did not violate § 48.356.

¶9 In ***Darrell A.***, we addressed the ground for termination under WIS. STAT. § 48.415(8), homicide (or solicitation to commit homicide) of a parent. ***Darrell A.***, 194 Wis. 2d at 643-45. The parent in that case, Darrell A., was convicted of murdering his children's mother. ***Id.*** at 634-35. The petitions to terminate his parental rights to his two children were originally based on other grounds but amended to include the then-recently-enacted homicide ground, and Darrell A.'s rights were terminated based on that ground. ***Id.*** at 634-36.

¶10 Darrell A. argued that the termination of his parental rights failed to comply with the notice provision in WIS. STAT. § 48.356. ***Darrell A.***, 194 Wis. 2d at 643. In rejecting his argument, we determined that "[t]he underlying purpose of the court's duty to warn a parent of 'any grounds for termination of parental rights under s. 48.415 which may be applicable' is to give a parent every possible opportunity *to remedy the situation*." ***Id.*** at 644 (emphasis added). We explained that this purpose is illustrated, in part, by "the language of § 48.356, STATS., itself, which states that at the time that the parents are informed of the grounds for TPR, the court must also inform them of the conditions necessary for the child to be returned to the home." ***Id.*** We distinguished subsections in § 48.415 under which a parent "has the ability to remedy the situation." ***Darrell A.***, 194 Wis. 2d at 644-45. We concluded:

> Subsection (8) differs from these other grounds in that a homicide cannot be remedied. There is no way for the surviving parent to rehabilitate himself or herself. In such a case, where rehabilitation of the family unit is impossible, we conclude as a matter of law that there is no need for

> notice under § 48.356, STATS. Notice in this situation would be superfluous.

Id. at 645; *see also* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶25, 233 Wis. 2d 344, 607 N.W.2d 607 ("The notice is necessary to give a parent an opportunity *to conform his or her conduct to avoid termination of parental rights*." (emphasis added)); ***Patricia A.P.***, 195 Wis. 2d at 863 (section 48.356 serves the purpose of warning a parent whose child is placed outside his or her home "that his or her rights to a child may be lost because of the parent's *future* conduct" (emphasis added)).

¶11 As in ***Darrell A.***, the termination ground here was based wholly on a past event which Spring was powerless to remedy. Spring could not change the fact that her parental rights to her other two children had been involuntarily terminated within the three years prior to the date that the circuit court adjudged Christopher to be in need of protection or services.[3] *Cf.* ***Patricia A.P.***, 195 Wis. 2d at 863 ("[W]hen the State warns a parent that his or her rights to a child may be lost because of the parent's *future* conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure." (emphasis added)).

¶12 Also, in ***Darrell A.***, the court relied on its assessment that "rehabilitation of the family unit is impossible." ***Darrell A.***, 194 Wis. 2d at 645. Here, the same is true, albeit for a different reason. In Spring's case, the rehabilitation of the family unit is impossible because Spring's parental rights to her other two children have already been terminated.

[3] Spring does not assert that one or both of the prior terminations remain subject to challenge.

¶13 Spring correctly points out that we expressly declined in ***Darrell A.*** to address WIS. STAT. § 48.415(7). *See* ***Darrell A.***, 194 Wis. 2d at 644 n.7. That subsection sets forth another ground for termination that the parent cannot remedy, incestuous parenthood. WIS. STAT. § 48.415(7). Spring's argument apparently is that the rationale of ***Darrell A.*** is necessarily limited to the homicide ground in subsec. (8), because the court in ***Darrell A.*** chose not to address subsec. (7). We disagree. Subsection (7) was not at issue in ***Darrell A.***, so the court did not need to address it. We do not read ***Darrell A.*** as signaling that its rationale does not apply to termination grounds other than the homicide ground.[4]

¶14 Spring also argues that the homicide ground is logically distinguishable based on the parent's lengthy incarceration, making it "literally impossible" for the parent to provide a home for that period of time. She asserts:

> [A]fter a parent is sentenced to life imprisonment for killing the other parent, it is literally impossible for the convicted murderer to provide a home for several years.
>
> … Darrell A. was convicted of murdering his children's mother … and sentenced to life imprisonment. As a result, Darrell A. had to serve at least 13 years and 4 months before parole was even a possibility. Thus, the mere fact of Darrell A.'s murder conviction meant that it was literally impossible for him to provide a home for more than a decade.

(Citations omitted.) In ***Darrell A.***, however, we did not rely on this reasoning. Further, we do not find this reasoning persuasive. Rather, as the circuit court here observed, the "bottom line" of ***Darrell A.*** is that the WIS. STAT. § 48.356 warning

[4] The act creating subsec. (10) of WIS. STAT. § 48.415, the prior-termination ground, did not take effect until after the court decided ***Winnebago County Department of Social Services v. Darrell A.***, 194 Wis. 2d 627, 534 N.W.2d 907 (Ct. App. 1995). *See* 1995 Wis. Act 275, §§ 89 & 9400.

requirement applies in cases where the parent can do something to correct the situation. We agree with the circuit court that § 48.356 does not require courts to apprise a parent of termination grounds the parent is powerless to remedy.

¶15 In sum, our rationale in ***Darrell A.*** applies to Spring's situation. We therefore reject Spring's due process argument to the extent she is relying on an alleged violation of the notice provision in WIS. STAT. § 48.356.[5]

B. Fundamental Fairness Apart From WIS. STAT. § 48.356

¶16 As already indicated, Spring also appears to be arguing that, apart from WIS. STAT. § 48.356, the Department's failure to provide a warning in the CHIPS order of all possible grounds for termination of her parental rights was fundamentally unfair. She asserts that she did not receive "advance fair warning" of the ground for termination.

¶17 We first observe that, contrary to what Spring seems to suggest, she received advance warning of the ground used to terminate her parental rights. The ground was stated in the petition. Indeed, that ground was the *only* ground stated. It is not as if Spring was deprived of the opportunity to be heard with respect to why her parental rights should not be terminated based on this ground.

¶18 What remains of Spring's argument is that, had she been warned sooner, she would have done things differently in order to appease the Department

[5] Spring does not make any argument that the rationale of ***Darrell A.*** is incorrect or that ***Darrell A.*** was otherwise wrongly decided and, in any event, we would be powerless to address such an argument. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

and to prevent it from acting arbitrarily or vindictively. Specifically, she asserts that she

> was not warned that, as a practical matter, she had to be especially solicitous of all the county's demands of her. In other words, Spring was not warned that solely because of the prior orders terminating her parental rights, the county was effectively free to pursue termination of her parental rights to Christopher on a whim, and could do so at any time.
>
> If she had received such a warning in the dispositional order, then Spring would have known that she had no margin for error. In short, she would have known that she was at the mercy of the county, so she had better do exactly as told at all times or face losing Christopher forever.

¶19 This argument does not persuade us that Spring's right to due process was violated. The assertion that Spring would have done things differently had she been warned sooner is pure speculation. More to the point, Spring's argument fails to recognize that it was within the Department's purview to file a petition to terminate her parental rights based on WIS. STAT. § 48.415(10) immediately after Christopher was found in need of protection or services, regardless whether Spring complied with whatever demands the Department put upon her. She directs us to nothing in the record, and we find nothing, suggesting that the Department acted arbitrarily or vindictively when it sought to terminate her parental rights based on § 48.415(10).

Conclusion

¶20 Spring's arguments do not persuade us that her right to due process was violated. We affirm the circuit court's order terminating her parental rights.

By the Court.—Order affirmed.

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