COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2812

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LISA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Lisa B. appeals an order terminating her parental rights to her nine-year-old son, Glenn. She claims that her "First Amendment and due process constitutional rights" were violated "when the child was placed in a non-Jewish home and made to attend Christian Sunday School." She also argues that she was not properly warned that her felony conviction for child abuse could be a ground for termination of her parental rights; that the trial court erred in certain evidentiary rulings and in denying her claims of privilege regarding a deposition and the release of Glenn's medical records; and that proceedings in the trial court did not comply with mandatory termination of parental rights (TPR) time limits. We reject all of Lisa's arguments and affirm the TPR order.

BACKGROUND

¶2 A jury found that Glenn was in "continuing need of protection or services" under WIS. STAT. § 48.415(2). Specifically, the jury concluded that Glenn had been adjudged to be a child in need of protection or services (CHIPS) and placed outside Lisa's home for six months or longer; that the Dane County Department of Human Services had made reasonable efforts to provide court-ordered services; that Lisa had failed to meet the conditions established for the safe return of Glenn to her home; and that there was a substantial likelihood that she would not meet those conditions within the twelve months following trial. The jury also found that grounds for TPR existed under § 48.415(5), in that Lisa had exhibited a pattern of physically abusive behavior which constituted a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

substantial threat to Glenn's health, and that Lisa had been convicted of a felony for causing injury to a child.

¶3 The department's social worker and Glenn's guardian ad litem both recommended that the court terminate Lisa's parental rights, stating that a TPR would be in Glenn's best interest. The trial court, after considering the factors set forth in WIS. STAT. § 48.426, agreed and ordered Lisa's rights terminated. She appeals the subsequent order terminating her rights.[2]

ANALYSIS

¶4 Lisa devotes the first twenty pages of argument in her brief to a discussion of what she apparently believes to be the salient issue in this case: whether her "First Amendment and due process constitutional rights" were violated because during the time that Glenn was in county foster care, he was taken by foster parents to Christian Sunday Schools, despite Lisa's request that he attend Jewish services. We agree with the department, however, that not only was this issue not raised in the trial court, but Lisa has not articulated how her First Amendment claim translates into reversible error with respect to the TPR proceedings. In her reply brief, Lisa asserts that there were "sub-attitudes toward Lisa B. [relating to her Jewish heritage] that were clearly wrong and inappropriate." She provides no citations to the record, however, to substantiate what appears to be a claim of religious discrimination. Lisa also attributes the failure to raise the issue in the trial court to her appointed counsel in the TPR and CHIPS proceedings. She does not, however, raise or argue a claim of ineffective

[2] The rights of a named individual "and other possible fathers" were also terminated by default after service by publication. This appeal concerns only the termination of Lisa's rights. We also note that the guardian ad litem did not file a brief in this appeal.

assistance of counsel. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992) (holding that a parent has a statutory right to effective assistance of counsel in TPR proceedings).[3]

¶5 Even though we deem it waived, we comment briefly on why we also conclude that Lisa's claim of constitutional error lacks merit. Lisa summarizes the argument in her reply brief as follows: "It is unconscionable for the government to take a child when the mother does not want the child to be raised in the majority religion and to place that child in a situation where they are being exposed to and trained in that religion and deprived of the training in his or her own religion."

¶6 While a child is in the temporary custody of a county department under a CHIPS order, a parent who has concerns regarding any aspects of the child's placement or treatment may seek redress from the court. *See* WIS. STAT. §§ 48.357(2m) and 48.363(1) (parent may request change in placement or other revisions to CHIPS dispositional order). A TPR proceeding, however, by its very nature, seeks to preclude a parent from having any say or oversight in the future

[3] As evidence that the dispute between Lisa and the department regarding religious education for Glenn was "raised" in the trial court, Lisa points to a passage in a psychological evaluation provided to the court which includes two paragraphs relating to Lisa's Jewish heritage and upbringing. The report indicates that "[a]lthough [Lisa] wanted Glenn to be raised Jewish, she herself was not interested in returning to her religion." Lisa also points to testimony from a social worker regarding discussions between the worker and Lisa regarding the Sunday School issue. The worker testified that Lisa was asked to consider having visitation with Glenn "on Saturday so she could take him to synagogue with her and then keep him Sunday so that Sunday School would not be an issue." The worker testified, however, that Lisa declined this alternative. The fact that Lisa's Jewish heritage and her dispute with the social worker regarding Sunday School attendance were mentioned in testimony and exhibits, however, does not translate into preserving the issue for appeal. Lisa made no argument in the trial court that this matter had any bearing on the court's decision to terminate her rights, and we agree that the issue was thus waived. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977) ("The burden is upon the party alleging error to establish by reference to the record that the error was specifically called to the attention of the trial court.").

religious upbringing of the child to whom rights are terminated, just as it seeks to terminate all other rights a parent may have with respect to his or her children. That is why courts have consistently viewed TPR proceedings as affecting "fundamental rights," and required that certain procedural safeguards and statutory requirements be scrupulously observed. *See, e.g.,* ***Monroe County v. Jennifer V.***, 200 Wis. 2d 678, 686-87, 548 N.W.2d 837 (Ct. App. 1996). If Lisa's parental rights were terminated following proceedings that were fair and error-free, she has no viable claim of error based simply on the fact that her future right to direct Glenn's religious upbringing has been terminated. Accordingly, we turn to Lisa's more concrete claims of error, and do not further address the First Amendment issue.

¶7 Lisa next seems to argue that because she did not appeal her felony conviction for physically abusing Glenn, the conviction "should not be used as [a] basis for the TPR." She claims that it was improper for the TPR jury to rely on the previous conviction, especially in the absence of testimony by a physician substantiating the 1994 injury that resulted in the conviction. According to Lisa "[w]ithout a physician's report indicating great physical harm there may be a felony based on a plea agreement, but no appeal and no physician's substantiation of great bodily harm." To the extent that we understand this argument, we reject it.

¶8 WISCONSIN STAT. § 48.415(5) provides in relevant part as follows:

> (5) CHILD ABUSE. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:

> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services….

During the jury trial, the department introduced certified copies of a criminal complaint and judgment of conviction establishing that in 1995 Lisa was convicted of "physical abuse of a child," a felony. The conviction resulted from an incident in October 1994 when Lisa struck Glenn in the eye with a brush. We are aware of no requirement that a felony conviction be affirmed on appeal in order to be relied upon in proving grounds for TPR under § 48.415(5)(a).[4] In addition, we note that Lisa did not object to the introduction of evidence concerning her felony conviction.

¶9 Lisa also cites as error the fact that she was never warned "that her felony conviction could be held as proof of a pattern of physically abusive behavior." She further claims that it was improper to allege and submit grounds for termination of parental rights that were "substantially different from those about which she was warned under § 48.356." We have two responses to these arguments. First, we agree with the trial court that there is no requirement similar to that under WIS. STAT. § 48.425(2) (continuing CHIPS grounds for TPR), for a parent to be warned that a past felony conviction for child abuse can be grounds

[4] Although not cited by Lisa, we note that we held in ***Monroe County v. Jennifer V.***, 200 Wis. 2d 678, 680-81, 548 N.W.2d 837 (Ct. App. 1996) that a felony conviction for injuring a child cannot be used as a ground for TPR under WIS. STAT. § 48.415(5)(a) until the right to appeal from the conviction has been exhausted. We did *not* hold that a conviction could only be relied upon if it had in fact been upheld on appeal. Lisa's right to appeal from her 1995 conviction for injuring Glenn expired long before the department commenced this action. *See* WIS. STAT. § 808.04(3) and RULE 809.30.

for termination of parental rights under WIS. STAT. § 48.415(5). We also agree with the trial court that such a warning after the fact of a conviction would seem to serve no purpose. *Cf.* ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 644-45, 534 N.W.2d 907 (Ct. App. 1995) (since a homicide cannot be remedied after the fact, no TPR warning is needed). Second, Lisa tacitly concedes that she was given the appropriate warnings for a termination of her parental rights based on Glenn's continuing need for protection or services under § 48.415(2). Accordingly, even if the jury verdict finding grounds existed under subsec. (5) were somehow defective, grounds for TPR would still exist under subsec. (2).

¶10 Lisa next argues that the trial court erred in denying her motion to exclude evidence of events occurring prior to April 1998, which is when Glenn's most recent and continuous period of out-of-home placement began.[5] Lisa's argument, apparently, is that because she was found to have met the conditions for Glenn's return to her home in December 1997, any evidence of events and activities prior to the subsequent foster placement in April 1998 would be irrelevant and prejudicial. She claims, in particular, that the department did not provide, or offer to provide, her any services after April 1998.

¶11 We agree with the department that the trial court did not erroneously exercise its discretion in permitting testimony and other evidence relating to the entire history of the department's involvement with Glenn and Lisa. The trial court noted that the department had the burden of convincing the jury that there was a substantial likelihood that Lisa would not be able to meet the conditions for Glenn's return to her home within the twelve months following trial. The court

[5] Glenn resided with his mother between December 4, 1997 and April 20, 1998, but before that brief interlude, he had been in foster homes since January of 1996.

also noted that it would possibly be to Lisa's advantage for the jury to hear that she had in fact, at one time, met the conditions for Glenn's return to her home. The court concluded that, on balance, it would be best for the jury to be informed of the entire history of the department's involvement:

> I think you have a good story to tell the jury about Glenn being returned home to his mother. It's equally important that they hear—that they not just have that piece of information, that they have more information than that, and it's their job to weigh that and come to a decision on each of the elements.

We conclude that the trial court did not erroneously exercise its discretion in admitting this evidence.[6]

¶12 Lisa next claims that the trial court erred by not prohibiting the department from calling any witnesses on its witness list because it missed the original deadline set by the court for the exchange of witness lists. The trial court indicated that it would deny Lisa's motion unless she could show prejudice, and we agree with the department that no such showing was made. The date for

[6] Lisa's arguments regarding evidence of events prior to April 1998, overlap somewhat with other arguments she makes to the effect that "social services did not make any kind of effort to reunite the family." Her point seems to be that, in Lisa's view, most, if not all, of the relevant services were offered or provided prior to Glenn's last out-of-home placement, which began in April 1998. She concedes, however, that "[t]hese issues go to a lack of probable cause for having brought the TPR to begin with and to defects in the institution of the proceedings or insufficiency of the petition." The jury returned a verdict that "the Dane County Department of Human Services [made] a reasonable effort to provide the services ordered by the court" and that Lisa "failed to meet the conditions established for the safe return of Glenn [] to Lisa []'s home." Lisa did not move the trial court to set aside the jury's verdict, nor does she argue on appeal that there was no credible evidence to support the jury's answers to questions on the verdict. We conclude that any claim of error based on an alleged lack of probable cause to commence the TPR action cannot be raised following the jury's unchallenged verdict that the department met its burden to establish the allegations of the petition by clear and convincing evidence. *Cf.* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (holding "that a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing").

exchanging witness lists was set for three weeks prior to the originally scheduled trial date, and the department provided the list at noon on the day following the prescribed date. In addition, the trial was subsequently postponed for a month, with the result that Lisa and her trial counsel had the department's witness list some seven weeks prior to the TPR trial. We find no erroneous exercise of discretion in the court's permitting the department to call its witnesses. *See* WIS. STAT. § 901.03(1) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

¶13 Lisa also cites as error the trial court's rulings regarding her deposition and the release of records from Glenn's therapist. She claims that "the right to remain silent … does apply in CHIPS and TPR cases …." Lisa's assertion is correct but incomplete. It is true that the Fifth Amendment privilege against self-incrimination "'can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory.'" ***In re Gault***, 387 U.S. 1, 47 (1967) (citation omitted). The privilege may only be claimed in civil proceedings, however, when "a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding." ***Grant v. State***, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978). "The fear of self-incrimination must be 'real and appreciable,' 'not merely [an] imaginary possibility of danger.'" ***Id***. at 82 (citation omitted).

¶14 Lisa points to no questions which engendered a "real and appreciable apprehension" on her part that she would be charged with a crime based on her responses. Although we can envision questions of that nature which might be put to a parent in the course of TPR proceedings, such as inquiries regarding uncharged abuse or neglect, Lisa cites none here.

¶15 Next, regarding the issue of medical releases, we note that the department ultimately dropped its pre-trial request that Lisa execute releases regarding records of her participation in various court-ordered counseling and therapy programs, concluding that it could "get that information in without the releases." Thus, the only adverse ruling on the issue of releases came after trial but before the dispositional hearing. Lisa had refused a request to execute a release to allow a therapist who had been treating Glenn "since 1996" to provide information to the department relevant to disposition of the TPR. Lisa argued that as Glenn's parent she had the authority under WIS. STAT. § 905.04(3) to claim a privilege on Glenn's behalf to not release information regarding his treatment and therapy. The trial court disagreed and ordered the release, stating:

> And the reason I'm doing this, and I'm absolutely certain that it is required at this point, disposition is a completely different part of the entire termination of parental rights process. There is no jury. The court has to consider every bit of information it can get its hands on in terms of determining the best interests of the child. And I would be greatly handicapped if I did not have access to information generated by the therapist who's been treating this child. I can't think of many more pieces of evidence or information that would be more essential to the court in terms of Glenn's present and future well-being.

¶16 We conclude that the court did not erroneously exercise its discretion in ordering the release of information from Glenn's therapist for purposes of the dispositional hearing. WISCONSIN STAT. § 48.426(2) provides that "[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition" of TPR proceedings. Under subsec. (3) of that statute, a court is required to consider "the health of the child" in determining his or her best interests. We agree with the department and the trial court that the statutory directive that a court must determine a child's best interests when

deciding on a disposition in TPR proceedings could be effectively thwarted if a parent were allowed to block the court's access to a child's medical and treatment records under WIS. STAT. § 905.04(3). We conclude, as did the trial court, that in the context of a TPR dispositional hearing, any privilege under § 905.04 relating to a child's medical or treatment records or information may be claimed only by the child, or by his or her guardian ad litem, but may not be asserted by a parent on behalf of the child.

¶17 Finally, Lisa claims that the trial court lost competency to proceed because the fact-finding hearing was not held within forty-five days of the hearing on the TPR petition. *See* WIS. STAT. § 48.422. Before reviewing the chronology of proceedings in the trial court, we note that under WIS. STAT. § 48.315, the "time requirements" specified in chapter 48 may be tolled under certain circumstances:

> (1) The following time periods shall be excluded in computing time requirements within this chapter:
>
> ….
>
> (b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel ….
>
> ….
>
> (d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that the evidence will be available at the later date, or to allow him or her additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case.

….

> (2) A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

¶18 The department filed the TPR petition on December 3, 1999, and the initial hearing on it was held on December 23. The court, following testimony by Lisa regarding paternity, adjourned the hearing until January 18, 2000, in order to allow the alleged father to be served by publication. On January 18, the matter of scheduling the fact-finding hearing was discussed, and Lisa's counsel made the following request: "Your Honor, if it's possible I would like to get a date approximately 45 to 60 days out. Considering the history in this case, it's going to take me a considerable amount of time to do a thorough investigation …." Counsel for the department and the guardian ad litem did not object to the request. A three-day jury trial was scheduled for the week of March 27, 2000, all counsel agreed to related discovery deadlines, and the court entered a scheduling order.

¶19 The parties were next in court on March 7, 2000 regarding a discovery dispute. The court conducted a pre-trial conference on March 13 and a status conference on March 24. At the latter proceeding, the guardian ad litem requested the court to postpone the jury trial because of concerns that an emergency involving the presiding judge's family might interfere with completion of the trial as scheduled. The guardian ad litem advised the court that "all counsel agree with that and [it] is basically a stipulated request." The court denied the request, stating that, at that time, it appeared likely that the trial could be completed as scheduled on March 29-31. On March 28, however, the court

informed the parties that the trial would indeed need to be postponed due to a medical emergency relating to the judge's father, and no party objected.[7]

¶20 A jury was selected on April 24, and the matter was tried on April 26, 27 and 28, 2000. At no time did Lisa object to proceeding on those dates, nor did she move for dismissal or otherwise argue that the time limitations of WIS. STAT. § 48.422 for conducting the fact-finding had been violated. Lisa did complain at the beginning of the dispositional hearing that it was being conducted a day later than the forty-five days following the fact-finding specified in WIS. STAT. § 48.424(4). The court recalled that all parties had agreed to the date for the dispositional hearing and that it had found good cause to schedule the hearing for the agreed upon date.[8] Lisa does not renew her argument regarding the scheduling of the dispositional hearing, and cites only the jury trial dates as having violated chapter 48 time requirements.

¶21 We reject Lisa's claim that the court lost competency to proceed because of the timing of the fact-finding. As we have noted, Lisa's trial counsel requested that the trial be set for "45 to 60 days" from the conclusion of the initial

[7] There is no transcript in the record for proceedings on March 28, 2000. The court minutes show only that counsel for all parties were present and that the trial was set over until April 24-28, 2000. The department asserts in its brief that no one objected, and Lisa does not assert otherwise in her reply brief.

[8] The transcript of the proceedings following receipt of the jury's verdict confirms the court's recollection:

> THE COURT: I think that we are still within, just within the 45 days [for the scheduled dispositional hearing]. If it turns out to be 46, do the parties agree that that date may be extended?
>
> [GUARDIAN AD LITEM]: Yes. I think there's good cause.
>
> THE COURT: [Lisa's counsel]?
>
> [LISA'S COUNSEL]: Yes. I have no problem, your Honor.

hearing, which produced the originally scheduled trial date in late March. Thereafter, Lisa joined the other parties in requesting an additional one month postponement, and there is no indication in the record that she ever voiced an objection in the trial court regarding the scheduling and completion of the fact-finding hearing. We conclude that Lisa has waived the issue by failing to raise it in the trial court, and further that she is precluded from raising it now by the doctrines of judicial estoppel and invited error. *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (The doctrine of judicial estoppel recognizes that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error."); ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (Where appellant requests a certain action by the trial court, and the court complies, "[i]f error occurred, [appellant]'s counsel invited it. We will not review invited error.").

CONCLUSION

¶22 For the reasons discussed above, we reject all of Lisa's claims of error and affirm the appealed order.

By the Court.—Order affirmed.

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