COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2009

David R. Schanker
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. 2008AP2062 **Cir. Ct. No. 2008TP32**

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JANICE W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

¶1 BRUNNER, J.[1] Janice W. appeals an order terminating her parental rights to Precious W. She also appeals an order denying her post-termination motion for relief from the termination order. Janice claims the circuit court should have granted her motion for relief from the termination order because she was in custody at the time of the hearing, she was unaware of the hearing, and she was denied her right to counsel. We affirm the orders.

BACKGROUND

¶2 On April 22, 2008, the Brown County Human Services Department filed a petition for the termination of Janice's parental rights to Precious. A supplement to that petition was filed April 24. As grounds for the petition, the Department alleged Precious was a child in continuing need of protection or services and that Janice had failed to assume parental responsibility. The Department served the petition on Janice by mail and publication after unsuccessfully attempting to serve her personally. On May 13, 2008, a hearing was held on the petition, and Janice did not appear in person or by counsel. The court found Janice in default, took testimony, found Janice to be an unfit parent, and concluded her parental rights should be terminated. An order terminating Janice's parental rights was filed May 15, 2008.

¶3 Janice filed a notice of intent to seek post-adjudication relief and a notice of appeal. She then filed a "Motion to Remand" with this court, requesting that we retain jurisdiction but remand to the circuit court to conduct a hearing on whether she was denied her right to counsel under WIS. STAT. § 48.23(2). By

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

order dated September 22, 2008, we granted the motion, directing Janice to file a post-termination motion and directing the court to hear the motion.

¶4 Janice filed her motion to vacate the termination order, claiming: she did not know about the hearing, which constituted excusable neglect under WIS. STAT. § 806.07(1)(a); she was in custody at the time of the hearing, which constituted newly discovered evidence under § 806.07(1)(b) and WIS. STAT. § 805.15(3); and she was denied her right to counsel under WIS. STAT. § 48.23(2), relying on the "any other reasons" basis in § 806.07(1)(h) and the interests of justice under § 805.15(1). The circuit court held two evidentiary hearings on the motion.

¶5 At the first hearing, the County conceded that Janice was taken into custody at the Brown County Jail the night before the termination hearing and that she remained there on the date of the hearing. Janice testified that her arrest resulted from a warrant and that she was unaware of the termination hearing on May 13, 2008. Janice further testified that, prior to the termination hearing, she was receiving mail at her mother's house. However, she stated she rarely went to her mother's house to get her mail. When pressed about her failure to check her mail, Janice stated, "I really don't have any explanations as to why I didn't go and get my mail. I think a big part of it was, for me, was because I was afraid to face reality…."

¶6 At the second hearing, the Department called Janice's sister, Billie Sue W., as a witness. Billie Sue testified that she had a conversation with Janice about attending the May 13, 2008 termination hearing. She stated that when she asked Janice whether she was going to attend the hearing, Janice stated she "probably was not going to go … [b]ecause she had a number of warrants."

¶7 The circuit court denied Janice's motion for relief from the termination order. The court noted that the Department complied with the applicable provisions for providing notice of the termination hearing to Janice. The court found Janice was aware of the termination hearing and that her testimony to the contrary was not credible. The court relied on Billie Sue's testimony that she and Janice discussed attending the termination hearing and that Janice did not intend to go because of warrants for her arrest. The court further relied on the fact that there was no evidence Janice sought permission to attend the court hearing while in jail or that jail staff would have denied such a request. By failing to make any effort to attend the termination hearing, the court concluded Janice forfeited her opportunity to participate in the proceedings and to have an attorney appointed to represent her.

DISCUSSION

¶8 On appeal, Janice again claims the court should have granted relief from the termination order due to mistake, inadvertence, surprise, or excusable neglect under WIS. STAT. § 806.07(1)(a) because she was unaware of the hearing. Janice also claims the court should have granted relief under WIS. STAT. §§ 806.07(1)(b) and 805.15(3) because her being in custody at the time of the hearing was newly discovered evidence. Finally, Janice claims she was denied her right to counsel and therefore the court should have granted a new trial in the interests of justice under § 805.15 and vacated the termination order for "any other reasons justifying relief" under § 806.07(1)(h).

¶9 Whether to grant relief from a judgment under WIS. STAT. § 806.07 is a discretionary determination for the circuit court. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). Whether to grant a new

trial under WIS. STAT. § 805.15 is also discretionary. *See* ***Burch v. American Fam. Mut. Ins. Co.***, 198 Wis. 2d 465, 476, 543 N.W.2d 277 (1996). We will affirm a court's exercise of discretion if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶10 We first address Janice's argument that her failure to attend the termination hearing was excusable neglect under WIS. STAT. § 806.07. Janice argues her failure to appear was excusable neglect because she did not know about the termination hearing. She implies the court's finding that she *was* aware of the hearing was clearly erroneous. Further, she argues that even if she did know about the hearing, she was in jail and could not attend.

¶11 We reject Janice's argument that the court erroneously found Janice was aware of the termination hearing. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." WIS. STAT. § 805.17(2). Under the clearly erroneous standard of review, we will affirm findings of fact as long as the evidence would permit a reasonable person to make the same finding, even if the evidence would permit a contrary finding. ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168. We review the record for evidence supporting, not contradicting, the court's findings. *See* ***Noble v. Noble***, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166.

¶12 Janice's sister, Billie Sue, testified that Janice was aware of the termination hearing and did not plan to appear because of warrants for her arrest. The court found this testimony credible and found Janice's testimony incredible.

We will not upset the court's credibility determinations. *See* WIS. STAT. § 805.17(2).

¶13 Janice contends Billie Sue's testimony was unbelievable because, after testifying that Janice was aware of the termination hearing, her testimony became less certain. However, the court perceived this shift in Billie Sue's testimony and noted that the shift coincided with Janice beginning to cry. In other words, the court believed Billie Sue's testimony was influenced by Janice's crying and viewed Billie Sue's initial testimony as more credible than her subsequent testimony. Given the court's credibility determinations, its finding that Janice was aware of the termination hearing was not clearly erroneous.[2]

¶14 Further, we conclude the court appropriately exercised its discretion when determining that Janice's incarceration did not constitute excusable neglect. The court considered the fact that Janice was in custody, but determined there was no excusable neglect because there was no evidence she notified jail staff about the hearing or that jail staff would have denied a request to attend the hearing. This was a reasonable determination in light of the evidence presented. *See* ***Loy***, 107 Wis. 2d at 414-15.

¶15 We next address Janice's argument that the court should have granted relief from the termination order because of newly discovered evidence. Under WIS. STAT. § 806.07(1)(b), a court may grant relief from an order due to "[n]ewly-discovered evidence which entitles a party to a new trial under [WIS.

[2] We further note that, even if the court had found Janice was unaware of the hearing, there is no apparent basis for finding her lack of knowledge constituted excusable neglect. Janice claimed not to know about the hearing because she did not pick up her mail. However, her own testimony was essentially that she did not have a good excuse for failing to do so.

STAT.] s. 805.15(3)…." For newly discovered evidence to warrant a new trial, § 805.15(3) requires the court to find:

> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

¶16 Janice contends the fact that she was in jail at the time of the hearing was newly discovered evidence because she was not aware of the hearing. As discussed above, the court properly found that Janice *was* aware of the hearing. Regardless, her assertion that being incarcerated was newly discovered evidence is absurd. Janice's knowledge of the hearing has nothing to do with her knowledge of her incarceration.

¶17 Finally, we consider Janice's claim that she was denied her right to counsel under WIS. STAT. § 48.23(2), and therefore the court should have granted relief from the judgment for "any other reasons justifying relief from the operation of the judgment" under WIS. STAT. § 806.07(1)(h) or in the interests of justice under WIS. STAT. § 805.15(1). The relevant portion of § 48.23(2) states, "If a proceeding involves … the involuntary termination of parental rights, any parent … who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made." Janice contends her right to counsel was violated because she was not represented by counsel and did not waive her right to counsel.

¶18 Janice's argument fails because the right to counsel provided by WIS. STAT. § 48.23(2) applies to parents who "appear[] before the court…." Janice failed to appear. This case is distinguishable from ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623. In ***Shirley E.***, our supreme court concluded a parent was denied her right to counsel when the court dismissed the parent's attorney after the parent failed to personally appear before the court. ***Id.***, ¶¶16-17, 46-47. Our supreme court concluded the parent did appear before the court through counsel, thereby invoking the protection of § 48.23(2). ***Shirley E.***, 298 Wis. 2d 1, ¶32. Here, Janice did not appear personally or through counsel. Therefore, unlike in ***Shirley E.***, the right to counsel under § 48.23(2) did not come into effect. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶32.

By the Court.—Orders affirmed.

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