**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 12, 2003**

Cornelia G. Clark
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 Nos. 02-2955**
**02-2956**

**Cir. Ct. Nos. 00-TP-38A**
**00-TP-39A**

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

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**NO. 02-2955**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ANTHONY E.S., A PERSON UNDER THE AGE OF 18:**

**MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**TONYA B.,**

**RESPONDENT-APPELLANT.**

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**NO. 02-2956**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO DESTINEY M.S., A PERSON UNDER THE AGE OF 18:**

**MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**TONYA B.,**

**RESPONDENT-APPELLANT.**

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APPEALS from orders of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Tonya B. appeals orders terminating her parental rights to her children, Anthony S. and Destiney S. Tonya argues the trial court violated her due process rights when it failed to hear testimony in support of the allegations in the petitions as required by WIS. STAT. § 48.422(2). Because we determine the court's failure to conduct the hearing was harmless error, we affirm the orders.

BACKGROUND

¶2 In September 2000, the Marathon County Department of Social Services petitioned for the termination of Tonya B.'s and Edward S.'s[2] parental rights to Anthony and Destiney. The petitions alleged that the children were in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2). At an adjourned plea hearing on October 30, Tonya did not appear personally but was represented by an attorney, who entered a denial to the allegations in the petitions and requested a jury trial. The jury trial was scheduled for April 17, 2001.

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

[2] Edward S. consented to voluntary termination of his parental rights.

¶3 Before the jury trial began, the parties entered into a written stipulation:

> [G]rounds exist pursuant to Wis. Stats., §48.415 for the termination of the parental rights of the parents in the event the court finds that the mother of the children failed to comply with the following terms:
>
> A. Comply with AODA services including, but not limited to, individual, group, and educational programming as recommended by the AODA clinician. Compliance with services shall be determined by the [Department] and reviewable by the court.
>
> B. Refrain from any illegal activity which results in a criminal charge.
>
> C. Comply with a visitation schedule established by the [Department].

The court signed an order approving the stipulation.

¶4 On September 19, 2001, the department filed a motion alleging that Tonya had failed to comply with the terms of the stipulation and seeking termination of her parental rights. The department alleged that Tonya was arrested for driving while intoxicated and driving after revocation in Lincoln County.

¶5 A hearing was held on December 20, 2001. Again, Tonya did not appear personally but her now former attorney was present. The attorney asked for an adjournment until January, which the court granted. The court ordered Tonya to apply for a new public defender to appear at the new hearing scheduled for January 16, 2002.

¶6 Neither Tonya nor an attorney appeared at the January 16 hearing. The department asked the court to proceed with a default order. However, the court was not satisfied that Tonya had received proper notice, because notice was

sent only to her last-known address in Wausau as well as to an address provided by her former attorney. The court requested that the notice be published in Wausau and Milwaukee newspapers and rescheduled the hearing.

¶7 The department filed a motion for default judgment. Notice of the hearing was published and sent by mail to all known addresses. The hearing took place on April 22, 2002. Tonya did not appear. Deb Jakel, a social worker, testified that Tonya had been convicted of driving while intoxicated and driving after revocation in Lincoln County; that Tonya's last visit with the children was on May 18, 2001; and that Tonya had been released from the Marathon County Jail in August 2001, failed to report as ordered to Lincoln County and her whereabouts were unknown. The court found that because Tonya violated the terms of the stipulation, grounds existed to terminate Tonya's parental rights. The court also found:

> The children are of an age that there is a good likelihood of adoption. There has been no contact or outside relationships with the natural parents' families. They have been living outside of the home for nearly three years. They will be in a much more stable environment if they are adopted.
>
> It would appear to be strongly in these children's best interests that … the mother's rights be terminated.

The court therefore ordered the termination of Tonya's parental rights. Tonya now appeals.

## STANDARD OF REVIEW

¶8 This issue involves the interpretation and application of WIS. STAT. § 48.422(2). The construction and application of a statute to undisputed facts is a question of law that we review independently. ***Gonzalez v. Teskey***, 160 Wis. 2d 1,

7-8, 465 N.W.2d 525 (Ct. App. 1990). When interpreting a statute, we first look to the statutory language and, if the statute's meaning is clear, we will not look outside the statute. ***McMullen v. LIRC***, 148 Wis. 2d 270, 274, 434 N.W.2d 830 (Ct. App. 1988).

DISCUSSION

¶9 Tonya argues that her statutory and constitutional due process rights were violated when the court failed to hear testimony in support of the allegations in the department's petitions. Instead, she claims Jakel's testimony at the April 22, 2002, hearing only spoke to Tonya's violation of the stipulation. Tonya therefore maintains that the court erroneously based the termination of her parental rights on violations of the stipulation when it should have been based on whether the department proved the allegations in its petitions.

¶10 We agree and conclude that simply showing that Tonya violated the terms of the stipulation does not amount to a showing that the children are in need of protection and services. The court did not hear testimony regarding the petitions, so we must determine whether Tonya is entitled to relief as a result.

¶11 When the petitions were initially filed in September 2000, Tonya, through her attorney, denied the allegations. WISCONSIN STAT. § 48.422(2) states: "If the petition is contested the court shall set a date for a fact-finding hearing …." Further, § 48.424(1) states:

> The purpose of the fact-finding hearing is to determine whether grounds exist for the termination of parental rights in those cases where the termination was contested at the hearing on the petition under s. 48.422.

¶12 The only testimony at the hearing on April 22, 2002, was Jakel's, and she was asked to testify about the stipulation. The allegations in the petitions were not addressed. Therefore, the court did not comply with WIS. STAT. § 48.422(2).

¶13 Nevertheless, we determine that the court's failure to follow the statute was harmless error. We rely on our supreme court's decision in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. Steven H. did not contest the petition for termination of his parental rights in that case, so the court applied WIS. STAT. § 48.422(3) instead of § 48.422(2). ***Id.*** at ¶53. However, we determine that the court's analysis is applicable to our review of § 48.422(2) as well.

¶14 In ***Steven H.***, the circuit court failed to conduct a hearing regarding the allegations in the petition to terminate parental rights. ***Id.*** at ¶53. The supreme court determined that although this was a violation of WIS. STAT. § 48.422(3), the error was harmless because "[a] factual basis for several of the allegations in the petition can be teased out of the testimony of other witnesses at other hearings when the entire record is examined." ***Id.*** at ¶58. Consequently, the supreme court determined that, based on the entire record, there were insufficient grounds to overturn the circuit court's judgment. ***Id.*** at ¶60.

¶15 The petition in this case alleged the children were in continuing need of protection or services under WIS. STAT. § 48.415(2)(a). That section states that termination is appropriate when it is proved:

> 1. That the child has been adjudged to be a child or an unborn child 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, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363

> or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> ….
>
> 2.a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe 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.

As the supreme court did in ***Steven H.***, our review of the record leads us to find support for the allegations in the petitions.

¶16 First, the record discloses that Anthony and Destiney had been adjudged in need of protection and services and have been outside their mother's home for more than six months. Second, reasonable efforts were made for Tonya to get drug and alcohol treatment, but she failed to follow through on the recommendations. As a result, she has not complied with the conditions established for her to regain custody of her children, which deal primarily with her drug and alcohol abuse. This is evidenced by her conviction in Lincoln County for driving while intoxicated. Finally, Jakel testified that Tonya had been a fugitive for eight months. It is therefore unlikely that Tonya will meet the conditions within a twelve-month period.

¶17 Our examination of the record persuades us that there is sufficient proof of the allegations in the petitions. We therefore conclude the trial court's failure to hear evidence pursuant to WIS. STAT. § 48.422(2) was harmless.

*By the Court.*—Orders affirmed.

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