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

**October 14, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-0908** **Cir. Ct. No. 02TP000299**

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

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO QUINEESHA R., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**LUCINDA B.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Lucinda B. appeals the order terminating her parental rights to her daughter, Quineesha R., following a jury trial and a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

dispositional hearing. Lucinda B. argues that because the State failed to personally serve her with the underlying CHIPS petition, she was deprived of her right to notice and due process and, as a result, the court lacked jurisdiction to hear her termination of parental rights case. She also contends that her trial attorney was ineffective for failing to bring a motion challenging the court's jurisdiction as a result of the lack of notice. Although the propriety of the State's service of notice of the CHIPS proceeding on Lucinda B. by substituted service is questionable, the State properly notified Lucinda B. of the CHIPS proceeding by publication, and testimony in the record revealed that Lucinda B. had actual knowledge of the CHIPS proceeding. Further, the State properly notified Lucinda B. by mailing the CHIPS dispositional order and warnings, as required by WIS. STAT. § 48.355, to an address supplied by her. Thus, the statutes directing service of the CHIPS order on Lucinda B. was accomplished and the trial court had jurisdiction over the termination proceedings. Consequently, her attorney was not ineffective and this court affirms.

## I. BACKGROUND.

¶2 In June 1999, Lucinda B. asked DeAnna W., the mother of the person Lucinda B. then believed to be the father of Quineesha R., to assist her with the care of Quineesha, then approximately four years old, because Lucinda's home had been burglarized.[2] The child remained with DeAnna throughout the summer. In September 1999, Lucinda B. was in a car accident and she asked DeAnna to continue caring for Quineesha. In October 1999, after receiving no money or food stamps from Lucinda B. for Quineesha's support, DeAnna contacted Child

[2] Later, another man was found to be Quineesha's biological father.

Protective Services for assistance. At the time, despite caring for Lucinda B.'s daughter for months, DeAnna did not know where Lucinda B. lived. DeAnna's home was subsequently licensed as a foster home and Quineesha has lived there throughout these proceedings.

¶3 After DeAnna contacted Child Protective Services, attempts were made by a worker for the Bureau of Child Management to obtain Lucinda B.'s address and to meet with her. After learning that Lucinda B. worked at a Wal-Mart store, the case manager called the store to determine Lucinda B.'s address, but the store refused to give it to her. The case manager later spoke to Lucinda B. at the store over the telephone, but Lucinda B. claimed not to know her address. She told the case manager that she would call her back with the information, but did not do so. The worker called again, set up a visit, and waited for a call from Lucinda B. to provide her address, which she again failed to do.

¶4 Because of Lucinda B.'s failure to cooperate with the Bureau, the case manager commenced a CHIPS proceeding in January 2000. The process server assigned to serve the CHIPS papers on Lucinda B. originally attempted service on Lucinda B. at the home of DeAnna W. and Quineesha. DeAnna W. gave the process server Lucinda B.'s correct address on North Booth Street. The process server made three attempts at this address, on three separate dates, and at different times. The first two times were unsuccessful. On the third try, the process server served a woman claiming to be "Rachel Dotson." On the form used by the process server, there is a check before the words "a cohabitant identified as," followed by the name "Rachel Dotson," which is handwritten. Shortly thereafter, on February 10, 2000, it appears that a case worker visited Lucinda B.'s home.

¶5 On February 22, 2000, Quineesha was found to be a child in need of protection or services pursuant to WIS. STAT. § 48.13(2), (5) and (10) (2001-02).[3] Lucinda B. did not appear at the hearing. Several months later, the trial court entered a dispositional order formally placing Quineesha outside her mother's home. In October 2000, an assistant district attorney sent a copy of the signed dispositional order to Lucinda B. at the North Booth Street address. This letter advised Lucinda B. that the enclosed order contained the conditions that she needed to meet in order to have Quineesha returned to her custody, and it alerted Lucinda B. that the order also contained warnings as to what could occur if she failed to meet the conditions. The letter was not returned.

¶6 In November 2000, months after the dispositional hearing and one month after the order was mailed to her, Lucinda B. contacted a case worker and told the worker that her current address was 323 North 31st Street. She also supplied the worker with a telephone number. Lucinda B. visited sporadically with Quineesha in the ensuing months. A hearing was scheduled for June 2001 to extend the dispositional order. A certified letter advising Lucinda B. of the extension hearing was sent to the 31st Street address and came back marked "attempted not known." In May, the State published a notice of the June 11 hearing in the Daily Reporter reflecting the address that Lucinda B. had provided in November 2000. Lucinda B. did not appear at the June hearing and the order placing Quineesha with DeAnna W. was extended.

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶7 On April 30, 2002, the State petitioned the court to terminate Lucinda B.'s parental rights.[4] The petition alleged two grounds for the termination. First, the State claimed that Quineesha remained in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2). Second, the State claimed that Lucinda B. had abandoned Quineesha pursuant to WIS. STAT. § 48.415(1)(a)(2).

¶8 A jury trial was held on August 28, 2002, and the jury determined that the State proved both grounds alleged in the petition for the termination of Lucinda B.'s parental rights. Lucinda B. was present at the trial and represented by counsel. She did not object to the court's jurisdiction. Following the jury's decision, a dispositional hearing was held. The trial court determined that Lucinda B. was unfit to continue as Quineesha's mother and her parental rights were terminated. Several months later, Lucinda B. brought a motion seeking to overturn the order terminating her parental rights based upon a lack of service of the underlying CHIPS proceeding. The trial court denied the motion, concluding that the State had made diligent efforts to personally serve Lucinda B. with the CHIPS petition.

## II. ANALYSIS.

¶9 Lucinda B. claims that the trial court had no jurisdiction in this matter because the State failed to personally serve her with the underlying CHIPS petition and summons. She contends that since both grounds alleged in the

[4] The State also petitioned to terminate the rights of Franklin R., the adjudicated father of Quineesha. Franklin R.'s parental rights were terminated after he was found in default. He is not appealing that determination.

termination proceeding were predicated upon her knowledge of the CHIPS proceeding findings and the conditions to be met for the return of Quineesha, the termination order is void. She further argues that her attorney was ineffective for failing to bring a motion challenging the trial court's jurisdiction on the basis of the lack of notice. In response to these allegations, the State argues that Lucinda B. has waived her right to raise this issue because she failed to bring a motion challenging the trial court's jurisdiction. The State, acknowledging that the allegation of ineffective assistance of trial counsel survives the failure to raise the issue in the trial court, also submits that her attorney's actions were not ineffective.[5]

¶10 This court agrees with the State's contention that a failure to raise the jurisdictional issue below permits a review of the issue only in the context of an ineffective assistance of counsel claim. In order to prevail on a ineffective assistance of counsel claim, a person must show that his or her attorney's performance was deficient and that he or she was prejudiced as a result of his or her attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A person claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. *See* ***Strickland***, 466 U.S. at 690. To prove deficient performance, the person must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** To show prejudice, the person must demonstrate that the result of the proceeding was

[5] The guardian ad litem advised this court that he will not be filing a brief and that he joins in the brief filed by the State.

unreliable. ***Id.*** at 687. If the person fails on either prong—deficient performance or prejudice—his or her ineffective assistance of counsel claim fails. ***Id.*** at 697. This court "strongly presume[s]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶11 WISCONSIN STAT. § 48.13 provides the court with jurisdiction over a child when an allegation is made that the child is in need of protection or services (CHIPS). WISCONSIN STAT. § 48.21 sets forth the procedure to be followed when a child is taken into protective custody. WISCONSIN STAT. § 48.255(4) requires the State to give a copy of the CHIPS petition to the parent. WISCONSIN STAT. § 48.27 explains the notice requirements for a CHIPS petition. In pertinent part, the statute reads:

> **Notice; summons. (1)** (a) After a petition has been filed relating to facts concerning a situation specified under s. 48.13 …, the court may issue a summons requiring the person who has legal custody of the child to appear personally, and, if the court so orders, to bring the child before the court at a time and place stated.
>
> ….
>
> **(3)** (a) 1. If the petition that was filed relates to facts concerning a situation under s. 48.13 …, the court shall also notify, under s. 48.273, the child, *any parent*, guardian and legal custodian of the child, any foster parent, treatment foster parent or other physical custodian described in s. 48.62 (2) of the child … and any person specified in par. (b), (d) or (e), if applicable, of all hearings involving the child except hearings on motions for which notice need only be provided to the child and his or her counsel. When parents who are entitled to notice have the same place of residence, notice to one shall constitute notice to the other….

WISCONSIN STAT. § 48.27 (emphasis added). WISCONSIN STAT. § 48.273 explains how the notice or summons should be served on a required party. It instructs:

> **Service of summons or notice; expense. (1)** Service of summons or notice required by s. 48.27 may be made by mailing a copy thereof to the persons summoned or notified. If the persons fail to appear at the hearing or otherwise to acknowledge service, a continuance shall be granted, except where the court determines otherwise because the child is in secure custody, and service shall be made personally by delivering to the persons a copy of the summons or notice; except that if the court is satisfied that it is impracticable to serve the summons or notice personally, it may make an order providing for the service of the summons or notice by certified mail addressed to the last–known addresses of the persons. The court may refuse to grant a continuance when the child is being held in secure custody, but in such a case the court shall order that service of notice of the next hearing be made personally or by certified mail to the last–known address of the person who failed to appear at the hearing. Personal service shall be made at least 72 hours before the time of the hearing. Mail shall be sent at least 7 days before the time of the hearing, except where the petition is filed under s. 48.13 and the person to be notified lives outside the state, in which case the mail shall be sent at least 14 days before the time of the hearing.

WIS. STAT. § 48.273(1). Thus, the statute requires the State to first mail a copy to the parent, and, if mailing fails to produce the parent's appearance, then the State must attempt personal service on the parent. In the event that personal service is found to be "impracticable," the service of the summons or notice can be effected by certified mail to the last known address of the person sought to be served. If the court refuses to grant a continuance, notice of the next hearing should be given by either personal service or certified mail.

¶12 Here, the record reflects that a certified letter, postmarked February 2, 2000, was sent to Lucinda B. at 3408 West Juneau, the home of Quineesha's caretaker. The letter was returned marked "unclaimed." The State then attempted personal service on Lucinda B. at the Juneau address. The invoice of the process server, dated February 3, 2000, reflects that a person at the Juneau address told the process server that Lucinda B. lived at 2430 North Booth Street. An affidavit of

service, admitted into evidence, reflects that two unsuccessful attempts were made to serve Lucinda B. at 2430 North Booth Street. One attempt was made on February 6, 2000, at 10:17 a.m., and another on February 8, 2000, at 5:50 p.m. On the third attempt, at 3:55 p.m. on February 9, 2000, the process server served a woman whom he believed to be a cohabitant of Lucinda B.'s named "Rachel Dotson." Lucinda B. later admitted she lived at that address on the date in question. Since the hearing date was February 22, 2000, the service was timely.

¶13 WISCONSIN STAT. § 801.11 sets out the method for perfecting personal service in this state. It reads in pertinent part:

> **Personal jurisdiction, manner of serving summons for.** A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> **(1)** NATURAL PERSON. Except as provided in sub. (2) upon a natural person:
>
> (a) By personally serving the summons upon the defendant either within or without this state.
>
> (b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode:
>
> 1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;
>
> 1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons….

¶14 Determining whether "reasonable diligence" is exercised in attempting to personally serve a party will depend on the facts of the case. ***Heaton v. Austin***, 47 Wis. 2d 67, 73, 176 N.W.2d 309 (1970). The trial court found, under

the totality of the circumstances, that reasonable diligence had been exercised in attempting to contact Lucinda B. This court agrees.

¶15 First, the trial court noted that actual notice is not necessary to obtain jurisdiction. Indeed, the basis of many CHIPS orders is the disappearance of a parent, and it would defeat the purpose of the CHIPS legislation to require actual notice on a missing parent to maintain an action. Here, the three attempts on different days and at different times would have been a reasonably diligent effort. *See* ***Heaton***, 47 Wis. 2d at 74 (two attempts at personal service could be considered reasonable diligence). The substituted service was not made on a "competent member of the family"; but, pursuant to WIS. STAT. § 801.11(1)(b)(1m), it is claimed that the party was a "cohabitant." Because the process server did not testify, it is impossible to conclude from this record whether the service was proper, because there is no indication as to whether "Rachel Dotson" claimed to live there, and the affidavit of service does not tell us what the process server told her. Lucinda B. argues that "Rachel Dotson" was not a resident of her apartment and, consequently, the State should have served her at work. This court disagrees. The State was not obligated to attempt service at her place of employment, and, given the lack of cooperation shown by Wal-Mart, it is unlikely that service would have been successful at the store.

¶16 Yet, it is well to remember that Lucinda B. failed to keep the case manager apprised of her address, despite monthly letters requesting the same. Notwithstanding her failure to provide the case manager with her current address, her home address was located and service was attempted there. The State properly followed the dictates of the statute in its attempts to serve Lucinda B. Consequently, the State used reasonable diligence in notifying Lucinda B.

¶17 Further, although service of the hearing date on Lucinda B. may have been defective, the State properly notified her of the dispositional order once it was entered. WISCONSIN STAT. § 48.355(2)(d) requires the court to "provide a copy of the dispositional order relating to a child in need of protection or services to the child's parent[.]" Evidence in the record shows that the dispositional order and a letter from an assistant district attorney were sent to Lucinda B.'s Booth Street address, and the documents were not returned. Consequently, this court concludes that Lucinda B. was properly notified of the CHIPS dispositional order. Further, Lucinda B. offers no authority for her contention that the alleged failure to serve her with notice of the CHIPS proceeding invalidates a termination of parental rights order.

¶18 Moreover, to defeat the validity of the termination order, Lucinda B. claimed she had no actual knowledge of the court order. Her claim rings hollow given her case manager's testimony that she discussed the CHIPS court order with Lucinda B., took out her copy for Lucinda B. to read, and also told her that the adoption process had been started for Quineesha. Thus, she knew of the underlying CHIPS proceeding from her case manager.

¶19 In sum, the trial court had jurisdiction to act in this termination of parental rights case. In light of this conclusion, Lucinda B.'s attorney was not ineffective for failing to raise this issue. ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994) (counsel's failure to bring a motion that would have been denied is no basis for an ineffective assistance of counsel claim). Accordingly, this court affirms.

*By the Court.*—Order affirmed.

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