

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 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. 03-2207
03-2208
STATE OF WISCONSIN**

**Cir. Ct. Nos. 02TP000507
02TP000508**

**IN COURT OF APPEALS
DISTRICT I**

NO. 03-2207
CIR. CT. NO. 02TP000507

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JANICE D.,

RESPONDENT-APPELLANT.

NO. 03-2208
CIR. CT. NO. 02TP000508

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JANICE D.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN W. MICKIEWICZ, Reserve Judge. *Dismissed.*

¶1 CURLEY, J.¹ Janice D. appeals the order terminating her parental rights to her two children, Jessica B. and John P., Jr.² While Janice D.'s attorney submits that the appeal is moot because Janice D. has since died, should this court decide otherwise, Janice D.'s attorney contends that the trial court erroneously exercised its discretion when it terminated Janice's parental rights. Because all the parties to this action concur that the appeal is moot, the appeal is dismissed.

¶2 On July 10, 2002, the State filed a petition seeking: (1) the termination of the parental rights of Janice D. and Frank B., the parents of Jessica B., born May 7, 1994; and (2) the termination of the parental rights of Janice D. and John P., Sr., the parents of John P., Jr., born March 8, 1996. The petition alleged that Jessica B. and John P., Jr. had previously been found to be children in need of protection and services and that both children were living

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

² This court consolidated the two cases on the motion of Janice D.'s attorney.

outside the homes of the parents.³ With respect to Janice D., the petition claimed two grounds existed for the termination of her parental rights: (1) she failed to meet the CHIPS conditions established for the safe return of the children to her home and it was substantially unlikely that she would do so within twelve months, pursuant to WIS. STAT. § 48.415(2) (2001-02)⁴; and (2) she failed to assume parental responsibility for the children as defined in WIS. STAT. § 48.415(6).

¶3 Janice D. contested the petition. A jury trial was held. The jury found that the State had proven both grounds for the termination of Janice D.'s parental rights to both children. Following the jury's determinations, the trial court held a dispositional hearing. The court found Janice D. unfit and terminated her rights to the children. This order was signed on April 11, 2003. On April 29, 2003, a document entitled Notice of Intent to Appeal and to Pursue Other Post-Dispositional Relief was filed on behalf of Janice D. by her trial attorney. As a consequence, the State Public Defender's office appointed Attorney Carl Chessir to represent Janice D. in the post-dispositional matters. Janice D. died on June 14, 2003. Attorney Chessir filed a notice of appeal on Janice D.'s behalf on August 19, 2003. Following the filing of the notice of appeal, the State filed a motion with this court seeking a dismissal of the action on the ground that the appeal is moot. The motion was denied.

³ Frank B. took no part in the proceedings and his whereabouts are unknown. Although John P., Sr. contested the petition, appeared personally, and was represented by counsel during the proceedings, he is not a party to this appeal.

⁴ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Janice D.’s counsel maintains that this appeal should be dismissed as moot. The prosecutor and the guardian ad litem join in counsel’s position. Notwithstanding this position, Janice D.’s attorney brings two cases to the court’s attention that appear to conflict with one another regarding whether an appeal survives the death of the party bringing it.

¶5 In *State v. McDonald*, 144 Wis. 2d 531, 424 N.W.2d 411 (1988), the defendant, a circuit court judge, was convicted of murdering the law partner of a man who defeated him for reelection. He committed suicide in prison while his appeal was in progress. In determining that the appellate process should continue despite his death, our supreme court said: “We conclude that when a defendant dies while pursuing postconviction relief, regardless of whether death is by suicide or by natural causes, the defendant’s right to bring an appeal continues.” *Id.* at 532. In contrast stands *State ex rel. Steiger v. Circuit Court for Dane County*, 86 Wis. 2d 390, 272 N.W.2d 380 (1978) (per curiam), where the supreme court determined that an action for a writ of prohibition brought in the supreme court by a congressman, who was ordered by the circuit court to reveal the names of people involved in voting irregularities, was moot because the congressman died while the action was pending. The court wrote: “A decision on the merits of this dispute can have no practical legal effect upon any existing controversy. The case is therefore moot, and generally this court will not determine a moot issue.” *Id.* at 391.

¶6 This court determines that neither case applies here because one was a criminal matter and the other concerned a John Doe proceeding. “A TPR proceeding is civil in nature[.]” *Door County DHFS v. Scott S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999); *see also* WIS. STAT. RULE 801.01(2) (“Chapters 801 to 847 govern procedure and practice in circuit courts of this state

in all civil actions and special proceedings ... except where different procedure is prescribed by statute or rule.”).

¶7 In civil matters, WIS. STAT. RULE 803.10 governs the procedure to be used when a party dies. RULE 803.10 reads, in pertinent part:

Substitution of parties. (1) DEATH. (a) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in s. 801.14 and upon persons not parties in the manner provided in s. 801.11 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested on the record by service of a statement of the facts of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(b) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in the action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

....

(5) DEATH AFTER VERDICT OR FINDINGS. After an accepted offer to allow judgment to be taken or to settle pursuant to s. 807.01, or after a verdict, report of a referee or finding by the court in any action, the action does not abate by the death of any party, but shall be further proceeded with in the same manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside. But a verdict, report or finding rendered against a party after death is void.

Assuming that the filing of Janice D.’s death certificate is the equivalent of a formal suggestion of death on the record, it is unclear who could even be substituted as a party, whether a TPR order falls within the category of cases

“extinguished” by the death of a party, or whether the trial court’s dispositional order is a type of “action [that] does not abate by the death of any party, but shall be further proceeded with in the same manner as if the cause of action survived by law.”

¶8 Regardless, this court concludes the matter is moot because all the parties agree that the action is moot. *See State ex rel. Olson v. Litscher*, 2000 WI App. 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (“An issue is moot when its resolution will have no practical effect on the underlying controversy.”). Under the circumstances present here, it is clear that any decision of the underlying controversy will have no practical effect. Accordingly, this appeal is dismissed.

By the Court.—Appeal dismissed.

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

