COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2324 **Cir. Ct. No. 02TP000005**

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

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

ASHLAND COUNTY,

PETITIONER-RESPONDENT,

V.

LISA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed in part and cause remanded with directions.*

¶1 CANE, C.J.[1] Lisa R. appeals an order terminating her parental rights to her son Bruce D.R. She claims the order should be reversed because Ashland County failed to prove either of the petition's allegations—that Lisa's parental rights to her other children were terminated before Bruce was found to be in need of protection and services, *see* WIS. STAT. § 48.415(10), or that Bruce was in continuing need of protection and services, *see* § 48.415(2). She also argues a new hearing is warranted because the withdrawal of her jury trial demand was not knowingly and voluntarily made.

¶2 Lisa argues that because the court-ordered conditions necessary for Bruce's return to Lisa were not entered into evidence, there is insufficient evidence to support a finding that she was an unfit parent under WIS. STAT. § 48.415(2). We reject this argument. Nevertheless, we remand the matter to the trial court to take additional evidence so that the court-ordered conditions will be made part of the record. This will then permit Lisa to seek later relief on appeal if she elects to argue that the evidence was insufficient to support the trial court's finding that she was unfit. Therefore, we affirm the order in part and remand for further proceedings.

BACKGROUND

¶3 Lisa is Bruce's biological mother. He was adjudged to be in need of protection or services on August 1, 2001. On October 30, 2002, the County filed a petition to terminate Lisa's parental rights, containing two allegations: (1) that within three years prior to the date Bruce was adjudged to be in need of protection

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

or services, a court ordered the termination of Lisa's parental rights with respect to another child, *see* WIS. STAT. § 48.415(10); and (2) that Bruce was in continuing need of protection and services, *see* § 48.415(2). On November 15, 2002, Lisa's parental rights were terminated to her other two children.

¶4 Lisa initially requested a jury at the fact-finding hearing for this matter, but later withdrew that request. At the fact-finding hearing, Lisa stipulated that Bruce was previously found to be a child in need of protection and services, that he had been placed outside the home for more than six months, and that the court had given Lisa the required termination of parental rights notice. However, the stipulation did not include what court-ordered conditions for Bruce's return were imposed on Lisa in relation to the CHIPS order.

¶5 The County called various witnesses who testified to the services provided to Lisa and opined that Lisa had not complied with the court-ordered conditions. However, the County never offered the conditions to be entered into evidence. It was also established that Lisa is cognitively disabled and has an IQ in the seventies. After the County rested, Lisa testified that she did the best she could to comply with the court-ordered conditions and was unable to do better because she felt a couple of the social workers were working against her.

¶6 The court determined that the County proved both grounds of the petition and eventually terminated Lisa's parental rights to Bruce. Lisa appeals.

DISCUSSION

¶7 A trial court's finding that a parent is unfit will not be overturned unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2).

I. DISMISSAL OF PETITION

¶8 Lisa argues the TPR petition should be dismissed because the court-ordered conditions were never entered into evidence and the County failed to prove the first allegation.

¶9 We agree with Lisa that the petition's first allegation cannot be sustained. WISCONSIN STAT. § 48.415(10) requires Bruce's CHIPS adjudication to occur after Lisa's parental rights were terminated to her other children. Section 48.415(10) reads:

> Prior involuntary termination of parental rights to another child … shall be established by proving all of the following:
>
> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13 (2), (3) or (10).
>
> (b) That, *within 3 years prior to the date the court adjudged the child who is the subject of the petition to be in need of protection* or services as specified in par. (a), *a court has ordered the termination of parental rights with respect to another child of the person* whose parental rights are sought to be terminated on one or more of the grounds specified in this section. (Emphasis added.)

It is undisputed that Bruce was adjudicated to be in need of protection or services on August 1, 2001, and that Lisa's parental rights were ordered terminated to two of her other children on November 15, 2002. Given that Bruce's CHIPS adjudication occurred before Lisa's parental rights were terminated to her other children, the County cannot establish § 48.415(10) as a ground for terminating Lisa's parental rights to Bruce.

¶10 As to the second allegation, Lisa claims the County failed to prove Bruce was a child in continuing need of protection or services. WISCONSIN STAT. § 48.415(2) states:

> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services … shall be established by proving any of the following:
>
> (a) 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 … *containing the notice required* by s. 48.356(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* ….
>
> 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. (Emphasis added.)

Lisa observes that the court-ordered conditions were never entered into evidence. *See* WIS. STAT. § 48.356(2) (requires a written CHIPS dispositional order to include court-ordered conditions for the child's return). She argues, "As a matter of common sense it can not be ascertained whether the agency made a reasonable effort to provide the services ordered by the court without knowing precisely what services the court ordered." Likewise, she claims "it can not be proven that the parent has failed and will fail to meet the conditions for return of the child without, as a predicate, enumerating the conditions." Because the County failed to prove

this critical element, Lisa maintains it did not meet its burden of proof and the record cannot sustain the trial court's finding. Therefore, Lisa asks that we dismiss the TPR petition. We reject her request.

¶11 On appeal, Lisa does not argue that the County failed to prove she did not comply with the court-ordered conditions, nor does she argue that she has complied with them. Instead she objects, for the first time on appeal, to the County's failure to actually enter the conditions into evidence. We agree that the County is required to prove Lisa has not and will be unable to comply with the court-ordered conditions. We also note that the County concedes it did not present a copy of the complete dispositional order outlining the conditions and that the testimony from its witnesses did not specifically enumerate them. Nevertheless, dismissal of the petition is not warranted. In ***Waukesha County v. Steven H.***, 2000 WI 28, ¶37, 233 Wis. 2d 344, 607 N.W.2d 607, the supreme court stated:

> The notice required by WIS. STAT. §§ 48.356(2) and 48.415(2) is meant to ensure that a parent has adequate notice of the conditions with which the parent must comply for a child to be returned to the home. The notice is also meant to forewarn parents that their parental rights are in jeopardy.

The key aspect of the court-ordered conditions, then, is to ensure the parent is alerted to the fact that his or her parental rights are in peril.

¶12 Here, Lisa has not alleged she was unaware or had inadequate knowledge of what conditions the court ordered. In fact, the record would belie such an allegation, as the County correctly points out the record plainly indicates all parties were aware of the court-ordered conditions at the fact-finding hearing. Lisa's counsel's strategy at the hearing was twofold: (1) to attack the County's assertion that the social services agency made reasonable efforts to provide Lisa

with court-ordered services because the services were offered without contemplating her learning disabilities, and (2) to argue that Lisa had not failed to meet the conditions. Additionally, the County notes that the court, in rendering its decision, specifically looked to the dispositional order and referenced it in determining whether the County met its burden.

¶13 Consequently, because the record indicates Lisa as well as all others involved in the hearing were aware of the court-ordered conditions, and because all parties were laboring under the assumption that they were admitted into evidence, we fail to see how Lisa has been harmed. For that reason, we will not dismiss the petition.

¶14 However, Lisa has a legitimate concern that meaningful appellate review cannot be had without the conditions included in the record. To allay this concern, we will not engage in guesswork and attempt to piece the conditions together from the County's witnesses' testimony. Instead, we remand this matter to the circuit court to take additional evidence on what conditions are contained in the dispositional order. We acknowledge that generally speaking, a remand order may not direct the taking of additional evidence to "shore up" a court's finding. *See, e.g.,* ***Snajder v. State***, 74 Wis. 2d 303, 312, 246 N.W.2d 665 (1976). However, a remand order can direct the court to take additional evidence if considerations of due process and fair play are not offended. *See* ***State ex rel. Lomax v. Leik***, 154 Wis. 2d 735, 741, 454 N.W.2d 18 (Ct. App. 1990). Again, the record plainly indicates all parties were not only aware of the conditions but that they formulated their trial strategies around them. Therefore, we conclude neither due process nor fair play will be offended by directing the taking of additional evidence. *See* ***id.***

II. NEW TRIAL

¶15 Alternatively, Lisa argues a new trial should be ordered. She claims her withdrawal of a jury demand was not knowingly and voluntarily entered because the court did not explain the size of the jury or that a five-sixths vote was necessary for the County to prevail. Lisa admits there is no TPR statute or case law that requires a court to explain either of these components, let alone any TPR law that requires a jury demand withdrawal to be knowingly and voluntarily entered. Nevertheless, she claims we should import the criminal law standards for a jury trial waiver, as declared in ***State v. Resio***, 148 Wis. 2d 687, 695, 436 N.W.2d 603 (1989), into a jury withdrawal in a TPR proceeding.

¶16 In ***Resio***, the supreme court held "the key feature of the right to a jury trial is that the defendant's case is tried before a group of twelve fellow citizens in the community rather than by a single state judicial official." ***Id.*** Lisa argues since she was not advised of "the key feature," it follows that her jury withdrawal was not knowing and voluntary. We are not persuaded.

¶17 We agree with the trial court's concern that at the pretrial phase, the size of the jury is unknown. WISCONSIN STAT. § 48.31(2) provides that a jury in a TPR case will consist of twelve people unless the parties agree to a lesser number. With the exact number of the jurors being untold, in withdrawing a jury demand we conclude the court need only find that the parent understand that the decision-maker will be the court as opposed to a jury. Here, the colloquy supports this finding:

> THE COURT: [To Lisa's attorney], does your client want a fact finding hearing to the court or to a jury?
>
> [LISA'S ATTORNEY]: To the court at this point, Your Honor.

THE COURT: [Lisa], is that correct?

(Whereupon, a discussion was had off the record between [Lisa's attorney] and [Lisa].)

[LISA]: Yes.

THE COURT: Have you had enough time to discuss that decision with your attorney?

[LISA]: Yes.

THE COURT: And do you understand that if the fact finding hearing is to the court there won't be a jury deciding the case? It would be the judge deciding the case.

[LISA]: Yes.

THE COURT: And do you understand that in a termination of parental rights case there are potentially two steps in the process, one step is the fact finding hearing, which is like a trial at which the court determines whether or not there are grounds for termination. If the Court finds there are not grounds for termination that ends the case. The case is over and dismissed.

If the Court finds that there are grounds for termination there is a legal basis for termination then another hearing, or the second step, comes and that is called a dispositional hearing which the Court decides whether termination of parental rights is in the child's best interest.

So, essentially in the first hearing the issue is can the State legally terminate parental rights. In the second hearing, if there is one, the question is should the State terminate parental rights.

Do you understand the steps in these proceedings?

(Whereupon, a discussion was had off the record between [LISA'S ATTORNEY] and [LISA].)

[LISA]: Yes.

THE COURT: Has anybody forced or threatened you or pressured you in any way to get you to give up your right to have that first hearing before a jury?

> [LISA]: No.
>
> THE COURT: Do you have any questions that you want to ask either your attorney or me at this time?
>
> [LISA]: No. Not right now.

Although minimal, this colloquy is adequate to demonstrate that Lisa understood it was the judge who was going to make the decision and not the jury.

¶18 As to the unanimity requirement, in ***Resio***, the supreme court held a circuit court must advise a criminal defendant "that the court cannot accept a jury verdict that is not agreed to by each member of the jury" before it accepts a jury trial waiver. ***Id.*** at 696-97. Lisa argues that, like the criminal defendant, she must be advised of the requisite degree of agreement, in this case a five-sixths verdict, before she can knowingly and voluntarily withdraw a jury trial request. However, in ***Resio***, the supreme court assigned to the trial court the obligation to inform the criminal defendant of the unanimity requirement pursuant to its constitutionally conferred judicial administrative powers. *See* ***id.***; WIS. CONST. art. VII, § 3. Whether those powers should be used to extend this obligation to non-criminal defendants is not a question for us, but rather is a matter to be resolved by the supreme court.

By the Court.—Order affirmed in part and cause remanded with directions.

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