COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-3566
95-3567

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II
No. 95-3566

In the Interest of
Crystal S., A Person
Under the Age of 18:

WAUKESHA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v.

TERESA B.,

Respondent-Appellant.

No. 95-3567

In the Interest of
Crystal S., A Person
Under the Age of 18:

WAUKESHA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v.

JOHN S.,

Respondent-Appellant.

APPEALS from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

ANDERSON, P.J. Teresa B. and John S. appeal from an order of the trial court terminating their parental rights to their child, Crystal S. We conclude that Teresa's and John's arguments are without merit. Accordingly, we affirm the order of the trial court.

Crystal was born in June 1992. She was found to be in need of protection or services (CHIPS) in January 1993. According to John's appellate brief, he was not involved at this stage of the proceedings because he had not yet been adjudicated Crystal's father. He was subsequently adjudicated the child's father.

A petition for termination of Teresa's and John's parental rights (TPR) was filed on January 12, 1995,[1] alleging that Crystal was in continuing need of protection or services, pursuant to § 48.415(2), STATS. The petition stated that the agency had made a diligent effort to provide the services ordered by the court.

[1] An amended petition was filed on April 7, 1995, to reflect the applicable statutes.

A jury trial was held in June 1995. With regard to both parents, the jury found that (1) Crystal was in need of protection and services which resulted in court-ordered conditions for return to John and Teresa, (2) Crystal continued in a placement outside the home for a cumulative total period of one year or longer pursuant to court orders under the applicable statutes, (3) the court orders placing Crystal outside of her mother's and father's home contained the notice required by § 48.356(2), STATS., (4) the Waukesha County Department of Health and Human Services made a diligent effort to provide the services required by the court, (5) Teresa and John substantially neglected, willfully refused or had been unable to meet the conditions established for the return of Crystal to their home, and (6) there was a substantial likelihood that in the future, Teresa and John would not meet the conditions established for the return of Crystal to either of their custody.

A dispositional hearing was held. The trial court concluded that termination was in the best interests of the child and issued an order terminating Teresa's and John's parental rights to Crystal. Teresa and John appeal.

Teresa argues that the trial court erroneously exercised its discretion when it denied her motion to sever her case from John's case for trial. She states that the ground for severing her trial was that the jury would be hearing evidence about John which would be unfairly prejudicial to her. The decision whether to grant a motion for severance is within the trial court's

discretion. ***I.P. v. State***, 157 Wis.2d 106, 121, 458 N.W.2d 823, 830 (Ct. App. 1990), *aff'd*, 166 Wis.2d 464, 480 N.W.2d 234 (1992).

We conclude that Teresa was not prejudiced by the trial court's decision to deny her motion for severance. The trial court stated:

> [T]his is a situation where there are witnesses I assume that are, based on my review of the petition or the amended petition, that are common, shall we say, to both parents; that under all the circumstances that a severance is not—is not feasible. The issues of the fact that the parties were never married are issues that will—can be delved into in voir dire, but not the basis of a motion to sever, not at this late hour and not in the interest of judicial economy.

An additional fact to support the trial court's decision is that separate verdict forms for Teresa and John were submitted to the jury. Furthermore, there was testimony that the parents were living together when Crystal was removed.

Next, Teresa argues that the trial court erred when it decided that the TPR petition was filed before the CHIPS dispositional order expired. She states that the extension order entered after a hearing extended the jurisdiction of the court to January 12, 1995. The TPR petition was filed on January 12, 1995. She contends that the TPR petition was required to be filed no later than January 11, 1995. Because the TPR petition was filed late according to Teresa's time line, the court lost subject matter jurisdiction of the case.

The facts are undisputed as to this issue and only a question of law remains. Therefore, we review the trial court's decision de novo. *See* ***Breier v. E.C.***, 130 Wis.2d 376, 381, 387 N.W.2d 72, 74 (1986).

We conclude that the TPR petition was timely filed. The extension order noted the expiration date as January 12, 1995. We agree with the County's argument that the last day in a stated time period is included in a calculation of time. Section 990.001(4)(a), STATS., provides:

> The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

This statute is instructive on how the time limit is to be measured. We conclude that the County had until midnight on January 12, 1995, to timely file the petition.

John first argues that his "due process rights [were] violated by the Department's decision to favor and pursue termination of his parental rights at roughly the same time that the Department pledged to the court that it would assist [him] in obtaining the return of Crystal." John, however, failed to raise this issue in the trial court. As a general rule, this court does not consider issues raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). We will not consider this issue because justice does not require it. *See* ***State v. Kircher***, 189 Wis.2d 392, 404, 525 N.W.2d 788, 793 (Ct. App. 1994).

John also argues that "the agency responsible for the care of the child and the family cannot take the inconsistent positions of favoring the termination of a parent's rights and at the same time representing to the court that it will make the required diligent efforts and must not be allowed to make quick and hasty decisions regarding a parent's status." He contends that the trial court erred in not granting his motion for dismissal based upon the County's failure to prove diligent efforts by the Department. A trial court shall not grant a motion challenging the sufficiency of the evidence as a matter of law to support a verdict, "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1), STATS.

WISCONSIN J I—CIVIL 7040 provides that "diligent effort" requires the department to act reasonably, using ordinary and reasonable diligence. It requires an earnest and energetic effort. There is ample evidence to support the finding that the Department made diligent efforts to help John fulfill the conditions for Crystal's return. Linda Senger, a social worker assigned to the case, testified that she made alcohol and drug referrals to the Waukesha County Council on Alcoholism and Other Drug Abuse and to the Department's

outpatient clinic. John was terminated from services at the Department due to noncompliance. This occurred after the establishment of his conditions for Crystal's return. Senger also suggested that John seek assistance through the Veterans Administration. It was John's failure to satisfactorily complete the offered services that was the trigger for the TPR petition. John offers no authority that permanency planning, with an eye towards termination, cannot be ongoing while services are being offered.

Last, John asserts that the jury's decision was clearly erroneous based upon the facts presented regarding a lack of diligent efforts by the Department. We will sustain a jury's verdict if there is any credible evidence to support it. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). Based on our discussion above, we conclude that there was sufficient evidence to support the jury's verdict that the Department made diligent efforts to help John fulfill the conditions for Crystal's return.

By the Court.—Order affirmed.

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