COURT OF APPEALS DECISION DATED AND FILED

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

Nos. 99-2019, 99-2020, 99-2021

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

NO. 99-2019

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ZACHARY H., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

WADE H.,

RESPONDENT-APPELLANT.

NO. 99-2020

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

WADE H.,

RESPONDENT-APPELLANT.

NO. 99-2021

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

WADE H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

¶1 PETERSON, J. Wade H. appeals a circuit court's orders granting the petitions for the termination of his parental rights to his three children, Zachary H., Derek and Luke D. Wade raises six claims of error: (1) He did not receive adequate notice of the grounds for the possible termination of his parental rights, in violation of due process; (2) he did not receive adequate notice of the grounds for the possible termination of his parental rights, in violation of § 48.356(2), STATS.; (3) he was not represented by counsel during the underlying CHIPS[1] proceedings which violated his rights to due process and effective representation in the TPR action; (4) the circuit court's determination that Brown

[1] CHIPS is an acronym for "children in need of protection or services." A CHIPS order is issued pursuant to § 48.13, STATS.

County Human Services made reasonable efforts to provide the court-ordered services was not supported by sufficient evidence; (5) the circuit court erroneously exercised its discretion in terminating his parental rights; and (6) the circuit court lost its competency to terminate his parental rights because it failed to enter its written orders within ten days of disposition. Because Wade's claims are unpersuasive, the circuit court's orders are affirmed.

BACKGROUND

¶2 Brown County Department of Human Services (County) filed a petition for the termination of Wade's parental rights grounded on the continuing need for protection or services. *See* § 48.415(2), STATS. The children were originally removed from their mother's home in 1992 based on a CHIPS action arising out of neglect. They were returned to their mother in 1994, but in October 1997, the children were again found unattended and the house was in complete disarray and unsanitary. Wade was unable or unwilling to provide care for the children and did not object to their foster placement.

¶3 The children remained in County care without either parent taking the necessary steps to re-enter the children's lives. The County filed a TPR petition in November 1998. Denise failed to appear at the initial hearing on the TPR action and the court found her in default. Wade waived his right to a jury trial and, after a hearing in February 1999, the court found that the County had met its burden as to each of the necessary elements. The court held a disposition hearing on March 26, 1999, where it found that termination was in the best interests of the children. The court filed its written order terminating Wade's parental rights for each child on April 16, 1999.

REQUIREMENT OF DUE PROCESS FOR NOTICE

¶4 Parents have a fundamental liberty interest in matters of family life. *See* ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982). In ***In re Jason P.S.***, 195 Wis.2d 855, 863, 537 N.W.2d 47, 50 (Ct. App. 1995), this court explained that fundamental fairness requires that parents be given fair notice of the actual conduct that could lead to the termination of their parental rights.

¶5 Wade claims that the County did not give him adequate notice of the possible grounds for terminating his parental rights. The facts surrounding the notice Wade received are basically undisputed. The application of the United States Constitution to undisputed facts presents a question of law that this court reviews de novo. *See* ***id***. at 862, 537 N.W.2d at 49-50.

¶6 Written warnings of the type of conduct that could lead to the termination of his parental rights were attached to the November 1997, CHIPS order. "Abandonment," the specific reason the children were removed from their home at that time, was the only ground checked as being most applicable to Wade for the future possibility of terminating his parental rights. There is no dispute that Wade received a copy of the written warnings. However, the eventual TPR petition was based on the "continuing need for protection or services." Based on this difference, Wade argues that the County substantially changed the grounds for terminating his parental rights without advance notice.

¶7 Wade relies on ***Jason P.S.***, where this court examined the amended version of § 48.415(2)(c), STATS. This court concluded that the amendment substantially changed the type of conduct that could lead to the termination of a person's parental rights. The petitioner had not provided the parent notice of the new, broader grounds. Therefore, this court held that the parent's rights had been

terminated under a fundamentally unfair procedure because the lack of notice prevented the parent from having the opportunity to address her family circumstances accordingly. *See **id***. at 863-64, 537 N.W.2d at 50.

¶8 Here, Wade was on notice of the possible grounds for terminating his parental rights. Attached to the underlying CHIPS order was an information sheet entitled "Notice Concerning Grounds to Terminate Parental Rights." Wade does not dispute that he received this document. The first paragraph read:

> Your parental rights can be terminated against your will under certain circumstances. A list of the potential grounds to terminate a parent's rights is given below. Those that are check-marked are most applicable to you, *although you should also be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.*

Although not check-marked, one of the listed grounds was continuing need of protection or services, the grounds alleged in the TPR petition. The information sheet therefore placed Wade on notice of the grounds that ultimately formed the basis of terminating his parental rights.[2] *See **In re Jamie L.***, 172 Wis.2d 218, 227-28, 493 N.W.2d 56, 61 (1992).

[2] Wade also received several other forms of warnings that further assure this court he had actual notice of the eventual grounds for terminating his parental rights. The social worker sent Wade numerous letters trying to establish meetings and attempting to give him help toward completing the court-ordered conditions. Some of the letters she sent him also contained written warnings that specifically highlighted the possibility of terminating his parental rights on the grounds of continuing need of protection or services, among others. Wade also concedes in his brief to this court that "all parties were aware early in the CHIPS proceeding that a termination proceeding was seriously threatened."

NOTICE UNDER § 48.356(2), STATS.

¶9 Similarly, Wade argues that the County failed to meet its burden of proving that the children were "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)*, [STATS]. Section 48.415(2)(a)1, STATS. In relevant part, § 48.356(2), requires that "any written order which places a child … outside the home … shall notify the parent" of any grounds for termination of parental rights under § 48.415, STATS., which may be applicable. Wade again seizes on the information sheet that was attached to the November 1997, CHIPS order claiming it does not satisfy the required notice because the eventual grounds for termination of his parental rights were not highlighted as being "most applicable" to him.

¶10 The supreme court has previously decided that written orders under § 48.356(2), STATS., may contain more warnings than the particular one eventually relied on in the TPR proceeding. *See **id***. To comply with § 48.356(2), the written orders need only have contained the same information as the oral notice given by the court under subsec. (1). *See **id***. at 228, 493 N.W.2d at 61. Under subsec. (1), the court was required to orally warn Wade of any grounds that may have been applicable for the termination of his parental rights. Wade concedes that the circuit court orally warned him that his parental rights could be terminated for the continuing need of protection or services. This court has already concluded that the information sheet, by its express terms, also provided Wade actual notice of the eventual grounds for terminating his parental rights. Therefore, Wade received adequate notice under § 48.356(2).

REPRESENTATION IN UNDERLYING CHIPS PROCEEDINGS

¶11 Wade argues that the circuit court's failure to appoint counsel in the underlying CHIPS proceedings constituted an erroneous exercise of discretion and denied him due process.

¶12 Wade bases his arguments on ***Joni B. v. State***, 202 Wis.2d 1, 549 N.W.2d 411 (1996). In ***Joni B.***, the court considered a challenge to an amendment to § 48.23(3), STATS., which prohibited a circuit court from appointing counsel for any adult in a CHIPS action. *See* ***id***. at 5, 549 N.W.2d at 412. The court concluded that the statute violated due process because it precluded a case-by-case determination of the necessity for appointment of counsel. *See* ***id***.

¶13 Wade argues that the circuit court erroneously exercised its discretion because it failed to address the issue of appointing counsel in his CHIPS proceeding. However, the ***Joni B.*** court clearly explained that a circuit court need not undertake such an inquiry in every case:

> We emphasize that the key to an individualized determination is that the need to appoint counsel will differ from case to case. In other words, a circuit court should only appoint counsel after concluding that either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment. *If the parent does not request appointment of counsel and the court perceives no particularized need for counsel in the case before it, the court need not address the issue.*

Id. at 18, 549 N.W.2d at 417-18 (emphasis added).

¶14 Wade makes a completely unsupported claim in his brief that he "may have" raised the issue of the need for counsel at the CHIPS hearing because when he arrived at the hearing he noted that he did not have a lawyer. Wade has

failed to provide the transcripts of the CHIPS proceedings. When an appellate record is incomplete in connection with an issue raised by the appellant, this court must assume that the missing material supports the circuit court's discretionary ruling. *See* ***Duhame v. Duhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).[3]

¶15 Acknowledging that there is no right to appointment of counsel at a CHIPS proceeding, he claims he required counsel because the court ordered him to decide within thirty days whether he wanted to be a parent to his children. He also makes an amorphous argument that he did not understand the legal procedures or significance of the CHIPS proceedings.

¶16 As the court in ***Joni B.*** noted, the interests of the parents affected by any CHIPS order are significant. Although there is no constitutional right to appointment of counsel, in cases demonstrating a particularized need, the circuit court must have discretion to do so. In assessing the need for counsel, the court suggested that the circuit court balance the following factors, among others:

> - the personal characteristics of the parent, such as age, mental capacity, education, and former contact with the court;
>
> - the parent's demonstrated level of interest in the proceedings and desire to participate;
>
> - whether the petition alleges incidents of abuse or neglect which could lead to criminal prosecution;
>
> - the complexity of the case, including the likelihood of the introduction of medical or psychological evidence;
>
> - the probability of out-of-home placement and potential duration of separation, based on the allegations in the petition and the social worker's recommendation.

[3] There is absolutely no evidence that Wade ever raised the issue of the need for appointment of counsel with the circuit court.

Id. at 19, 549 N.W.2d at 418.

¶17 Wade has not specifically addressed any of these factors, and his vague claims do not illustrate the type of concerns that are extraordinary or could raise doubt as to the validity of the proceedings.[4] Legal counsel was not necessary for Wade to realize that he needed to make his children a higher priority. This court concludes that the CHIPS proceedings in this case did not present any special circumstances that overcame the presumption against appointing counsel or risked either the efficient administration of justice or Wade's right to due process.[5]

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[4] The ***Joni B.*** court used a hypothetical example to illustrate the kinds of special circumstances that might require the appointment of counsel to ensure the fundamental fairness of the CHIPS proceedings:

> A woman is severely developmentally disabled, with a borderline IQ, but manages to live independently, gainfully employed as a waitress. She gives birth to twins and lovingly raises them, providing for all of their necessities. But as the boys grow older they mentally outstrip their mother; she does not have the capacity to help them with their homework, and they soon find ways they can "outfox" her. There has been no abuse or neglect but the county decides that it is too expensive to continue to provide in-home services to assist the family, so they file a CHIPS action requesting that the boys be placed in foster care.
>
> The mother desperately wants to keep her two children whom she intensely loves, so she contests the CHIPS petition. Under amended § 48.23(3), the court is prohibited from appointing counsel to assist the mother, and a date for a jury trial is set where the mother must appear alone to argue that she should be allowed to keep her family intact.

Joni B. v. State, 202 Wis.2d 1, 17, 549 N.W.2d 411, 417 (1996).

[5] Wade also argues that the circuit court's failure to appoint counsel in the underlying CHIPS proceedings rendered his trial counsel's representation in the TPR proceedings ineffective. Wade's argument is insufficiently developed and he has failed to provide the transcripts of the underlying CHIPS proceedings. We will not consider inadequate argument or appeals that otherwise do not comply with § 809.19, STATS. Nor will we abandon our neutrality by developing Wade's argument for him. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

"REASONABLE EFFORT" TO PROVIDE SERVICES

¶18 Wade argues that the evidence is insufficient as a matter of law to support the circuit court's decision. In particular, he claims that the County failed to make a "reasonable effort" to provide the court-ordered services, as required by § 48.415(2)(a)2, STATS. Subparagraph (2)(a)2a requires the County to prove that it made an earnest and conscientious effort to take good-faith steps to provide the court-ordered services. This court reviews challenges to the sufficiency of the evidence necessary to support a trial court's decision de novo. *See* ***In re Lily R.A.P.***, 210 Wis.2d 132, 140, 565 N.W.2d 179, 183 (Ct. App. 1997).

¶19 Whether the County made a diligent effort to provide court-ordered services is a fact-sensitive inquiry where this court must consider the totality of circumstances as they exist in each case. *See* ***In re Torrance P.***, 187 Wis.2d 10, 15, 522 N.W.2d 243, 245 (Ct. App. 1994). The factfinder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence. *See* ***In re Dejmal***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980). Furthermore, this court applies a highly deferential standard of review to the circuit court's findings of fact, giving due regard to the court's opportunity to judge the credibility of the witnesses, and will not set them aside unless they are clearly erroneous. *See* § 805.17(2), STATS.

¶20 Here, the circuit court's determination that the County made a reasonable effort to provide the court-ordered services was supported by sufficient evidence. The social worker told Wade that she would assist him with the court-ordered services, but that he needed to take steps toward completing an alcohol and other drug abuse assessment and completing any necessary treatment ordered by the court. Wade claims that the social worker denied him visitation until he

completed an assessment. But there is absolutely no evidence in the record that Wade ever specifically requested visitation or that the County denied him that opportunity. In fact, the social worker testified that whenever she asked Wade why he had not taken the initiative to be involved with the kids, he "repeatedly explained that he's had some things going on in his life … that he had some personal problems to deal with." This testimony contradicts Wade's claim that the social worker prevented him from visiting his children.

¶21 Wade claims he could not afford an assessment and was unaware that financial assistance was available. However, the social worker testified that she could not recall Wade ever raising financial concerns with her.

¶22 Wade contends that the social worker's efforts to provide him the court-ordered services were less than diligent because she insisted that he take some initial steps to help himself. However, the social worker made numerous phone calls and sent Wade thirteen letters, several of which contained explicit warnings that his children's continuing need for protection and services could be grounds for the termination of his parental rights. The social worker also scheduled ten meetings, only two of which Wade actually attended. This evidence contradicts Wade's claim that the social worker did not make an earnest and conscientious effort to provide him the court-ordered services. The circuit court found the social worker's testimony credible and its determination that the County made a "reasonable effort" to provide Wade the court-ordered services was therefore supported by sufficient evidence. *See* § 805.17(2), STATS; ***Plesko v. Figgie Int'l***, 190 Wis.2d 764, 775, 528 N.W.2d 446, 450 (Ct. App. 1994) (When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony.).

TERMINATION OF PARENTAL RIGHTS

¶23 According to Wade, the circuit court erroneously exercised its discretion in terminating his parental rights because it failed to consider the steps he had taken between the fact-finding hearing and the dispositional hearing. Once grounds were established to terminate Wade's parental rights, the decision of whether to actually terminate his rights is vested with the circuit court's sound discretion. *See* ***In re Brandon S.S.***, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993). If the circuit court rationally applies the correct law to the relevant facts, an appellate court will not disturb its discretionary decision. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

¶24 At the disposition, the court was required to consider the best interests of the child, including the specific factors enumerated under § 48.426(3), STATS.[6] Wade does not specifically challenge the court's consideration of the appropriate factors, but argues that it erroneously exercised its discretion because it did not give more weight to the steps he had taken toward assuming

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[6] Section 48.426(3), STATS., requires the court to consider the following non-exhaustive list of factors:

> (a) The likelihood of the child's adoption after termination.
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
> (d) The wishes of the child.
> (e) The duration of the separation of the parent from the child.
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

responsibility in the approximate month between the fact-finding hearing and the dispositional hearing.

¶25 At the dispositional hearing, Wade testified that he had completed the assessment, found a better apartment and intended to follow through with the other court-ordered services. The circuit court listened to the evidence, but found it insufficient to alter the complete picture, which was most heavily painted by Wade's past actions. The court stated that Wade had never exhibited the commitment necessary to retaining his children, but that he had only made excuses. The court also noted that Wade's latest efforts were not timely. As Wade acknowledges, this was a "judgment call" that the circuit court was entitled to make in its discretion.

¶26 Wade also argued at the dispositional hearing that the County effectively denied him visitation with his children by requiring him to make progress on the court-ordered services before setting up any supervised visitation. Unconvinced, the circuit court found that Wade failed to demonstrate any attempts to establish a substantial relationship with his children. It took his social worker over three months of sustained effort before Wade would even meet with her. Only when they finally met did she explain to him that she wanted him to complete the assessment and establish a reliable schedule before unfairly raising the children's hopes and expectations with sporadic or unreliable visitation. Wade then proceeded to miss the next four scheduled meetings and a scheduled assessment. He went to Texas for four months and before leaving he rejected the social worker's emphatic plea to sign releases that would allow his children to participate in their activities. Then Wade was in jail from September 1998, to January 1999. The circuit court reminded Wade that it had asked him nearly a year and a half earlier to make a commitment to his children and that Wade had

simply failed to do so. The court properly exercised its discretion in determining that termination was in the best interests of the children.[7]

LOSS OF COMPETENCY

¶27 Finally, Wade claims that the circuit court lost its competency to terminate his parental rights because it failed to enter a written order within the statutory period. Section 48.427(1), STATS., requires a circuit court to enter its disposition terminating parental rights within ten days after receiving evidence at the dispositional hearing.[8] Wade does not dispute that the court unambiguously pronounced oral judgment on the same day as the dispositional hearing. Nevertheless, he argues that the court lost its competency because it failed to enter its written order within ten days of the hearing.

¶28 The application of undisputed facts to a statute presents a question of law this court reviews de novo. *See* ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). The cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction that will defeat the manifest object of the act. *See* ***Ynocencio v. Fesko***, 114 Wis.2d 391, 398, 338 N.W.2d 461, 464 (1983).

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[7] Wade also argues that it was fundamentally unfair to rely on his failure to visit his children when the County was effectively prohibiting him from doing so. Wade raises this constitutional issue for the first time on appeal, and therefore this court does not consider it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980).

[8] Section 48.427(1), STATS., provides:

> (1) Any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court. After receiving any evidence related to the disposition, the court shall enter one of the dispositions specified under subs. (2) to (4) within 10 days.

¶29 Section § 48.427(1), STATS., states that the court "shall" enter disposition within ten days. The use of the term "shall" presumptively renders the statute mandatory in nature. *See* ***Karow v. Milwaukee County Civil Serv. Comm'n***, 82 Wis.2d 565, 570, 263 N.W.2d 214, 217 (1978). However, it is well established that "the mandatory nature of [a] statute does not necessarily mean that noncompliance requires the loss of competence." ***State v. Kywanda F.***, 200 Wis.2d 26, 32, 546 N.W.2d 440, 444 (1996). Indeed, this court has serious reservations whether the ten-day requirement under § 48.427(1) is mandatory. *See* ***State v. Industrial Comm'n***, 233 Wis. 461, 466, 289 N.W. 769, 771 (1940) ("a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.").[9] Nevertheless, even assuming that the ten-day requirement is mandatory, this court concludes that failure to enter a written judgment does not affect the circuit court's competency to proceed.

¶30 Courts that have held that some of ch. 48, STATS., time limits involve the circuit court's competency to proceed have relied on legislative history to reach their result. *See* ***Kywanda F.***, 200 Wis.2d at 34, 546 N.W.2d at 445. The

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[9] In ***In re R.H.***, this court also differentiated between mandatory and directory time period stating:

> The language … that the court shall set a hearing date which "is no more than" a specified number of days from the previous event, implies that the time is intended to be a limitation. Where a time limit has been held to be directory, the statute simply provided that the act "shall" be done within a specified time.

In re R.H., 147 Wis.2d 22, 26, 433 N.W.2d 16, 18 (Ct. App. 1988), (citing ***Galewski v. Noe***, 266 Wis. 7, 16, 62 N.W.2d 703, 708 (1954) (decision of trial court "shall be … filed" within sixty days after submission)).

legislative history and expressed policy here suggests that failure to satisfy the ten-day time requirement under § 48.427(1), STATS., should not result in the loss of competency. Wade is not harmed in any conceivable way by the court's failure to file a written order memorializing its oral judgment within ten days.

¶31 Moreover, an opposite conclusion would be directly contrary to the express purposes and policies behind ch. 48, STATS. Section 48.01(1)(gg), STATS., states that it is the purpose of the chapter "[t]o promote the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster or treatment foster care." Here, the circuit court found that adoption was likely. It stated, that "[i]t's clear that the foster parents now are willing to adopt these children." If the circuit court lost competency to file its written order, the adoption it found likely would be on hold, contrary to the express intent of ch. 48.

By the Court.—Orders affirmed.

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