COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2006

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 No. 2005AP2656 **Cir. Ct. No. 2005TP4**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRIANCA M. W., A PERSON UNDER THE AGE OF 18:

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

NICOLE W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Nicole W. appeals an order terminating her parental rights to Brianca M.W. She contends that the circuit court erred by permitting a prior involuntary termination of parental rights to another child to be grounds for termination, pursuant to WIS. STAT. § 48.415(10), where Nicole defaulted to the allegations of the petition in the prior proceeding. This court rejects Nicole's argument and affirms the order.

FACTS

¶2 On March 11, 2005, the Oneida County Department of Human Services filed a petition to terminate Nicole's parental rights to her daughter, Brianca. That petition alleged two grounds for termination. First, the petition asserted that Brianca was adjudged to be in continuing need of protection or services and the requirements of WIS. STAT. § 48.415(2) were satisfied. Second, Nicole's parental rights to another child had been involuntarily terminated within the previous three years, which is grounds pursuant to WIS. STAT. § 48.415(10).

¶3 The Department sought partial summary judgment as to the second ground, relying upon an order, filed in Waukesha County on February 3, 2003, which terminated Nicole's parental rights to her son, Rockey. Two hearings were held on the Department's motion. At the first hearing, Nicole contended that the prior termination was not a termination on grounds because she defaulted. The court reviewed the Waukesha order, which stated that Nicole defaulted but did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

state the grounds for termination. The court then continued the hearing to permit the Department to produce a copy of the Waukesha petition.

¶4 At the second hearing, the court reviewed the Waukesha petition, which alleged abandonment, pursuant to WIS. STAT. § 48.415(1)(a)2, and that Rockey was a child in continuing need of protection or services, as provided by § 48.415(2)(a). Nicole argued that the allegations of the petition were insufficient to show that the prior order was based on grounds as provided by statute. The court rejected Nicole's argument and granted partial summary judgment, concluding that Nicole defaulted to the grounds alleged in the Waukesha petition.

DISCUSSION

¶5 Nicole argues a default judgment is not a termination "on grounds," as required by WIS. STAT. § 48.415(10)(b). She also contends there was an insufficient showing that the prior termination was on grounds and, therefore, partial summary judgment should not have been granted.

¶6 The guardian ad litem argues that a default judgment is sufficient because, in a TPR proceeding, a default must be accompanied by a showing of grounds by clear and convincing evidence. Nicole responds that there is no evidence that the Waukesha court followed this procedure and, therefore, partial summary judgment was inappropriate.

¶7 Partial summary judgment may be granted at the fact-finding stage of a TPR proceeding where there is no genuine issue of material fact regarding the grounds alleged, considering the heightened burden of proof required by WIS. STAT. § 48.31(1). ***Steven V. v. Kelley H.***, 2004 WI 47, ¶6, 271 Wis. 2d 1, 678

N.W.2d 856. That statute requires grounds to be proven by clear and convincing evidence. WIS. STAT. § 48.31(1).

¶8 The permissible grounds for an involuntary termination of parental rights are found in WIS. STAT. § 48.415. The grounds at issue in this case are found in § 48.415(10):

> PRIOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS TO ANOTHER CHILD. Prior involuntary termination of parental rights to another child, which 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.)

¶9 The parties seem to present two questions for review. The first is whether a prior TPR where the parent defaulted at the fact-finding hearing can be the basis for a later TPR under WIS. STAT. § 48.415(10). If the answer to the first question is yes, the second question is how much evidence about the prior TPR must be shown to grant partial summary judgment in a later proceeding.

¶10 As for the first question, Nicole's argument focuses on the last clause of WIS. STAT. § 48.415(10)(b), which refers to a prior termination "on one or more of the grounds specified in this section." She argues that for a termination to be "on grounds," it must involve a contested fact-finding hearing on the merits. This court rejects Nicole's argument because she misinterprets the significance of

this language in § 48.415(10)(b). The language refers to grounds specified in § 48.415, which is entitled "Grounds for involuntary termination of parental rights." The reference to "grounds specified in this section" does not distinguish the manner in which the fact-finding phase of a TPR proceeding is resolved, but instead characterizes the type of TPR—involuntary—that may be used as grounds in a later proceeding. Therefore, it is of no significance that Nicole defaulted in the fact-finding phase. If the prior TPR was involuntary, it was necessarily on one of the grounds specified in § 48.415.

¶11 For the same reason, this court rejects Nicole's argument that the Department was required to submit more proof regarding the grounds for the prior TPR to be entitled to partial summary judgment here. The Department was only required to prove that there was an order for the involuntary termination of Nicole's parental rights. The flaw of Nicole's position is evident from her response to the guardian ad litem's argument that even a default in a TPR proceeding must be accompanied by a showing of grounds by clear and convincing evidence.[2] Nicole argues the Department failed to prove such a showing occurred in the Waukesha case.

¶12 To require the type of extensive review suggested by Nicole would be tantamount to permitting a collateral attack on the prior TPR. Nicole does not argue she should be permitted to collaterally attack the prior TPR, and neither party has cited precedent for a collateral attack in this circumstance. However, this court notes that, in criminal cases, collateral attacks on prior convictions are

[2] This requirement was outlined by our supreme court in ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶36, 246 Wis. 2d 1, 629 N.W.2d 768.

permitted only in very limited circumstances. For example, in ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528, our supreme court concluded that a defendant may only collaterally attack a prior conviction that serves to enhance a prospective sentence where the defendant makes a prima facie showing that his or her constitutional right to counsel was violated. Here, Nicole has made no prima facie showing of error in the prior proceeding, and any error could presumably have been addressed on direct appeal. As such, this court need not address whether a collateral attack could ever proceed in this context.

By the Court.—Order affirmed.

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