COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-3379

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

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

PORTAGE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

REBECCA E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Rebecca E. (hereafter "Becky")[2] appeals an order denying her motion to vacate the order terminating her parental rights to Samantha W. Becky complains that the trial court failed to advise her of her right to substitution of judge at the initial hearing. We reject her arguments and affirm the trial court's order.

FACTS

¶2 Becky was convicted on April 8, 1999, of felony child abuse charges due to extended abuse of one of her children. She started serving her eight-year prison sentence on June 3, 1999. On July 6, 1999, Samantha W., her fourth child, was born and was immediately placed in foster care.

¶3 On April 19, 2000, the Portage County Department of Human Services ("County") filed a petition to involuntarily terminate Becky's parental rights to three of her children, including Samantha, and also filed petitions to terminate the parental rights of the children's three fathers. On that same date, the trial court signed an order appointing Attorney Susan Lynch as counsel for Becky. Prior to the initial hearing on the petition, Attorney Lynch communicated with Becky in person once and several times by phone.

¶4 On May 15, 2000, thirteen people appeared at the initial hearing on the multiple petitions involving the termination of the parental rights of Becky and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Although the caption in this case indicates that the respondent-appellant's name is Rebecca, appellate counsel informs us that her given name is Becky. Accordingly, we will refer to her as Becky in this opinion.

three separate fathers. Becky did not appear. Apparently there had been a plan to have her appear by telephone from Taycheedah Prison, but for reasons not apparent on the record, that plan was not executed. Attorney Lynch did not ask for a continuance, but instead represented Becky at the hearing in her absence.

¶5 During the hearing, the trial court asked Attorney Lynch and another attorney whether they had "taken the opportunity to go over the petitions with your clients as well as their rights that they have in a termination of parental rights proceeding." Lynch affirmed she had. The court asked whether Becky wanted a jury trial and Attorney Lynch affirmed Becky did, except with respect to one child. The court then presented the issue of whether it was necessary for Becky and one of the absent fathers to be present in order to deny the petitions. Lynch again affirmed that she explained Becky's rights to her:

> [THE COURT:] [Becky] is represented by counsel, as well. And, Ms. Lynch, you have explained your client's rights to her and you have discussed the contents of that termination petition; is that correct?
>
> MS. LYNCH: Yes, Your Honor.
>
> THE COURT: Based on that representation by counsel, it's the Court's determination that they are represented by a lawyer. [Becky] is represented by a lawyer, as well. It is not necessary to bring her here today to enter a denial.
>
> And denials are entered on their behalf by counsel, and we will schedule jury trials.

¶6 On June 29, 2000, the court held a pretrial hearing. Becky appeared in person with Attorney Lynch. Samantha's father also appeared and, in Becky's presence, voluntarily terminated his parental rights after being advised of his rights, including the right to substitution. Later, in the same proceeding, a father to a different child of Becky's also voluntarily terminated his parental rights after

acknowledging and waiving his right to substitution. Next, Becky voluntarily terminated her parental rights to the two children other than Samantha. Upon questioning by Attorney Lynch, Becky acknowledged and waived her rights to substitution concerning both of these other children.

¶7 Nineteen days later, on July 18, 2000, a jury trial commenced regarding Samantha. The jury found in favor of the County on all verdict questions without dissent. The jury found, among other necessary findings, that Becky failed to assume her parental responsibilities and that she exhibited a pattern of abusive behavior which was a substantial threat to Samantha. On August 17, 2000, acting on the verdict, the court entered an order terminating Becky's parental rights with respect to Samantha.

¶8 On January 4, 2001, Becky filed a motion alleging ineffective assistance of counsel and a violation of WIS. STAT. § 48.422(1), (4), and (5). In that motion, she complained about the failure of the trial court to advise her of her right to substitution of judge at the initial hearing. Becky later withdrew her ineffective assistance claim.

¶9 On February 6, 2001, the court held an evidentiary hearing. Becky testified that she spoke in person with Attorney Lynch prior to the initial hearing. Although she initially said she did not remember "exactly what" they talked about, she then testified that Attorney Lynch told her she had the right to representation and the right to a jury trial, but did not tell her she had the right to request a different judge. Becky remembered having one phone call with Attorney Lynch, but admitted there could have been more.

¶10 The trial court denied the motion. Without deciding whether Becky had made a prima facie showing, the court held the County had shown by clear

and convincing evidence that Attorney Lynch told Becky, prior to the initial hearing, that she had the right to substitution. The court based its decision on Attorney Lynch's assertions at the initial hearing that she had advised Becky of her "rights" and a finding that Becky's testimony on the topic was not credible. Becky appeals.

DISCUSSION

¶11 The County filed a group of petitions seeking to involuntarily terminate Becky's parental rights to three of her children, including an infant named Samantha. Becky eventually voluntarily relinquished her parental rights with respect to two children, but contested termination with respect to Samantha. The case proceeded to trial and a six-person jury unanimously found the factual prerequisites for termination. The trial court subsequently entered an order terminating Becky's parental rights.

¶12 Becky now seeks an order from this court vacating the entire proceeding and, thereby, restoring her parental rights. She claims that the trial court failed to comply with a notice requirement found in ***In re Termination of Parental Rights to M.A.M.***, 116 Wis. 2d 432, 342 N.W.2d 410 (1984). In that case, the supreme court stated:

> A party may be his or her own counsel, but, in any event, whether represented or not, a party must be told of the right to trial by jury and the right to a substitution of judge. Whether a party exercises those rights personally, if there is a waiver of counsel or through counsel is irrelevant; but the statutes clearly afford a party to a termination proceeding the option to exercise those rights.

M.A.M., 116 Wis. 2d at 440. Later, the court stated:

> The statutory direction is unequivocal: A parent has the right to representation in court unless there is a waiver; and, in any case, the trial court has the duty to make a full explication of the statutory rights—the right to representation, the right to a continuance, the right to request a jury trial, and the right to request a substitution of judge.

Id. at 441.

¶13 Becky assumes that this language means that a trial court must, at an initial termination hearing, personally inform the parent of his or her right to substitution. She says the trial court in this case failed to comply with the requirement.

¶14 Becky acknowledges that this type of omission does not require the vacating of a termination order unless there is prejudice. The court in ***In re Robert D.***, 181 Wis. 2d 887, 890-92, 512 N.W.2d 227 (Ct. App. 1994), set forth a procedure for dealing with this situation. The court held that the procedure used in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), for plea withdrawal can be applied to determine whether reversible error occurred in this context. *See* ***Robert D.***, 181 Wis. 2d at 892.

¶15 Pursuant to ***Robert D.***, Becky needed to make a prima facie showing that (1) the trial court violated its duty to inform her of her right to substitution and (2) she in fact did not know or understand her right to substitution. *See* ***id***. If Becky met that burden, the County was required to show by clear and convincing evidence that she actually knew and understood the right. *See* ***id.***

¶16 We begin by affirming the trial court on the ground on which it ruled. That is, assuming that ***M.A.M.*** applies and assuming that Becky met her prima facie burden, the record nonetheless reveals that the County met its burden

of showing by clear and convincing evidence that Becky in fact knew and understood, at the time of the initial hearing, that she had the right to substitute the trial judge.

¶17 At the initial hearing, Attorney Lynch informed the trial court that she had several conversations with Becky by telephone and one face-to-face meeting. Attorney Lynch twice affirmed that she had explained to Becky her "rights." The trial court found that Attorney Lynch had conscientiously communicated with Becky several times and the court was entitled to assume that Attorney Lynch was a competent lawyer who understood that "rights" in this context included the statutory right of substitution. This is particularly true because the right of substitution is expressly mentioned in the statute dealing with hearings on termination petitions, WIS. STAT. § 48.422(5), and it is highlighted in a prominent state supreme court decision, ***M.A.M.***

¶18 While it is true that Becky testified that Attorney Lynch did not tell her about the right to substitution prior to the initial hearing, the trial court rejected this testimony. The court found that Becky was not credible and we accord deference to this credibility finding. *See* WIS. STAT. § 805.17(2). The credibility finding is supported by the court's observation that Becky was a convicted felon who was experienced in similar matters, having been through various criminal proceedings and CHIPS cases with different attorneys representing her.

¶19 There is another reason that Becky suffered no prejudice. Even if her attorney failed to explain the right of substitution to her, the record shows that nearly three weeks before the trial in this case Becky was advised and understood that, in termination of parental rights cases, parents have the right of substitution.

On June 29, 2000, nineteen days before the start of the July 18 trial, Becky voluntarily terminated her parental rights to two other children. At this proceeding, Becky was present when Samantha's father was advised of his right of substitution and then waived that right. Later in this proceeding, she was also present when another father of one of her children was advised of his right of substitution and waived that right. Finally, Becky's attention was directed to her right of substitution and she waived that right with respect to two of her other children. Evidence that Becky understood that she had the right of substitution with respect to her other two children provides clear and convincing evidence that she understood she had that right in the proceeding involving Samantha.

¶20 Becky argues that even if she received notification six weeks after the initial hearing, it was an inadequate cure because it forced her to choose between the right of substitution and the right to speedy resolution of the matter. The assertion that she was faced with this choice is unsupported by the record. There is no indication the trial would have been delayed significantly if Becky had invoked her right to substitution. Indeed, one of the attorneys involved in this matter said the case could have proceeded as planned even if substitution had been requested at that time.

¶21 In ***State v. Kywanda F.***, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996), the Wisconsin Supreme Court held that the prejudice suffered by juveniles when a trial court fails to inform them of their right to substitute a judge "is the loss of the opportunity to exercise the right to substitution due to the lack of knowledge of that right." Applying that reasoning here, even assuming that Becky was not informed of her right to substitution before June 29, she did not lose her opportunity to substitute. She understood her right to substitution at least nineteen

days prior to her scheduled jury trial, and the record provides no reason to conclude that a decision to exercise that right would have caused detriment to Becky.

¶22 There is yet one more basis on which to affirm the order of the trial court. The language Becky relies on from ***M.A.M.*** is not binding authority. The supreme court in ***M.A.M.*** addressed a situation in which a trial judge failed to grant a continuance to two parents who appeared without representation in a termination of parental rights action. The question presented involved the parents' right to representation and the need to have a knowing waiver of that right. In the course of deciding the matter at hand, the supreme court spoke on a topic that was not disputed or necessary to its decision, that is, whether the statutes required a trial judge, at an initial hearing, to inform parents of their right to substitution. The court stated:

> A party may be his or her own counsel, but, in any event, whether represented or not, a party must be told of the right to trial by jury and the right to a substitution of judge. Whether a party exercises those rights personally, if there is a waiver of counsel or through counsel is irrelevant; but the statutes clearly afford a party to a termination proceeding the option to exercise those rights.

M.A.M., 116 Wis. 2d at 440. Later, the court spoke a little more specifically:

> The statutory direction is unequivocal: A parent has the right to representation in court unless there is a waiver; and, in any case, the trial court has the duty to make a full explication of the statutory rights—the right to representation, the right to a continuance, the right to request a jury trial, and the right to request a substitution of judge.

Id. at 441.

¶23 However, the asserted statutory directive to advise regarding the right of substitution is far from "unequivocal." In fact, the statute the court referred to contains no such directive. Section 48.422 reads in pertinent part:

> **Hearing on the petition.** **(1)** The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. *At the hearing on the petition to terminate parental rights the court shall* determine whether any party wishes to contest the petition and *inform the parties of their rights under sub. (4) and s. 48.423*.
>
> ….
>
> **(4)** Any party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition.
>
> **(5)** Any nonpetitioning party, including the child, shall be granted a continuance of the hearing for the purpose of consulting with an attorney on the request for a jury trial or concerning a request for the substitution of a judge.

Thus, WIS. STAT. § 48.422(1) directs trial courts to advise parties of the right to a jury trial because that right is specified under subsection 4. But the right to substitution is not mentioned in subsection 4. Subsection 5 refers to "substitution of judge," but does not direct courts to advise parties of the right to substitution.

¶24 A statement is obiter dictum if it is irrelevant to the rationale of the decision. Such dictum is not binding unless it is an administrative or supervisory directive. *See* ***Miller v. Mauston School Dist.***, 222 Wis. 2d 540, 554, 588 N.W.2d 305 (Ct. App. 1998). We conclude that the above-quoted statements from ***M.A.M.*** are non-binding obiter dictum. The pronouncements are not relevant to the

disputed issues in this case, and there is no indication that the court intended to issue an administrative or supervisory directive. Rather, the court seems to simply believe it was stating the obvious meaning of the statutes.

¶25 Accordingly, because the language Becky relies on from ***M.A.M.*** is non-binding dictum, and because the rule expressed in that language is not supported by the statutes, we find that the trial court was not required to advise Becky at the initial hearing that she had the right to substitution. It follows that the failure to provide the advisement is not error.

By the Court.—Order affirmed.

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