Appeal No. 2007AP8 **Cir. Ct. No. 2005TP29**

WISCONSIN COURT OF APPEALS
DISTRICT II

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

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANDREA L. O.,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2005-06) this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does the rationale and holding of ***N.E. v. DHSS,*** 122 Wis. 2d 198, 361 N.W.2d 693 (1985), a juvenile case arising out of WIS. STAT. ch. 48 (2003-

04),[1] govern a termination of parental rights (TPR) case such that a parent must personally withdraw his or her prior demand for a jury trial?

BACKGROUND

The Walworth County Department of Health and Human Services (the County) filed a petition to terminate Andrea's and the adjudicated father's parental rights to two-year-old Lyle D.E., Jr. (known as "Junior").[2] Andrea requested a jury trial. Prior to trial, the County submitted requests for admissions that included the first element for termination, i.e., that one or more proper court orders had placed Junior outside the home for a cumulative period of at least six months. Andrea admitted to this request. Based on that admission, the County inquired if Andrea would stipulate to that element. The trial court then read the element and Andrea's lawyer answered that he stipulated to it on Andrea's behalf. Her lawyer then addressed Andrea:

> MR. ROLNICK [Andrea's lawyer]: Andrea, do you understand that issue and … are you willing to stipulate that those things are true; that [Junior] was adjudicated in need of protection or services, that he was placed out of your home and out of [his father's] home for a total cumulative period of six months? The answer was yes.
>
> [ANDREA]: Yes.
>
> THE COURT: Ms. Schmieden [the father's attorney] is now looking at it.
>
> (Attorney Schmieden talks to her client off the record.)

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] This appeal concerns only Andrea's TPR.

> MS. SCHMIEDEN: Yes—
>
> THE COURT: All right.
>
> MS. SCHMIEDEN: —we stipulate to that.
>
> THE COURT: All right. We're all set with that. At the appropriate time, the state is expected to bring that up and have the stipulation read out loud on the record.

However, the trial court did not ask Andrea if she understood that her agreement meant that she was giving up her right to have the jury answer the question. The matter then proceeded to trial, and the jury answered the remaining elements in favor of the County, and the trial court ultimately terminated Andrea's parental rights. Andrea appeals.

LAW

TPR proceedings "are among the most consequential of judicial acts, involving as they do 'the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.'" ***Steven V. v. Kelley H.***, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856 (citation omitted). Several sections of the Children's Code, WIS. STAT. ch. 48, expressly guarantee a parent's right to a jury trial in these proceedings. For example, a parent "shall be granted a jury trial upon request" if the request is timely made, and may obtain a continuance of the initial hearing to consult with an attorney about whether to request a jury trial. WIS. STAT. § 48.422(4), (5). In addition, the jury, which will comprise twelve jurors unless the parties agree to fewer, must decide whether any grounds for the TPR have been proven. WIS. STAT. §§ 48.31(2), 48.424(3).

The parties agree that there is no controlling law directly on point.[3] The closest analogous case is ***N.E.***, a juvenile case arising out of WIS. STAT. ch. 48.[4] There, N.E., the juvenile, had requested a jury trial, but his lawyer later withdrew the request before a juvenile court commissioner without the presence of N.E. and without any written waiver from N.E. ***N.E.,*** 122 Wis. 2d at 200-01. The court of appeals certified the case to the supreme court. The supreme court accepted the certification to determine whether the court commissioner erred in accepting defense counsel's withdrawal of the juvenile's demand for a jury trial in the absence of the juvenile's personal withdrawal in writing or on the record in open court. ***Id.*** at 202.

The parties in ***N.E.*** agreed that there is no federal constitutional right to a jury trial in the adjudicatory phase of a juvenile delinquency proceeding, ***id.***, and the supreme court held that there also is no state constitutional right:

> The right preserved in Art. I, sec. 5 of the Wisconsin Constitution is simply the right as it existed at the time of the adoption of the constitution in 1848. Juvenile delinquency proceedings did not exist at the time the constitution was adopted and thus, no right to a jury trial in delinquency proceedings could have been preserved.

N.E., 122 Wis. 2d at 203 (citations omitted).

The supreme court then considered whether the right to a jury trial in a juvenile case, which clearly is a statutory right, also is a fundamental right. Fundamental rights are those "very basic constitutional rights" that are

[3] Junior's guardian ad litem filed a statement that it would not file an appellate brief and would adopt the County's arguments.

[4] We recognize that juvenile delinquency cases now are governed by WIS. STAT. ch. 938.

"fundamental to the concept of fair and impartial decision making." ***Id.*** at 205 (citations omitted). The supreme court concluded that the juvenile's right to a jury trial is not a fundamental right and therefore the procedures required for the waiver of fundamental rights do not apply as a matter of right to the withdrawal of the juvenile's entitlement to a jury trial. ***Id.*** at 207-08.

Despite holding that a jury trial was neither a constitutional nor a fundamental right, the supreme court nonetheless held that as a matter of judicial administration it had the power to fashion a remedy. ***Id.*** at 208. It did so because, while the legislature had granted a statutory right to a jury, it did not establish a procedure for withdrawal of the jury trial demand once the right was invoked. ***Id.*** In so doing, the court held that, even though the juvenile had no constitutional or fundamental right to a jury, a juvenile court nonetheless was required to take a personal waiver, either orally or in writing, from the juvenile. ***Id.***

Andrea's case is analogous to ***N.E.*** in that both cases arose out of WIS. STAT. ch. 48 proceedings. As with ***N.E.***, the TPR statute also confers the statutory right to a jury trial, but is silent as to the procedure by which a jury demand may be withdrawn.[5]

Also, the supreme court's invocation in ***N.E.*** of its authority to "fashion an adequate remedy" travels to that court's superintending authority. *See* WIS. CONST. art. VII, § 3 (providing in pertinent part that the supreme court "shall have superintending and administrative authority over all courts"); ***Arneson v. Jezwinski***, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996) (stating that the

[5] The legislature has since eliminated the right to a jury trial in a juvenile case. WIS. STAT. § 938.31(2). However, the right to a jury trial in a TPR case remains intact.

supreme court has among its powers general superintending control over lower courts). The court's superintending power "is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." ***Arneson***, 206 Wis. 2d at 226 (citation omitted). In fact, the supreme court invoked that very concept in the opening paragraph of ***N.E.***: "We hold that as a matter of judicial administration, a juvenile's statutory right to a jury trial, once demanded, must be withdrawn personally, by the juvenile, either in writing or on the record in open court." ***N.E.,*** 122 Wis. 2d at 199-200. This case likewise may be an appropriate instance for the supreme court to exercise its constitutional superintending authority.

CONCLUSION

Terminating a parent's rights to his or her child is a matter of profound importance and consequence. ***N.E.*** is analogous, but there is no Wisconsin law directly on point. As the principal law-developing body, the supreme court is better suited to answer whether the reasoning of ***N.E.*** also applies in a TPR setting, especially when the resolution of the issue may implicate the supreme court's superintending authority. We therefore respectfully certify this case to the Wisconsin Supreme Court and ask that the court accept jurisdiction over this appeal.