

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2014

Diane M. Fremgen
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 Nos. 2014AP1259
2014AP1260**

**Cir. Ct. Nos. 2014TP8
2014TP9**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
ADIAN J. M., A PERSON UNDER THE AGE OF 18:**

**PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN
SERVICES,**

PETITIONER-APPELLANT,

V.

SHANNON M.,

RESPONDENT-RESPONDENT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
TRENTON J. M., A PERSON UNDER THE AGE OF 18:**

**PORTAGE COUNTY DEPARTMENT OF HEALTH AND HUMAN
SERVICES,**

PETITIONER-APPELLANT,

V.

SHANNON M.,

RESPONDENT-RESPONDENT.

APPEALS from orders of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Portage County Department of Health and Human Services (the Department) appeals orders of the circuit court setting aside the verdicts of the jury following a hearing on whether grounds existed to terminate Shannon’s parental rights to her children, A.M. and T.M., and dismissing the Department’s petitions to terminate Shannon’s parental rights. For the reasons discussed below, I affirm.

BACKGROUND

¶2 On January 17, 2014, the Department filed petitions to involuntarily terminate Shannon’s parental rights to A.M. and T.M. The petitions alleged three grounds: abandonment; child in continuing need of protection and services (CHIPS); and continuing denial of periods of physical placement or visitation. *See* WIS. STAT. § 48.415(1), (2) & (4). Shannon denied the allegations and demanded a hearing before a jury on the issue of whether grounds existed.

¶3 Prior to the hearing, the third ground—continuing denial of periods of physical placement or visitation—was dismissed by the circuit court because

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. On the court’s own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion to October 2, 2014.

the order denying Shannon visitation and custody, which was entered in September 2012, failed to comply with the notice and conditions for return requirements under WIS. STAT. §§ 48.415(4) and § 48.356. The September 2012 order had been entered following a Permanency Plan Hearing. It is undisputed that neither Shannon nor her attorney was present at the hearing. Following the hearing, the circuit court, at the request of the social worker overseeing A.M.'s and T.M.'s cases, changed the permanency goal for the children from reunification to adoption, transferred custody of the children to the Department and suspended Shannon's visitation rights with the children. WISCONSIN STAT. § 48.356(1) provides that "[w]henver the court orders a child to be placed outside his or her home ... or denies a parent visitation because the child ... has been adjudged to be in need of protection or services ... the court shall orally inform the parent or parents who appear in court ... of the conditions necessary for the child ... to be returned to the home or for the parent to be granted visitation." However, Shannon was not provided notice by the court that her visits were suspended or that custody of the children was to be transferred to the Department, nor was Shannon informed by the court of conditions necessary for the children's return to her home or for her to regain visitation rights. Instead, Shannon was notified by the social worker of the changes set forth in the September 2012 order when Shannon called the social worker the day after the hearing to request a visit.²

¶4 The hearing on the grounds phase of the termination proceedings was held in March 2014. The jury ultimately determined that the Department had established the remaining two grounds for termination of Shannon's parental

² Whether Shannon was informed by the social worker that she could continue to communicate with her children is disputed by the parties.

rights. Following the jury's verdict, Shannon moved the circuit court for judgment notwithstanding the verdict (JNOV). The court granted Shannon's motion and dismissed the jury's verdicts with respect to both grounds for termination, but did so for a different reason than those asserted by Shannon in her motion—the jury's verdicts were tainted by the improperly entered September 2012 dispositional orders.

¶5 In April 2014, Shannon moved the circuit court for an order dismissing the parental rights termination actions based on the court's dismissal of the jury's verdicts. The court granted Shannon's motion and in May 2014, entered orders wherein the court memorialized its earlier dismissal of the jury's verdicts and dismissed the petitions to terminate Shannon's parental rights. The Department appeals.

DISCUSSION

¶6 The Department contends the circuit court erred in granting Shannon's motions for JNOV and dismissing the jury's verdicts on the grounds for termination of Shannon's parental rights.

1. Standard of Review.

¶7 In a motion for JNOV, the findings of the verdict are accepted as true and the movant asserts that for reasons other than those decided by the jury, the movant should have judgment. *See* WIS. STAT. § 805.14(5)(b). A circuit court's decision on a motion for JNOV presents a question of law subject to de novo review. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

2. JNOV

¶8 The Department asserts the circuit court erred in granting Shannon’s motion for JNOV on the ground of abandonment.

¶9 In granting Shannon’s motion for JNOV, the circuit court explained that it originally believed that by dismissing the ground of continuing denial of physical placement or visitation, it removed any taint caused by the improperly entered September 2012 dispositional order, which terminated Shannon’s legal custody of the children and suspended her visitation with them. The court further explained, however, that during the hearing, the September 2012 dispositional order and Shannon’s lack of legal custody and visitation rights became “a major issue once again.” The court concluded that it had “no confidence that [the abandonment] ground ha[d] been properly and legally proven because it was tainted from the outset by the improper procedures and actions of the Court,” and on its own motion, dismissed the jury’s verdict with respect to that ground.

¶10 To establish the ground of abandonment, the Department bore the burden of proving that A.M. and T.M. were “placed, or continued [to be] in a placement, outside [Shannon’s] home by a court order containing the notice required by [§] 48.356(2) or 938.356(2) and [Shannon] failed to visit or communicate with the [children] for a period of 3 months or longer.” *See* WIS. STAT. § 48.415(1)(a)2. The Department argues that the September 2012 dispositional order did not harm Shannon at the hearing because the order, although prohibiting visitation, did not prohibit Shannon from communicating

with A.M. and T.M.³ The Department further argues that the jury's finding that Shannon did not have good cause for not communicating with her children indicates that the jury found testimony by the social worker that she encouraged Shannon to communicate with the children and that she informed Shannon that Shannon could regain visitation rights to be more credible than testimony from Shannon that the social worker informed her that she would not be allowed any further contact with her children.

¶11 The Department essentially argues that the evidence was sufficient to sustain the jury's verdict on the issue of abandonment. However, in a motion for JNOV, the sufficiency of the evidence is not in dispute. *See Management Computer Servs., Inc.*, 206 Wis. 2d at 177. The focus is instead on whether the movant should have judgment for reasons other than those decided by the jury. *See* WIS. STAT. § 805.14(5)(b). In this case, the September 2012 dispositional order and the circumstances surrounding the improper entry of that order may have had a negative effect on Shannon's conduct following the order's entry, and may have contributed to her abandonment of A.M. and T.M. within the meaning of WIS. STAT. § 48.415(1)(a)2. The jury was not asked to decide what effect, if any, the order had on Shannon's conduct. Accordingly, I agree with the circuit court that JNOV on the issue of abandonment was appropriate.

¶12 The Department also asserts that the circuit court also erred in granting Shannon's motion for JNOV on the continuing CHIPS ground because the court had no legal basis to do so.

³ The Department does not challenge on appeal the circuit court's determination that the September 2012 dispositional order failed to comply with statutory requirements. Accordingly, for purposes of this appeal, I will assume, without deciding, that the circuit court was correct.

¶13 In granting Shannon JNOV on the continuing CHIPS ground, the circuit court determined that the jury’s verdict on that issue was also tainted by the improper procedures and actions of the Court with respect to the September 2012 dispositional order. The court observed that “there was a lot of testimony ... regarding the conditions for the return of the children [] and how [Shannon] had totally failed to comply, had been in partial compliance, or in some rare instances was in compliance.” The court noted that Shannon testified that initially after the September 2012 dispositional order, she believed she could no longer visit her children, which caused her to give up, but that the social worker testified that she had informed Shannon that Shannon could continue to communicate with her children. The court also noted that it was within the jury’s province to determine whether Shannon or the social worker was more credible. The court stated, however, that it couldn’t “help but wonder what the jury would have done if they were given the information that this Court had improperly entered [the September 2012 dispositional order] and that legal and statutory procedures had not been followed and that Shannon[’s] rights under the law had been violated.” The court questioned whether information about the order and Shannon’s behavior as a result of her understanding, or lack of understanding, of the order may have “provided a lot different perspective to a jury,” and the court ultimately concluded that the entire proceeding was tainted by the improperly entered September 2012 dispositional order.

¶14 The Department asserts that the circuit court usurped the jury’s role as the fact finder. The Department argues that the jury “clearly found” that Shannon had been informed that the September 2012 dispositional order did not prevent her from communicating with her children and that she needed to reengage services because the jury’s verdict “is only possible if the jurors believed

[the social worker].”⁴ The Department also argues that the jury’s finding that Shannon would not meet the conditions of return within the next nine months “undermines the proposition that she would have responded differently to conditions for re-instating visitation rights.”

¶15 As I stated above in ¶11, it is unclear what, if any, effect the September 2012 dispositional order had on Shannon’s behavior following the entry of that order. And, as noted by the circuit court, it is also unclear how the jury might have reacted to information that the order failed to comply with statutory requirements intended to safeguard Shannon’s parental rights and that Shannon behaved a certain way in reaction to the invalid order. Furthermore, in order to establish grounds for termination under CHIPS, WIS. STAT. § 48.415(4), the parent must have been denied physical placement or visitation by a court order containing notice specified in WIS. STAT. § 48.356(1). *See* § 48.415(4)(a). The circuit court determined that the September 2012 dispositional order denying Shannon visitation with A.M. and T.M. failed to comply with the notice requirements, and the Department has not appealed the court’s ruling on that issue. Because the order fails to comply with the statutory requirements, it cannot serve as the basis for termination of Shannon’s parental rights on the basis of continuing CHIPS. Accordingly, I agree with the circuit court that in this case that JNOV on the continuing CHIPS ground was also appropriate.

CONCLUSION

¶16 For the reasons discussed above, I affirm.

⁴ What the jury could “possibl[y]” have believed is pure speculation by the Department.

By the Court.—Orders affirmed.

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

