

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

Nos. 97-0987 & 97-0988

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 97-0987

**IN THE INTEREST OF JAMES L.,
A PERSON UNDER THE AGE OF 18:**

**MARATHON COUNTY DEPARTMENT OF
SOCIAL SERVICES,**

PETITIONER-RESPONDENT,

V.

TERRI L.,

RESPONDENT-APPELLANT,

BARTH L.,

RESPONDENT-CO-APPELLANT.

No. 97-0988

**IN THE INTEREST OF MERISA L.,
A PERSON UNDER THE AGE OF 18:**

**MARATHON COUNTY DEPARTMENT OF
SOCIAL SERVICES,**

PETITIONER-RESPONDENT,

V.

TERRI L.,

RESPONDENT-APPELLANT,

BARTH L.,

RESPONDENT-CO-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL W. HOOVER, Judge. *Reversed.*

WEDEMEYER, P.J.¹ Terri L. and Barth L. appeal from an order terminating their parental rights to their children, James L. and Merisa L. The parents claim that: (1) the trial court erred when it determined that there is no substantial likelihood that they would meet the conditions established by the court for the return of the children within the twelve-month period following the fact-finding hearing; and (2) they received insufficient notice with respect to the conditions required for return of the children. Because the trial court's finding was clearly erroneous, and because the parents were deprived of their parental rights without due process, this court reverses the order.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

Merisa L. was born on July 17, 1990, and James L. was born on June 17, 1991. In March 1992, the children were placed in foster care under a temporary order. On June 1, 1992, the children were found to be in need of protection and services and a dispositional order was entered on July 30, 1992.

The order set forth seven conditions that the parents must demonstrate for the children to return to the parents' home. The conditions were that the parents must: (1) obtain a drug and alcohol assessment and follow through with any treatment that is deemed necessary by that assessment; (2) obtain psychological evaluations to determine their ability to parent and nurture their children; (3) provide suitable, safe and adequate housing as determined by the Department of Social Services for at least six months; (4) demonstrate the ability to provide food, pay bills, etc., on a regular basis; (5) cooperate with a parent aide as well as a public health nurse in regard to nutrition as well as the different developmental parenting issues which may arise as the children age after they are placed back in the parental home; (6) maintain a positive and regular visitation schedule with the children; said visitation shall be supervised until such time, at the discretion of the agency, visitations were safe, with food and other basic needs of the children being met on a regular basis by the parents; and (7) become involved in the parenting skills group in the area in which they currently reside.

The order was extended annually for three years. In January 1995, a petition for termination of parental rights was filed. This petition was dismissed because of a defect in parental rights warnings and the order was extended for another year. The petition forming the basis for this appeal was filed on June 12, 1996. The case was scheduled for a fact-finding hearing before a jury on September 10, 1996. On that day, the parties entered into a stipulation where the

parents waived their right to a jury trial and admitted all the elements necessary for termination of parental rights except whether the parents would meet the condition for the return of their children in the future.

On November 12, 1996, a combination fact-finding and dispositional hearing was held on the petition to terminate parental rights. The trial court heard testimony from several witnesses, including the social workers, the guardian *ad litem*, a psychologist and the parents. The court determined that the parents failed to demonstrate substantial progress toward meeting the fourth condition of the dispositional order, which required the parents to demonstrate the ability to provide food, pay bills, etc., on a regular basis. The other six conditions of the order are not at issue. In focusing on the fourth condition, the trial court ruled:

The only issue is whether they will continue under such a disability, if you will, for the next 12 months. That's the only issue before the court in terms of the termination of parental rights. And there has been no showing of any change with regard to the failure to demonstrate substantial progress. And that's with specific regard to the requirement for their return, that they demonstrate an ability to provide for the children's basic needs, food, utilities, shelter, because of payment of the rent, that sort of thing, just to meet their needs.

Based on this finding, the trial court terminated the parents' parental rights. The trial court's order reflects that the trial court actually terminated the rights because "[c]ompliance with mechanical requirements of programming attendance and cooperating with service providers are ultimately inutile gestures if the parents are unable or unwilling to internalize and independently utilize the tools they were thus exposed to," and the parents have not "demonstrated the ability to provide adequate food for their children on a dependable basis or to manage other daily living skills without pervasive intervention." The parents appeal from that order.

II. DISCUSSION

The parents argue that the trial court erred in finding that the fourth condition had not been satisfied. They cite evidence in the record demonstrating that the parents have made substantial progress in meeting this condition. In response, the State cites testimony from the psychologist that the parents could not *implement* what they had been taught and could not demonstrate that they could satisfy this condition absent any assistance from social service providers.

The standard of review for findings of fact in termination of parental rights cases is whether the findings are clearly erroneous. *See In re Baby Girl K.*, 113 Wis.2d 429, 440, 335 N.W.2d 846, 852 (1983). This court has reviewed the record and concludes that the trial court's finding of fact was clearly erroneous.

The record establishes that the parents had made substantial progress in meeting the fourth condition of the order as specifically stated within the dispositional order. The social worker testified that there was food in the home when she made her first visit in May 1996, and that there has always been food in the home since she became involved with the family. There was evidence that the parents' new baby was well-fed. The record also demonstrates that the parents were caught up on their bills and the rent was paid. In light of this evidence, the trial court's finding that the parents had not made substantial progress toward meeting condition four is clearly erroneous.

The trial court's error arose because it interpreted the fourth condition to require the parents to demonstrate that they could independently, without assistance from social services, demonstrate their ability "to provide food, pay bills, etc. on a regular basis." As the trial court stated in its order, the parents

have not demonstrated their ability to provide food, etc., without “pervasive intervention” or without “the social worker’s constant intervention.”

“Parents have a fundamental liberty interest in matters of family life,” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), which is protected by the due process clause of the United States Constitution. Therefore, terminating the relationship between the parents and their children must be accomplished under a fundamentally fair procedure in order to be constitutional. *See State v. Patricia A. P.*, 195 Wis.2d 855, 862, 537 N.W.2d 47, 50 (Ct. App. 1995). Section 48.356, STATS., requires the parents to be notified of the conditions necessary for the child to be returned to the parents’ home. Here, the parents were warned that they needed to make substantial progress toward demonstrating their ability to provide food, pay bills, etc., on a regular basis. Then, their rights were terminated because the trial court determined that this condition actually required the parents to demonstrate that they were able to do so independently, without any assistance from social services. This court concludes that this constituted a substantial change in the type of conduct that the parents were warned might lead to the loss of their parental rights. In other words, they were not notified that in order to prevent a termination of their rights that they must demonstrate their ability to comply with these conditions without relying on the assistance of social services. If this is a condition required before the children may be returned, then such requirement should be specifically stated within the dispositional order. Without this specific warning, the parents were not given the specific notice required by due process. Accordingly, the order is reversed.

By the Court.—Order reversed.

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

