COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1132

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF ALEXANDRA S., A PERSON UNDER THE AGE OF 18:

DANE COUNTY,

PETITIONER-RESPONDENT,

JANET S-B, GUARDIAN,

RESPONDENT,

V.

JAMES S.,

RESPONDENT-APPELLANT.

APPEAL[1] from order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

[1] This appeal is expedited under § 809.107(6)(e), STATS.

EICH, J.[2] James S. appeals from an order terminating his parental rights to his child, Alexandra S. He raises the following issues: (1) whether the trial court erred when it "found the facts supporting termination" despite James's request for a jury trial; (2) whether James understandingly and voluntarily waived his right to a jury trial; (3) whether his trial counsel was ineffective for advising him to stipulate to the grounds for termination; (4) whether he is entitled to a new trial in the interest of justice; and (5) whether the County failed to establish that he received the required statutory "warnings." We resolve all issues against James and affirm the order.

Alexandra S. is a seven-year-old girl. James, her father, was convicted of sexually assaulting her when she was just under four years old and is presently serving a twenty-year prison sentence for that offense. At about the time of the assault, Alexandra S.'s mother was granted a divorce from James and was awarded sole legal and physical custody. The judgment denied physical placement with James. When Alexandra S. was five, her mother died and she has, since that time, been living with her maternal grandmother, who is also her legal guardian.

The County petitioned to involuntarily terminate James's parental rights in February 1997, based on (a) the continuing denial of periods of physical placement with James and (b) child abuse.[3] Because James's sexual-assault

[2] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

[3] Section 48.415, STATS., includes as grounds for termination of parental rights:

> (4) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:

(continued)

conviction was on appeal, the County elected to proceed on the first ground only—that James had been denied periods of physical placement with Alexandra S. in the 1994 divorce judgment, and that the judgment had remained outstanding (and unchanged) for more than two years.

After receiving the petition, James demanded a jury trial. At about the same time, the County filed a motion asking the court to find as a fact that the divorce judgment had denied placement with James and had been outstanding for more than two years without revision. At a hearing on the motion, the County asked the trial court to take judicial notice of the judgment. The court, questioning whether judicial notice was proper under the circumstances, stated that it would prefer to make a "finding of fact" that the judgment has remained unchanged since its issuance:

> I don't think it takes judicial notice. I think you make a finding. I think you take judicial notice of whatever a document is, whatever a decision is, or you may take judicial notice of other things, but the fact that there has been nothing between the time of [the] judgment … and

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> (a) That the parent has been denied periods of physical placement by court order …
>
> (b) That at least one year has elapsed since the order … was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.
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> (5) CHILD ABUSE. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child … and proving either of the following:
>
> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order … after an adjudication that the child is in need of protection or services…

> now is more than two years, … that's uncontested. That's a finding of fact.

That having occurred, the corporation counsel stated that no facts relevant to § 48.415(4), STATS., remained to be determined by a jury—that the only questions remaining related to James's parental fitness which, under the code, is a matter for the court, not a jury, to determine. Counsel for James disagreed, stating that he wanted the jury to know all of the circumstances surrounding the couple's divorce and the order denying placement. The court disagreed, stating that it would be inappropriate to relitigate the divorce case before a jury in the termination proceedings. The court stated that its "findings" did not mandate termination and that James would receive both a "fact-finding" hearing and a dispositional hearing before a final order could be entered. By this time, James's conviction had been affirmed on appeal, and the trial court ruled that the County could also proceed with the termination on child-abuse grounds if it chose to do so.

A few weeks later, at a hearing before the court, the parties stipulated that the County would have an opportunity to prove James's parental unfitness at a fact-finding hearing and James waived his right to such a hearing. James, appearing by telephone, indicated his assent to the stipulation after the court reviewed it with him paragraph by paragraph. All that remained, then, was the dispositional hearing.

The court began the dispositional hearing by ruling that grounds for termination existed due to continuing denial of placement under § 48.415(4), STATS. It also ruled, pursuant to the parties' stipulation, that James was an unfit parent. The hearing proceeded. The County called three witnesses, and James, instead of offering any evidence in his behalf, submitted a written stipulation to

the court acknowledging that he had had no contact with Alexandra S. for more than three years. At the conclusion of the hearing, the court reiterated its earlier finding that grounds existed for termination. It also concluded that it was in Alexandra S.'s best interest to terminate James's parental rights. James appeals from the order implementing those rulings.

In addition to filing a notice of appeal, James asked us to remand the case to the trial court for a hearing on whether his trial counsel was ineffective and on many of the other issues he raised on his appeal. We granted the remand motion and, after taking further testimony, the trial court denied James's motion in its entirety, concluding, among other things that: (1) James was not entitled to the statutory warnings required by § 48.415(4)(a), STATS.;[4] (2) he had waived his right to a fact-finding hearing on fitness and there was no jury-waiver issue; (3) James's trial counsel was not ineffective; and (4) James was not entitled to a new trial in the interest of justice.

Improper factual findings. James argues first that, by "finding" that he had been denied placement for more than two years, the trial court effectively granted "summary judgment" to the County, which is improper in termination cases. *See* ***In re Philip W.***, 189 Wis.2d 432, 438, 525 N.W.2d 384, 386 (Ct. App. 1994), where we said that summary judgment is inappropriate when a parent contests termination because the contest "automatically raises the issue of whether he or she is a fit parent," which in turn "creates a genuine issue of material fact which cannot be disposed of by summary judgment."

[4] As we discuss at the conclusion of this opinion, the statute requires that warnings of the existence of possible grounds for termination of parental rights be given when certain orders are issued in various juvenile proceedings.

A termination proceeding has two elements. First, statutory grounds must be established, and, second, the petitioner must prove that termination is in the child's best interest. If the grounds are proved, the court "shall find the parent unfit" and the case then proceeds to disposition. Section 48.424(4), STATS. The statute dealing with dispositions permits the court, after hearing the evidence, to either dismiss the petition or terminate the parent's rights (and several options exist with respect to termination). Section 48.427. In this case, both parties took the position that additional evidence of James's fitness was warranted, and the trial court agreed. And that is consistent with ***In re Philip W.***, *supra*. Indeed, the trial court set further hearings on James's parental fitness—a question reserved for determination by the court, not a jury. *See* ***In re Jerry M.***, 198 Wis.2d 10, 20, 542 N.W.2d 162, 166 (Ct. App. 1995) (under § 48.424(4), STATS., fitness is not a question for a jury, but for the court). In ***In re K.D.J.***, 163 Wis.2d 90, 103, 470 N.W.2d 914, 920 (1991), the supreme court recognized that, even where grounds for termination have been found by the court or a jury, the court may still dismiss the petition in the dispositional phase if it determines that the evidence of unfitness "is not so egregious as to warrant termination of parental rights."

Thus, when the trial court in this case made its ruling as to the existence of the statutory grounds for termination, Jerry's parental fitness—the fact-laden issue we said in ***Philip W.*** precludes the granting of summary judgment in contested termination cases—had been reserved by the court for future determination. This is not a case like ***Philip W.*** where the court granted summary judgment terminating the parent's rights on grounds of abandonment without providing her any hearing on the key issue: whether the parent had abandoned the child within the meaning of a statute defining "abandonment"—a statute which, in lengthy, broadly written language, requires consideration of such concepts as the

child's exposure to "substantial risk of great bodily harm," the parent's knowledge—actual or inferred—of the child's whereabouts, and whether the parent had "good cause" for the actions he or she either took or failed to take with respect to the child. *See* § 48.415(1), STATS. In the ***Philip W.*** situation, application of the statutory termination grounds was a complicated task, both legally and factually. Here, in contrast, the grounds on which the County's petition was based were simply that a court order denying James periods of physical placement had been issued and in effect, unmodified, for at least one year. The existence of such an order is not only undisputed, it is a matter of court record. This is, then, not a situation where facts extrinsic to the order must be established in order to prove grounds for termination, as in the ***Philip W.*** "abandonment" situation, or where the grounds involve various legal and factual issues, such as a parent's indefinitely continuing disability to provide adequate care for the child, § 48.415(3); a parent's failure to make "substantial progress" in meeting certain conditions despite the agency's "diligent effort" to provide assistance to the parent, § 48.415(2); or a parent's alleged failure to establish a "substantial parental relationship" with the child, § 48.415(6).

Under the statute on which the County's petition is based in this case, all that need be established in the first phase of the proceedings is the existence of a court order—a fact not in dispute. And neither trial nor appellate counsel has argued that any other reasonable interpretation of that fact could be presented to a jury. What James apparently wants to put before the jury is "his side" of the divorce proceedings—in effect (as the trial court noted), to mount a

collateral attack on the divorce judgment.[5] And we agree with the trial court that such an attack would serve no relevant purpose in these proceedings.

The trial court's ruling did not foreclose James from litigating "whether he … is a fit parent"—the crucial fact which led us to reverse the summary judgment in ***Philip W.*** *Philip W.*, 189 Wis.2d at 436, 525 N.W.2d at 385. The hearing was continued for the express purpose of determining—among other things—James's parental fitness, and that purpose was ultimately foreclosed by James's own act of stipulating the issue. We are satisfied that ***Philip W.*** does not require reversal of the trial court's action.

Jury trial "waiver." James also argues that he did not knowingly and voluntarily waive his right to a jury trial. We assume he refers to a right to a jury trial on the question of his parental fitness, although his brief is somewhat unclear on the point.[6] In any event, his argument proceeds as follows. Pointing to the statement in § 48.424(4), STATS., that if grounds for termination are found by the court or a jury "the court shall find the parent unfit," he claims that his waiver of a hearing on fitness could not have been knowing and voluntary because "[he] believed he was waiving a hearing that is not even provided for in the TPR statutory scheme…." It sounds like an argument that his waiver should be treated as unknowingly made because there was nothing to waive. In any event, he states

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[5] James argued to the trial court, for example, that he wanted a jury to hear his explanation that "there was a lot of confusion surrounding the divorce and whether or not it was going forward," and that he was "upset that he didn't know what was going on" at the time. In short, according to his counsel, he wanted a jury to "not look at it … just on the cold outside face but look at the circumstances behind [the divorce judgment]."

[6] He states, for example, that he "either waived just a hearing on fitness or a hearing on grounds *and* fitness."

that we should "conclude that the parties and James … were so uninformed about the procedural posture of the case that any waiver by James … was not knowing and voluntary."

As we have discussed above, a parent is entitled to request a jury only with respect to whether the statutory grounds for termination stated in § 48.415, STATS., exist. ***Jerry M.***, 198 Wis.2d at 20, 542 N.W.2d at 166. And we have concluded that, on the facts of this case, where the grounds are established by proving the existence of a court document and everyone concedes is exists, the trial court did not err in making the appropriate finding. We agree with the County that a "jury trial" was thus not even an option after those findings were made, and that the hearing contemplated by the parties and the court was one to determine, among other things, James's parental fitness—in the court's words, a "fact-finding" hearing at which "unfitness is … one of the things that will be gone into…" We see this as consistent with § 48.424(4), STATS., which, as we have noted, immediately following the "shall find the parent unfit" language, states that a finding of unfitness "shall not preclude a dismissal of a petition [if the evidence does not warrant termination]."

To the extent James is challenging the stipulation he filed with the court at the continued "fitness" hearing, we are satisfied that the trial court did not err in accepting it. The stipulation, which was in writing and signed by James and his attorney, began by acknowledging that the hearing—which had been scheduled for two full days—"would allow [James] the opportunity to present … evidence concerning his circumstances around the time of his divorce … as well as other relevant evidence," and James agreed that the County "has sufficient evidence … to establish [James's] unfitness as that concept is defined in … Wisconsin … law." The document then states: "By this … stipulation, [James] knowingly waives his

right to a fact-finding hearing as to his fitness," and acknowledges that a "final hearing on dispositional factors will be scheduled." The trial court questioned James at some length with respect to his age and education, his understanding of the English language, whether he was on medication or under a doctor's care at the time, whether he had read the stipulation in full and discussed it with his attorney, and whether there was any reason the proceedings could not go forward. Receiving satisfactory answers to each question, the court then went through each of the eight brief paragraphs of the stipulation with James, ascertaining his understanding of each point made—sometimes asking James to explain them in his own words. The colloquy covered the grounds for termination, the matters that James would be able to present at the hearing—including the circumstances surrounding his divorce—and the fact that, by his stipulation, he would be "giving up that opportunity." In further response to the court's questions, James indicated that he understood he was also agreeing that the County had sufficient evidence to establish his unfitness as a parent. He told the court he had no questions as to any of the paragraphs, and his attorney stated that he, too, agreed with its terms.

James does not dispute any of this. Rather, he argues that the court failed to inform him that, at such a hearing, he could subpoena, call and cross-examine witnesses, and have his case heard by a twelve-person jury. The County points out, however, that, unlike the criminal cases James cites in support of his argument, the right to a jury in a termination case is statutory, not constitutional, and he has offered no authority that the panoply of constitutional rights he appears to assert is applicable here. And we agree with the County that (a) the signed stipulation and the in-court colloquy establish that James understood the purpose and function of the hearing he waived, and (b) questions concerning a jury trial are

irrelevant in light of the fact, which we have referred to above, that fact-finding hearings in termination cases are, by statute, heard by the court.

Ineffective assistance of counsel. Alternatively, James argues that his trial counsel was ineffective in advising him to enter into the stipulation.[7] He states: "Trial counsel was ineffective in this case for waiving James'[s] right to a jury trial and stipulating as to the grounds for termination." Beyond that, the argument is largely unexplained. Citing ***County of Racine v. Smith***, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984), a case holding that a guilty plea to a traffic offense waives the right to appeal the conviction, he appears to argue that his trial counsel was ineffective because she believed that James would be able to appeal "the court's making findings of fact" despite his stipulation that grounds for termination existed. But he does not explain how he "lost" that right to appeal. He appealed the termination order, and we have devoted a substantial portion of this opinion to discussing and resolving his arguments that the trial court engaged in impermissible fact-finding.[8] After examining his arguments in this regard, we rejected them, and James has not persuaded us that he lost any appellate rights or prerogatives as a result of his counsel's performance. His attorney may not have predicted our own resolution of the issue, but her actions did not cause him to lose the chance to present his arguments to us.

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[7] A parent in a TPR case is entitled to effective assistance of counsel, and the applicable standards are those applicable in criminal cases. ***In re M.D.(S)***, 168 Wis.2d 995, 1005, 485 N.W.2d 52, 55 (1992). For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

[8] Indeed, James's trial counsel included in the stipulation a specific reservation of the right to appeal: "Respondent preserves his objections to all aspects of these proceedings not specifically waived by the stipulation."

New trial in the interest of justice. Section 752.35, STATS., provides that "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court [of appeals] may reverse the judgment or order appealed from …." Under the statute, "[w]e may grant a new trial … where the real controversy has not been fully tried or there is a substantial degree of probability that a new trial will likely produce a different result." ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995).

Renewing and restating the arguments that have gone before, James claims that, cumulatively, the trial court's actions "deprived him of his right to a jury trial" and, additionally, "that the parties' confusing use of the terms 'fitness,' 'fact-finding hearing' and 'disposition' caused [him] to waive important rights out of a lack of understanding, all of which led to a denial of due process." As a result, he claims he is entitled to a new trial. The record does indicate some uncertainty on the part of counsel and the trial court with respect to the appropriate designation of the "fitness" hearing, and with respect to various other procedural matters. But the law is clear that a jury's role in termination proceedings is limited to the establishment-of-grounds portion of the case; and the trial court was equally clear in ruling that, in a case such as this, where the grounds for termination are based entirely on the existence of a concededly genuine court document, there is nothing for a jury to try.

Additionally, as the County points out, James had two opportunities to present "his side" of the case—at the "fact-finding" or "fitness" hearing, which he waived, and at the dispositional hearing, at which he appeared without

testifying or presenting any evidence on his behalf.[9] He has not persuaded us that this is an appropriate case for the exercise of our discretion under § 752.35, STATS., to order a new trial in the interest of justice.

The statutory "warnings." Finally, James argues that we should reverse because the County failed to prove that he had received the "warnings" required by § 48.415(4)(a), STATS. The statute, which states the "denial of physical placement" grounds for termination, provides that termination shall be established by proving that "[t]he parent has been denied periods of physical placement by court order in an action affecting the family *or* has been denied visitation under an order under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2)" (emphasis added). The notice required under §§ 48.356(2) and 938.356(2), STATS., is a notice—to be given whenever the juvenile court, in a CHIPS proceeding under either ch. 48 or ch. 938, orders a child to be placed outside his or her home or denies parental visitation—of "any grounds for termination of parental rights … which may be applicable…." *See* §§ 48.356 and 938.356.

The trial court concluded that James was not entitled to the notice because the denial of visitation (placement) was contained in an order in an action affecting the family (his divorce proceeding), and not in one of the listed ch. 48 (children's code) or ch. 938 (juvenile justice code) proceedings. James disagrees, arguing that it makes no sense for the legislature to require the warnings to a

[9] By that time, of course, his conviction for sexually assaulting Alexandra S. had been affirmed on appeal and that fact, in itself, constitutes grounds for termination under § 48.415(5)(a), STATS.: "That the parent has caused … injury to a child … resulting in a felony conviction."

parent who is denied visitation in a CHIPS proceeding under ch. 48 or ch. 938, but not require them when visitation is denied in the course of a divorce or other family-court proceeding.

We think the propriety of the trial court's reading of the statute is borne out not only by its terms but by its history as well. Prior to July 1, 1996, the visitation- or placement-denial grounds for termination under § 48.415(4), STATS., were limited in their application to orders in family-court proceedings, and the statute contained no provisions relating to "warnings" of any kind.[10] When the legislature amended the statute in 1995 to add as a ground for termination visitation denials contained in juvenile-court orders, it added a note explaining that the amendment

> [e]xpands the ground for involuntary TPR based on continuing denial of periods of physical placement to also provide for periods in which *a juvenile court* has denied visitation under an order under s. 48.345 or 938.345, Stats. (CHIPS dispositional order), 48.357 or 938.357, Stats. (change in placement order), 48.363 or 938.363, Stats. (revision of dispositional order), or 48.365 or 938.365, Stats. (extension of a dispositional order), *if the order contained the notice required by s. 48.356(2), Stats., that is, a warning about continuing denial of visitation as a ground for involuntary TPR and the conditions necessary for the parent to be granted visitation.*

[10] Section 48.415(4), STATS. (1993-94), provided as follows:

> (4) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT. Continuing denial of periods of physical placement may be established by a showing that:
>
> (a) The parent has been denied periods of physical placement by court order in an action affecting the family; and
>
> (b) At least 1 year has elapsed since the order … was issued and [it] has not [been] subsequently modified…

Note to 1995 Wis. Act 275, § 80 (emphasis added). *See also* WIS. STATS. ANNOTATED, Comments to § 48.415. The legislative comment reinforces what we believe to be the plain meaning of the statute: grounds for termination exist when the parent (a) has been denied physical placement in a family-court (e.g., divorce) proceeding; *OR* (b) has been denied visitation in a juvenile-court order which contains the notice specifically required by the children's and juvenile codes.

James correctly points out that we have said in the past that, in some situations, "[a] strict reading of the word 'or' should not be undertaken where to do so would render the language of the statute dubious." ***State v. Duychak***, 133 Wis.2d 307, 317, 395 N.W.2d 795, 800 (Ct. App. 1986). It is also true, however, that we presume that the legislature "cho[oses] its terms carefully and precisely to express its meaning." ***Johnson v. City of Edgerton***, 207 Wis.2d 343, 351, 558 N.W.2d 653, 656 (Ct. App. 1996).

In this instance, we do not consider that giving meaning to the term "or" in the statute renders it so dubious that we should ignore the word. First, as the County points out in its brief, family-court proceedings are, by their nature, different from juvenile-court proceedings. Family-court judgments—such as judgments of divorce—are not limited in duration, or subject to regular re-examination and extension, as are orders of the juvenile court; they are subject to revision only upon the suit of a party, and then only if the circumstances underlying the order have changed substantially. Nor do they provide, as do many juvenile court orders—such as those issued in CHIPS proceedings—that a party must meet specific conditions in order to regain visitation rights. Finally, while children are an integral part of many family-court proceedings, such proceedings are not directed entirely toward the child, nor is the government involved, as is the case in juvenile-court proceedings.

Second, the notice required by the statutes referred to in § 48.415(4)(a), STATS.—§§ 48.356 and 938.356—is applicable only in juvenile court proceedings where the juvenile court orders a child placed outside the parental home or denies visitation. It has no application to family-court proceedings such as divorce actions. Indeed, § 48.415(4) appears to recognize this distinction; in the first clause it refers to denial of "physical placement"—a term limited to family-court proceedings—and in the second to denial of "visitation"—a term used in the children's code and the juvenile justice code. The legislature's use of distinct terminology in the two clauses indicates to us its intention to separate them in the statute—to limit the "warning" requirement to denials only in proceedings in which they are required: proceedings in juvenile court.

It is well settled that courts may not rewrite statutes to meet a party's desired construction. "If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts." ***LaCrosse Hospital v. LaCrosse***, 133 Wis.2d 335, 338, 395 N.W.2d 612, 613 (Ct. App. 1986). Our role in the process is limited to attempting to construe a statute so that all parts have a function and meaning. If the legislature has created redundancies, or even uncertainties, "it is not up to this court to create functions for such parts." ***Novak v. Madison Motel Assocs.***, 188 Wis.2d 407, 415, 525 N.W.2d 123, 126 (Ct. App. 1994) (quoted source omitted). In this case, we are satisfied that § 48.415(4)(a), STATS., means what it says: grounds for termination exist when it is established that "the parent [a] has been denied physical placement by court order in an action affecting the family or [b] has been denied visitation in an order [in juvenile-court proceedings under ch. 48 or 938] containing the notice required by s. 48.356(2) or 938.356(2)."

By the Court.–Order affirmed.

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