COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2009

David R. Schanker
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. 2008AP3065
2008AP3066
2008AP3067
2009AP136
2009AP137
2009AP138

Cir. Ct. Nos. 2008TP9
2008TP10
2008TP11
2008TP9A
2008TP10A
2008TP11A

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

No. 2008AP3065

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TANYA M.B.,

RESPONDENT-APPELLANT.

No. 2008AP3066

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMILY M.L., A PERSON UNDER THE AGE OF 18:

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TANYA M.B.,

RESPONDENT-APPELLANT.

No. 2008AP3067

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TANYA M.B.,

RESPONDENT-APPELLANT.

No. 2009AP136

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

WILLIAM S.L.,

RESPONDENT-APPELLANT.

No. 2009AP137

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMILY M.L., A PERSON UNDER THE AGE OF 18:

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

WILLIAM S.L.,

RESPONDENT-APPELLANT.

No. 2009AP138

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

WILLIAM S.L.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Reversed*.

¶1 NEUBAUER, J.[1] William S.L. and Tanya M.B. appeal from trial court orders terminating their parental rights to their three children, Elijah, Emily, and Irie, on grounds that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2)(a). The parents contend that there was no credible evidence to support the jury's finding that the Sheboygan County Department of Health and Human Services made reasonable efforts to provide specific court-ordered services as required by WIS. STAT. §§ 48.355(2)(b)1. and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

48.415(2)(a)2. Because the CHIPS dispositional orders underlying the termination of parental rights (TPR) petitions failed to set forth any court-ordered services as required by § 48.355(2)(b)1., we conclude that the trial court erred in denying the parents' motions to change the jury's special verdict answers and dismiss the TPR petitions on that basis. We reverse the trial court's orders.

BACKGROUND

¶2 On March 7, 2008, the Department filed petitions for the involuntary termination of the parental rights of both William and Tanya to their three children under WIS. STAT. § 48.415(2)(a). The Department based its petitions on the children's underlying CHIPS dispositional orders entered on March 25, 2004. The Department's statements as to the facts and circumstances supporting its petitions for termination cited William's and Tanya's failure to meet the conditions set forth in the CHIPS dispositional orders. The dispositional orders, dated March 30, 2004, each set forth numerous conditions to be met for the return of the children; however, the court did not order any services to be provided to the child and family.[2] Neither William nor Tanya ever challenged the dispositional orders.

¶3 The matter proceeded to a five-day jury trial commencing June 24, 2008. All six petitions regarding William's and Tanya's parental rights to their three children were heard together. The six special verdicts required the jury to answer, with respect to each parent and each child, whether the Department had

[2] We note that there are six separate dispositional orders and none of them contain court-ordered services or refer to the court report.

made a reasonable effort to provide the services ordered by the court.[3] During deliberations, the jury inquired of the court, "What exactly were the services ordered by the court?" The court replied, "The obligation of the Department was to provide supervision of the case which implicitly included assisting the parents to meet the conditions of the return of the children." The jury further inquired, "Are the services ordered by the court contained in the conditions of return?" The court responded, "No."

[3] The special verdict form and jury instructions, as to each child, provided as follows:

> **INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES**.
>
> The petition in [this case] alleges that [the child] is in continuing need of protection or services which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.
>
> 1. Has [the child] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
>
> 2. Did the Sheboygan County Department of Health and Human Services make a reasonable effort to provide the services ordered by the court?
>
> 3. Has [the parent] failed to meet the conditions established for the safe return of [the child] to [the parent's] home?
>
> 4. Is there a substantial likelihood that [the parent] will not meet these conditions within the 12 month period following the conclusion of this hearing?

¶4 The jury returned all verdicts finding that the Department had met its burden as to the elements underlying grounds for termination, including that the Department had made a reasonable effort to provide the services ordered by the court. William and Tanya each filed postverdict motions requesting the court to (1) dismiss the underlying CHIPS orders, (2) dismiss the TPR petitions, or (3) change the answers to special verdict question 2 to the negative and dismiss the cases. The trial court denied the parents' motions reasoning that the "defect" in the orders had not been timely raised, and therefore the voidable orders still stand. Considering the CHIPS orders in relation to the jury verdict questions, the court determined that there were no services ordered, "[e]rgo, the department technically was not obligated to provide specific services—though services were provided by the department to aid the parents in meeting the conditions for return of the children set forth in the CHIPS order." The parents appeal.[4]

[4] William's and Tanya's appeals were initially filed separately; however, we consolidated the appeals in an order issued on March 18, 2009. *See* WIS. STAT. RULE 809.10(3).

DISCUSSION

Standard of Review

¶5 The termination of parental rights affects some of a parent's most fundamental human rights and, therefore, termination proceedings require heightened legal safeguards against erroneous decisions. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶20-21, 246 Wis. 2d 1, 629 N.W.2d 768. Although TPR proceedings are civil in nature, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the petitioner to show by clear and convincing evidence that the termination is appropriate. ***Id.***, ¶21; *see also* WIS. STAT. § 48.31(1) (imposing the clear and convincing evidence standard in TPR cases). The provisions of WIS. STAT. ch. 48, the Children's Code, reflect these constitutional safeguards in requiring a two-step procedure when a parent contests the termination of his or her parental rights. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22.

¶6 The first step of a TPR proceeding, during which the rights of the parents are paramount, is a fact-finding hearing to determine whether grounds exist for the termination. ***Id.*** If the petitioner proves by clear and convincing evidence that they do, then the circuit court shall find the parent unfit and advance to the second step of the termination procedure. ***Id.*** The second step is the dispositional phase during which the best interests of the child are paramount. ***Id.***, ¶23.

¶7 The challenge in this case involves the fact-finding hearing. The jury found that the Department met its burden of proving by clear and convincing evidence that William and Tanya's children were in continuing need of protection or services and therefore grounds for the involuntary termination of William's and Tanya's parental rights existed. *See* WIS. STAT. § 48.415(2) (setting forth "continuing need of protection and services" as a grounds for involuntary termination). The continuing need of protection and services, under § 48.415, "shall be established by proving": (1) that the child has been adjudged to be a child in need of protection or services and placed, or continued in a placement, outside his or her home for a cumulative period of six months or longer pursuant to one or more court orders; (2) that the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) that the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) that there is a substantial likelihood that the parent will not meet these conditions within the nine-month period following the fact-finding hearing. *See also* WIS JI—CHILDREN 324A.[5]

¶8 The parents contend that because the dispositional order failed to include an order for services, it was impossible for the Department to meet its burden of proof that it made reasonable efforts to provide those services. As such, they argue that the jury's answers to special verdict question 2 must be changed

[5] We note that the time period for the likelihood of meeting the conditions was reduced from twelve months to nine months by 2005 Wis. Act 293. *See* WIS JI—CHILDREN 324A (comment). Because the dispositional order in this case was issued prior to that change, the special verdicts given used the twelve-month period.

and the TPR petitions dismissed. The trial court, however, determined that if no court- ordered services are specified, then the Department was not required to prove that any court-ordered services were provided. Therefore, the issue in this case centers on whether WIS. STAT. § 48.355(2)(b)1. mandates written court-ordered services in the dispositional orders as a basis for proving at a subsequent TPR hearing that the Department made reasonable efforts to provide the ordered services. This issue involves the application of a statute to undisputed facts. As such, our standard of review is de novo. *See* ***Gonzalez v. Teskey***, 160 Wis. 2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990).

WISCONSIN STAT. § 48.355(2) mandates written court-ordered services in the dispositional order.

¶9 WISCONSIN STAT. § 48.345 governs CHIPS dispositions. Pursuant to WIS. STAT. § 48.355(2)(b)1., the dispositional order "*shall* be in writing and shall contain: … The specific services to be provided to the child and family ... and, if custody of the child is to be transferred to effect the treatment plan, the identity of the legal custodian." (Emphasis added.) The use of the word "shall" in § 48.355 has been construed by this court to be mandatory, requiring dispositional orders to contain certain statements or be void due to failure to comply with the mandate. *See* ***F.T. v. State***, 150 Wis. 2d 216, 225, 441 N.W.2d 322 (Ct. App.

1989) (interpreting the use of "shall" in § 48.355(2)(b)7) (1987-88).[6] In rejecting the argument that the provisions of § 48.355 are directory, not mandatory, such that substantial compliance is sufficient, the court in ***F.T.*** observed:

> In our opinion, considerations of clarity, definiteness and adherence to basic principles of due process of law lead to the conclusion that "consequences" of a mandatory construction are conducive not only to realization of the aims of particular juvenile court proceedings, but to the integrity of the judicial process itself.

F.T., 150 Wis. 2d at 221, 227.

¶10 Here, it is undisputed that the dispositional orders fail to comply with the statutory mandate. Insofar as there may be cases in which the trial court chooses not to order services, we think it evident that the court must, at a minimum, state that intention. While in this case, the conditions of return ordered by the court required William and Tanya to complete certain treatment and parenting programs, the Department acknowledges that the dispositional orders did not specifically list the services that the Department was required to provide. Moreover, the trial court advised the jury that the court-ordered services were not contained in the conditions of return. In short, no services were ordered to be

[6] The issue in ***F.T. v. State***, 150 Wis. 2d 216, 225, 441 N.W.2d 322 (Ct. App. 1989), involved the application of WIS. STAT. § 48.355 in a juvenile delinquency proceeding. In 1995, the legislature created WIS. STAT. ch. 938, the Juvenile Justice Code, which now governs delinquent juveniles; CHIPS cases remain in WIS. STAT. ch. 48. *See* 1995 Wis. Act 77. However, the ***F.T.*** court's rationale applies with equal force to the current application of the provisions of § 48.355.

provided. The involuntary termination of parental rights based on a continuing need of protection and services is premised on a finding that the parent failed to meet the conditions of return *and* that the court-ordered services necessary to meet those conditions were in fact provided. *See* WIS. STAT. § 48.415(2)(a). As such, we agree with the parents that the Department is precluded from clearly and convincingly proving that it made a reasonable effort to provide the court-ordered services.

¶11 Without addressing the mandate of WIS. STAT. § 48.355, the Department asks us to ignore our holding in ***F.T.*** as inapposite and outdated. Instead, the State argues, we should examine the question "of whether the Department was unable to prove … parental unfitness as a matter of law" through the larger framework of both the legislative intent of the Children's Code, and a recognition of what due process requires of a TPR proceeding. The Department contends that, regardless of the trial court's oversight in failing to specify court-ordered services, the procedures followed in this case provided due process to both William and Tanya. However, the Department's argument ignores that it is the provisions of WIS. STAT. ch. 48 that are intended to provide the constitutional safeguards necessary in TPR proceedings. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶22. We therefore must reject the Department's invitation to uphold the TPR orders despite the absence of clear and convincing proof that the Department provided the court-ordered services required under § 48.355(2)(b)1.

¶12 Finally, the Department contends that because William and Tanya failed to challenge the underlying CHIPS orders, the common-law waiver rule

articulated by the court in ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190, applies. We reject the Department's waiver argument. The parents are not challenging the validity of the CHIPS orders—in fact, as the Department points out, they submitted to the terms of the orders repeatedly over a four-year period. Rather, the parents are challenging the existence of evidence to support the jury's answers to special verdict question 2. We reluctantly agree with the parents that the evidence simply does not exist.[7] That being the case, we are compelled to conclude that the trial court erred in affirming the jury's verdicts. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389 n.9, 541 N.W.2d 753 (1995) ("[A] circuit court commits error in affirming a jury verdict when there is no credible evidence supporting the jury's finding …. When the circuit court commits such error, an appellate court declares that the circuit court is clearly wrong.")

CONCLUSION

¶13 We conclude that the absence of the mandatory written court-ordered specific services in the CHIPS dispositional orders precluded the Department from clearly and convincingly proving that it made a reasonable effort

[7] We note that the Department's brief sets forth a lengthy recitation of the facts and procedural history in this case. We agree with the Department that the facts underlying the TPR petitions in this case are both heartbreaking and compelling. It is undisputed that the jury's verdict that the parents failed to meet the conditions established for the safe return of each child to the parent's home was supported by the evidence, and that the Department met its burden to establish the same by clear and convincing evidence. However, the statute imposes this separate requirement and we are bound by the language of the statute. *See* ***Midwest Mut. Ins. Co. v. Nicolazzi***, 138 Wis. 2d 192, 201, 405 N.W.2d 732 (Ct. App. 1987).

to comply with such orders. As a matter of law, the jury's answer to special verdict question 2 must be "no." Because the Department failed to satisfy its burden of proving grounds for the involuntary termination of William's and Tanya's parental rights, we reverse the TPR orders as to each parent and each child.

By the Court.—Orders reversed.

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