COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 01-0666, 01-0667
01-0668, 01-0669

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

NO. 01-0666

IN THE INTEREST OF KATARINA R.C.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

ROCHELLE D.,

RESPONDENT-RESPONDENT,

GERARDO M.C.,

RESPONDENT.

NO. 01-0667

IN THE INTEREST OF CARLOS C.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

ROCHELLE D.,

RESPONDENT-RESPONDENT,

GERARDO M.C.,

RESPONDENT.

NO. 01-0668

IN THE INTEREST OF LEILA M.C.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

ROCHELLE D.,

RESPONDENT-RESPONDENT,

GERARDO M.C.,

RESPONDENT.

NO. 01-0669

IN THE INTEREST OF HECTOR C.,
A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

ROCHELLE D.,

RESPONDENT-RESPONDENT,

GERARDO M.C.,

RESPONDENT.

APPEAL from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] The Brown County Human Services Department appeals orders vacating previous orders terminating Rochelle D's parental rights. The circuit court determined that Rochelle had not been properly instructed of her right to substitution of judge and that she did not know of that right. The State argues that Rochelle was advised of her right to substitution of a judge while she still had the opportunity to exercise that right. Therefore, according to the State, Rochelle did not suffer prejudice. We disagree and affirm the order.

BACKGROUND

¶2 On May 5, 2000, the County filed petitions requesting termination of Rochelle's parental rights to her children, Katarina, Carlos, Leila and Hector. The petitions alleged that grounds for termination of parental rights existed under WIS. STAT. § 48.415(2).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 The initial appearance was held on May 26, 2000. Rochelle appeared without an attorney and indicated a desire to voluntarily terminate her parental rights to all four children. The circuit court set the matter for an adjudication hearing on June 5. At the adjudication hearing, Rochelle requested an attorney. The court adjourned the matter to allow Rochelle the opportunity to obtain counsel. On June 6, Rochelle appeared with her attorney and requested a jury trial.

¶4 On August 7, 2000, the date scheduled for trial, Rochelle waived her right to a jury trial and voluntarily admitted to the petition regarding her son, Hector. The circuit court conducted a colloquy. At the conclusion of the colloquy, the County asked Rochelle if she understood that she could substitute judges and have another judge hear the case. Rochelle stated she understood.

¶5 The circuit court accepted Rochelle's voluntary termination of her parental rights to Hector and accepted Rochelle's waiver of her right to a jury trial for her other three children. The petitions regarding the remaining children proceeded to a bench trial.

¶6 At the conclusion of the bench trial, the court found that grounds existed to terminate Rochelle's parental rights. At the dispositional hearing, the court found it was in the minor children's best interests to terminate Rochelle's parental rights.

¶7 Rochelle appealed. We remanded to the circuit court for an evidentiary hearing on the issue whether Rochelle was informed of her right to substitution of a judge. The circuit court determined that Rochelle had not been properly informed of her right to substitution and that she did not have knowledge before she lost the opportunity to exercise that right, thereby suffering prejudice.

The court vacated the orders terminating Rochelle's parental rights. This appeal followed.

DISCUSSION

¶8 The County argues that Rochelle was fully advised of the statutory right to substitution of a judge when the opportunity to exercise that right still existed. It concedes that, at the initial appearance, the circuit court did not inform Rochelle of her right to request a substitution of judge. However, the County argues that Rochelle was informed of her right of substitution at the conclusion of the plea colloquy. The County further argues that when Rochelle became aware of her right of substitution, she still had the opportunity to exercise it. We disagree.

¶9 WISCONSIN STAT. § 48.422(1), (4) and (5) requires the circuit court to inform a parent of the right of substitution before the conclusion of the initial hearing. In ***In re Kywanda F.***, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996), the supreme court held that a circuit court's failure to inform an alleged delinquent of the right to substitution is harmless error unless the party establishes actual prejudice. Relying on a termination of parental rights case, ***In re Robert D.***, 181 Wis. 2d 887, 891-92, 512 N.W.2d 227 (Ct. App. 1994), the supreme court held that "[i]n the case of the right to substitution, we conclude that actual prejudice is shown if it is established that the juvenile was not told of the right and did not know of that right." ***Kywanda***, 200 Wis. 2d at 37. The court concluded that the prejudice suffered by the juvenile is the lost opportunity to substitute the judge due to ignorance of the right. ***Id.***

¶10 When determining whether failing to inform of the statutory right of substitution was reversible error, the parent must first make a prima facie showing that the court violated its mandatory statutory duties. *See* ***id.*** at 38. The parent

must then allege that he or she in fact did not know of the information that the court was statutorily required to provide. *See* ***id.*** If a prima facie showing is made, the burden shifts to the County to demonstrate by clear and convincing evidence that the person knew of the statutory right and therefore was not prejudiced. *See* ***id.*** The County may utilize any evidence to substantiate knowledge of the right, including testimony from the person's counsel. *See* ***id.***

¶11 Because the County concedes that Rochelle was not advised during the initial hearing of her right to substitution of judge, the burden shifts to the County to demonstrate that Rochelle knew of the statutory right. The County argues that Rochelle was informed of that right during the colloquy and that she still had an opportunity to exercise her right because the bench trial had not begun.

¶12 The record establishes that Rochelle was informed of her right of substitution during the colloquy regarding her voluntary termination of parental rights to her son, Hector. At the conclusion of the colloquy, Rochelle was asked if she understood that she could substitute the judge and have another judge determine the case.

¶13 Rochelle argues this knowledge of the right of substitution was in the context of Hector, not the other three children. Even if Rochelle had been fully advised in the colloquy of her right of substitution with respect to the remaining children, we conclude that Rochelle had already lost her right of substitution.

¶14 Under WIS. STAT. § 48.29(1),[2] if a parent requests a substitution of judge, the request must take place either before or during the plea hearing. The

[2] WISCONSIN STAT. § 48.29(1) reads as follows:

(continued)

plea hearing, for purposes of termination of parental rights, is the initial hearing under WIS. STAT. § 48.422. At the initial hearing on the petition to terminate parental rights, the circuit court determines whether the parent wishes to contest the petition. The initial hearing is also the last time for filing a request to substitute a judge. WIS. STAT. § 48.422(5).[3]

¶15 At the January 25, 2001, evidentiary hearing the circuit court stated that it would have granted a request by Rochelle for substitution had she made one at the conclusion of the colloquy. From this, the County contends that Rochelle had not lost the opportunity to substitute the judge due to ignorance of the right. *See* ***Kywanda***, 200 Wis. 2d at 37. We disagree.

¶16 Had Rochelle requested a substitution, the circuit court may have granted her request. However, Rochelle did not have a statutory right of substitution. It is undisputed that Rochelle did not have knowledge of her right to substitution of a judge at the conclusion of the initial hearing. It is also undisputed that she did not know of that right at the conclusion of the hearing on June 6,

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> The child, the child's parent, guardian or legal custodian, the expectant mother or the unborn child by the unborn child's guardian ad litem, either before or during the plea hearing, may file a written request with the clerk of the court or other person acting as the clerk for a substitution of the judge assigned to the proceeding. Upon filing the written request, the filing party shall immediately mail or deliver a copy of the request to the judge named in the request. When any person has the right to request a substitution of judge, that person's counsel or guardian ad litem may file the request. Not more than one such written request may be filed in any one proceeding, nor may any single request name more than one judge. This section does not apply to proceedings under s. 48.21 or 48.213.

[3] WISCONSIN STAT. § 48.422(5) reads as follows: "Any nonpetitioning party, including the child, shall be granted a continuance of the hearing for the purpose of consulting with an attorney on the request for a jury trial or concerning a request for the substitution of a judge."

2000, when she first appeared with her attorney. We do not decide whether the initial hearing concluded on May 26 or on June 6. It is only relevant that she did not have knowledge of her right of substitution at the conclusion of the June 6 hearing.

¶17 The County has not demonstrated that Rochelle knew of her statutory right before she lost the opportunity to exercise that right. Therefore, we affirm the order vacating previous orders terminating Rochelle's parental rights.

By the Court.—Orders affirmed.

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