COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2004

Cornelia G. Clark
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. 04-0509
04-0510
04-0511

Cir. Ct. Nos. 02TP000080
02TP000081
02TP000082

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

NO. 04-0509

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LUZ O.,

RESPONDENT-APPELLANT.

NO. 04-0510

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LUZ O.,

RESPONDENT-APPELLANT.

NO. 04-0511

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LUZ O.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Reversed*.

¶1 SNYDER, J.[1] Luz O. appeals from orders terminating her parental rights to three children.[2] Luz O. contends that the TPR orders are invalid because

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The children's father consented to the terminations of his parental rights after the contested court proceedings. Luz O. is the sole appellant.

the Kenosha County Department of Human Services (Department) failed to prove that it made reasonable efforts to provide specific court-ordered services as required by WIS. STAT. §§ 48.355(2)(b)1. and 48.415(2)(a)2.a. and b. She further contends that her trial counsel was ineffective.[3]

¶2 We must conclude that prior written court-ordered services to be provided to the children and family are a mandatory prerequisite to involuntary TPR orders and that no such court-ordered services exist in this case. Because no mandatory court orders for specific services to Luz O. and the children exist, the Department cannot present clear and convincing evidence[4] that it made reasonable efforts to comply with nonexistent orders. We therefore must reverse the terminations.

¶3 The essential facts are undisputed. On March 23, 1999, all three of Luz O.'s children were adjudicated in need of protection or services (CHIPS)

[3] TPR orders are final and appealable under WIS. STAT. § 808.03(1) according to the procedure specified in WIS. STAT. § 48.43(6). Luz O. timely appealed the terminations and her appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m), to which Luz O. responded. On July 2, 2004, we rejected the no-merit report and remanded the matters for further proceedings. We noted, inter alia, that: (1) the record raised a question of whether the Department made a reasonable effort to provide WIS. STAT. § 48.415(2)(a)2.b. court-ordered services, and, (2) the record revealed a possible ineffective assistance of trial counsel claim relating to whether the Department made reasonable efforts to provide court-ordered services to the children and family. The trial court conducted a ***Machner*** hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), found that trial counsel was not ineffective, and denied Luz O.'s motions for relief from the terminations.

[4] WISCONSIN STAT. § 48.31(1) imposes the clear and convincing evidence burden in TPR cases.

pursuant to WIS. STAT. § 48.13(8).[5] On April 20, 1999, the court ordered that custody be transferred to the Department and the children were placed in a foster home. The CHIPS dispositional orders were extended on April 19, 2000, and again on May 20, 2003, and the children remained in foster care throughout the CHIPS and TPR proceedings. Luz O. did not challenge the CHIPS orders, placements and/or extensions.

¶4 Petitions for the termination of Luz O.'s parental rights were filed on August 14, 2002, pursuant to WIS. STAT. § 48.415(2)(a)2.a. A jury trial was conducted in July 2003, with the jury returning a special verdict favorable to the Department's petitions for termination. In doing so, the jury answered the following special verdict question "Yes":

> 2. Did the Kenosha County Department of Human Services make a reasonable effort to provide *the services ordered by the court*? (Emphasis added.)

¶5 Luz O. contends that the court never ordered the Department to provide WIS. STAT. § 48.355(2)(b)1. services. Section 48.355(2)(b)1. reads:

> (b) The [CHIPS dispositional] court order shall be in writing and shall contain:
>
> 1. The *specific services or continuum of services to be provided to the child and family*, … the *identity of the agencies* which are to be *primarily responsible for* the provision of *the services ordered by the judge*, the identity of the person or agency who will provide case management or coordination of services, if any, and, if custody of the child is to

[5] WISCONSIN STAT. § 48.13(8) provides that CHIPS jurisdiction over a child exists where the child "is receiving inadequate care during the period of time a parent is … incarcerated …." It is undisputed that both Luz O. and the father of the children were incarcerated in the State of Florida during the CHIPS and TPR proceedings.

> be transferred to effect the treatment plan, the identity of the legal custodian. (Emphasis added.)

¶6 The WIS. STAT. § 48.355(2)(b)1. court-ordered services are incorporated into TPR proceedings through WIS. STAT. § 48.415(2)(a)2.b., which provides the basis for jury special verdict question number 2. Section 48.415(2)(a)2.b. reads:

> **48.415 Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> .....
>
> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which *shall be established by proving any of the following*:
>
> ....
>
> [(a) 2.] b. 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*. (Emphasis added.)

¶7 We agree with the Department that the sole appellate issue here is whether WIS. STAT. § 48.355(2)(b)1. mandates written court-ordered services in the dispositional orders as a basis for proving that the Department made reasonable efforts to provide the ordered services in a TPR trial.[6] The issue

[6] This dispositive issue is raised in Luz O.'s brief independent of the ineffective assistance of counsel determination: "II. The underlying CHIPS orders, as the only evidence of what services were ordered to be provided, were insufficient." For this reason, we need not address the issue of whether Luz O.'s trial counsel's performance was deficient. If a decision on one point disposes of the appeal, we will not decide other issues raised. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

concerns the application of a statute to a set of undisputed facts. Construction of a statute presents a question of law, and this court owes no deference to the trial court's determination. ***State v. Grayson***, 165 Wis. 2d 557, 563, 478 N.W.2d 390 (Ct. App. 1991), *aff'd*, 172 Wis. 2d 156, 493 N.W.2d 23 (1992). The construction of the juvenile code and its application to the facts are questions of law. *See* ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 645, 469 N.W.2d 845 (1991).

¶8 If the WIS. STAT. § 48.355(2)(b) language is mandatory, and the TPR prerequisite dispositional order does not comply with that language, the Department cannot meet its burden of proof of making reasonable efforts to provide nonexisting court-ordered services to the children and family in an involuntary TPR trial. In that event, special verdict question number 2 must be answered "No" by the trial court in spite of the jury answer and the terminations would be void. "[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." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389 n.9, 541 N.W.2d 753 (1995).

¶9 The Department concedes that "the written court order[s] in the present case [do] not expressly direct the Department to provide any specific

services." Relying upon the ***Karow***[7] factors, however, to determine if the language is mandatory or directory, the Department opines that the WIS. STAT. § 48.355(2)(b) language is directory. If the language is directory, then substantial compliance with the statutory terms is sufficient to answer special verdict question number 2 "Yes." *See* ***Cross v. Soderbeck***, 94 Wis. 2d 331, 340, 288 N.W.2d 779 (1980).

¶10 The Department argues that the services provided to the children and family here were sufficient and provided substantial compliance with WIS. STAT. § 48.355(2)(b)1. without the necessity of a written court order for specific services, and that the Department met its burden of proof as to special verdict question 2. In addition, the Department contends that Luz O.'s compliance argument is merely "technical" in light of the liberal legislative intent attending the provision of services to children and families in WIS. STAT. ch. 48 proceedings. *See* WIS. STAT. § 48.01(1)(a). Accordingly, the Department requests that the termination orders be affirmed.

¶11 Luz O. disagrees, contending that the mandatory character of the WIS. STAT. § 48.355(2)(b) language has been addressed in ***F.T. v. State***, 150 Wis. 2d 216, 441 N.W.2d 322 (Ct. App. 1989). In ***F.T.*** the court addressed whether language in § 48.355(2)(b)7. is mandatory. The ***F.T.*** court concluded that the

[7] ***Karow v. Milwaukee County Civil Service Commission***, 82 Wis. 2d 565, 263 N.W.2d 214 (1978), sets forth four factors to consider in determining whether the legislature considered statutory provisions to be mandatory or directory: (1) omission of a prohibition or a penalty; (2) the consequences resulting from one construction or the other; (3) the nature of the statute, the evil to be remedied, and the general object sought to be accomplished by the legislature; and (4) whether failure to act within the time limit works an injury or wrong. ***Id.*** at 572.

language in § 48.355(2)(b)7. requiring dispositional orders to contain statements of the conditions upon which the orders were issued is mandatory and that failure to comply with the mandatory terms of the statute in applying the subsections of the statute voids an order based on that subsection. ***F.T.***, 150 Wis. 2d at 225. Rejecting the contention that the statutory language is directory, the ***F.T.*** court opined that if the requirements were directory, the courts would rely upon others, such as the Department here, to communicate the basic and vital information that the legislature intended the court itself to address in the dispositional order. ***F.T.***, 150 Wis. 2d at 227.

¶12 In determining that the dispositional order language is mandatory, the ***F.T.*** court held that WIS. STAT. § 48.355(2)(b) is "a non-time limitation statute" and, therefore, the first and fourth factors of the ***Karow*** analysis are inapplicable. ***F.T.***, 150 Wis. 2d at 226-27. We are satisfied that ***F.T.*** controls the appellate issue and the written court-ordered services required in § 48.355(2)(b)1. are mandatory in a CHIPS dispositional order that is the basis of presenting WIS. STAT. § 48.415(2)(a)2.b. grounds for subsequent TPR proceedings.

¶13 The trial court addressed only the ineffective assistance of counsel matter at the postdetermination remand hearing and denied Luz O.'s motion for relief. We do not see this appeal as dependent upon an ineffective assistance of counsel analysis only. The legislature, in enacting WIS. STAT. § 48.415, has prescribed the grounds for the involuntary termination of parental rights.

¶14 We are satisfied that the failure of the Department to prove mandated grounds for termination does not address an ineffective assistance of counsel claim alone, but raises an issue of whether Luz O. was deprived of her

parental rights without due process. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 864-65, 537 N.W.2d 47 (Ct. App. 1995). Here, Luz O. was denied the benefit of reasonable efforts being made to provide the children and family with court-ordered services as intended by the legislature. "The legislature created a panoply of procedures to assure that parental rights will not be terminated precipitously or capriciously when the state exercises its awesome power to terminate parental rights." ***Waukesha County v. Steven H.***, 2000 WI 28, ¶25, 233 Wis. 2d 344, 607 N.W.2d 607. The rigorous procedure, including the notice requirements, is "meant to forewarn parents that their parental rights are in jeopardy" and advise them "of the conditions with which [they] must comply for a child to be returned to the home." ***Id.***, ¶37.

¶15 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 to comply with such orders. Accordingly, the answer to special verdict question 2 must be "No" as a matter of law, and Luz O. is entitled to relief from the orders for termination of her parental rights.

By the Court.—Orders reversed.

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