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. 97-2481 & 97-2562

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

97-2481

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CRYSTAL K. AND APRIL K., CHILDREN UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT C.,

RESPONDENT-APPELLANT.

97-2562

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CRYSTAL K. AND APRIL K., CHILDREN UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CATHERINE V.K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Reversed.*

SCHUDSON, J. [1] Robert C. and Catherine V.K. appeal from the trial court order, following a jury trial, terminating their parental rights to their children, Crystal K. and April K.[2] They argue that: (1) they were denied due process of law because of inadequate and inaccurate notice resulting from the State's and circuit courts' varying references to and invocations of the different bases for termination under the "old" and "new" versions of § 48.415(2), STATS.; (2) the trial court did not have authority to proceed under the "new" § 48.415(2), STATS., because the "newest" version of the law precluded a termination action under the "new" version where, as here, less than one year had elapsed since the date of notice under the "new" law; and (3) the evidence was insufficient to support the trial court's affirmative answer to the first question of the special verdict: "Have Crystal and April K. been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of one year or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?" Catherine also argues that the trial court erroneously exercised discretion and denied her due process of law by granting the

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

[2] Robert and Catherine had their termination cases tried together. Each, however, filed an appeal. Upon this court's own motion, the two cases are ordered consolidated for purposes of disposing of their appeals.

State's motion to withdraw from a court-approved stipulation to apply the "old" law.

The appellants' arguments inevitably lead to several complex issues corresponding to the considerable confusion regarding whether the "old," "new," or "newest" law applied to the termination proceedings. Interestingly enough, even on appeal, no party takes a certain stand or provides definitive authority to establish which law properly applied. This court, however, need not reach the many issues percolating beneath the surface because, simply stated, Robert and Catherine never received proper notice as required by § 48.356(2), STATS. Thus, under ***Cynthia E. v. LaCrosse County Human Services Department***, 172 Wis.2d 218, 493 N.W.2d 56 (1992), and ***State v. Patricia A.P.***, 195 Wis.2d 855, 537 N.W.2d 47 (Ct. App. 1995), this court must reverse.

A chronological summary is essential to the understanding of this case:

> October 26, 1992: The trial court finds Crystal and April to be children in need of protection and services (CHIPS), under § 48.13(10), STATS., and enters a CHIPS order. The trial court orally warns Robert and Catherine of the bases for termination as required by law, under § 48.415(2), STATS., (the "old" law).
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> December 4, 1992: A dispositional order (based on the October 26, 1992 hearing) is entered. The order contains termination of parental rights warnings under the old law.
>
> November 24, 1993: The trial court extends the CHIPS order and again orally warns Robert and Catherine of the bases for termination under the old law.
>
> January 31, 1994: An order extending the CHIPS order (based on the November 24, 1993 hearing) is entered. The order contains the termination warnings under the old law.

May 5, 1994: Section 48.415, STATS., is amended, creating the "new" law.

October 13, 1994: The trial court again extends the CHIPS order. The trial court orally warns Robert and Catherine of the bases for termination under the *new* law.

December 12, 1994): Another order extending the CHIPS order (based on the October 13, 1994 hearing) is entered. *The written order, however, contains the termination warnings under the old law.*

November 20, 1995: The trial court again extends the CHIPS order. The trial court orally warns Robert and Catherine of the bases for termination under the new law.[3]

January 31, 1996: Another order extending the CHIPS order (based on the November 20, 1995 hearing) is entered. *The written order, however, contains an incorrect statement of the termination warnings under the new law*.[4]

April 25, 1996: The State files the termination petition under the *old* law.

July 1, 1996: The law is amended again, creating the "newest" law. In part, it provides that "[t]his subsection

[3] The trial court correctly stated: "If you don't demonstrate substantial progress toward meeting those conditions of return within the next year," and "if a jury believes that you would not meet those conditions of return within one year from the trial of a termination of parental rights action," parental rights could be terminated.

[4] The written order states that grounds for termination include a finding of "substantial likelihood that you will not meet these conditions within the 12-month period *following this [CHIPS] order*," rather than "within the 12-month period following the [TPR] fact-finding hearing under s. 48.424," as required by § 48.415, STATS., as amended. *See* slip op. at 5-6, *infra*.

> does not preclude" a petition from being filed under the new law to terminate parental rights to a child who was at least three years old at the time of the initial CHIPS order[5] "if one year or longer has elapsed since the date of notice." 1995 Wis. Act. 275, § 9110(2)(c).
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> October 29, 1996: The State moves to amend the petition, in order to seek termination under the *new* law.
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> March 6, 1997: The State's motion to amend the petition is heard by the trial court, but the parties stipulate not to amend the petition; they agree that the trial will proceed under the *old* law.
>
> March 24, 1997: On the first day of trial, the State moves for relief from its stipulation and requests that the trial proceed under the *new* law. The trial court grants the motion, and the trial proceeds under the new law.
>
> April 28, 1997: The trial court enters the order terminating Robert's and Catherine's parental rights to Crystal and April, under the new law.

An understanding of the difference between the old and new laws also is essential. The "old" law refers to § 48.415, STATS. (1991-92) before it was amended in 1994. In relevant part, it states that grounds for termination include:

> That the child has been outside the home for a cumulative total period of one year or longer pursuant to such [CHIPS] orders, the parent *has substantially neglected, wilfully refused or been unable to meet* the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions *in the future*.

[5] At the time of the original CHIPS order, April was about four and one-half years old; Crystal was about six years old.

Section 48.415(2)(c), STATS. (1991-92) (emphasis added). The "new" law refers to the same statute as amended on May 5, 1994, by 1993 Wis. Act 395, § 25. In relevant part, it provides:

> That the child has been outside the home for a cumulative total period of one year or longer pursuant to such [CHIPS] orders; and that the parent *has failed to demonstrate substantial progress toward meeting* the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions *within the 12-month period following the [TPR] fact-finding hearing under s. 48.424*.

Section 48.415(2), STATS. (1993-94) (emphasis added).

Although the factual background is complicated, a careful study of the record reveals two dispositive facts: (1) Robert's and Catherine's parental rights were terminated pursuant to the new law; but (2) Robert and Catherine never received accurate written notice warning them of the grounds for termination under the new law.

This court recently declared:

> [W]hen the State warns a parent that his or her rights to a child may be lost because of the parent's future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure.

Patricia A.P., 195 Wis.2d at 863, 537 N.W.2d at 50. In ***Patricia A.P.***, this court considered the difference between the old and new versions of § 48.415, STATS. – the very statute at issue in the instant case – and whether warnings under the old law were sufficient to give notice under the new law. *See* ***id.*** This court explained that the difference was substantial:

> The change in the type of conduct for which termination is risked under the old and new statutes is not merely a matter of degree. It is a change in quality of the very nature of the

> acts leading to termination. The notice to Patricia under the old § 48.415, STATS., told her she faced the loss of her parental rights only for culpable conduct—substantial neglect or willful refusal—or for inability to meet the conditions established for the return of the child to her. Inability is not fault based and need not involve culpable conduct but its proof requires the State to show that for reasons beyond the parent's control, the conditions have not been met.
>
> The ground for termination under the new law requires no showing of neglect, willfulness or inability. Under the new law Patricia faced loss of her parental rights, in material part, merely because she "failed to demonstrate substantial progress toward meeting the conditions established for the return of the child." The reasons for the lack of substantial progress are irrelevant. Under the old law, the reasons for failure to meet the conditions established for the return of the child must be shown. Without a showing of those reasons, termination could not occur under the old law.
>
> The change in the type of conduct for which termination is possible changes the burden on the State. The ground under the new law is far easier to establish than the grounds under the old law. Under the new law, the ground for termination is purely objective: whether there has been a lack of substantial progress. Under the old law, the grounds are more stringent and are partly subjective.

Id. at 864, 537 N.W.2d at 50-51. Thus, because Patricia had her parental rights terminated under the new law but had received termination warnings under the old law, the termination was reversed. *See* ***id.*** at 864-65, 537 N.W.2d at 51. Although the instant case is distinguishable in that the primary inaccuracy in the written order relates to the time frame within which the parents would be unlikely to meet the conditions for return, the time frame itself is inextricably connected to the factual basis for termination and the burden on the State. Standing alone, that

discrepancy is substantial.[6] In combination with the chameleon-like manner in which Robert and Catherine were warned of the bases for termination under the old law, the new law, and under an inaccurate statement of the new law, they have an even more solid basis for contending that they simply did not receive adequate and accurate written notice.

The State and guardian ad litem maintain, however, that notice still was adequate because Robert and Catherine had received proper oral warnings under the new law. Under ***D.F.R. v. Juneau County Department of Social Services***, 147 Wis.2d 486, 433 N.W.2d 609 (Ct. App. 1988), and under ***Cynthia E.***, however, accurate oral warnings are not enough.

This court, in ***D.F.R.***, and the supreme court, in ***Cynthia E.***, evaluated exactly what was required to constitute notice of termination warnings under § 48.356, STATS., which provides:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home because the child has been adjudged to be in need of protection or services under s. 48.345, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child to be returned to the home.
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child outside the home under sub. (1) shall notify the parent or parents of the information specified under sub. (1).

[6] This substantial difference distinguishes the instant case form ***A.S. v. State***, 163 Wis.2d 687, 472 N.W.2d 819 (Ct. App. 1991), *rev'd. on other grounds*, 168 Wis.2d 995, 485 N.W.2d 52 (1992), on which the State heavily relies. In ***A.S.***, this court considered CHIPS orders with "two sets of conditions/requirements … so closely related as to be equivalent." ***Id***. at 699, 472 N.W.2d at 824. Here, by contrast, the different periods specified in the oral and written warnings – one year following the CHIPS order and one year following the termination trial – are anything but "equivalent."

In ***D.F.R.***, this court reversed a termination due to inadequate notice of the warnings, concluding:

> [T]he trial court's duty to warn and inform a parent under sec. 48.356(2), Stats., is included in that "panoply of substantive rights and procedures to assure that … parental rights will not be terminated precipitously [or] arbitrarily…." The statute is mandatory, unequivocal and imperative. The importance of the notice required by sec. 48.356(2) is reflected in the fact that the legislature has required that the dispositional orders which establish the CHIPS grounds for termination include the notice.

D.F.R., 147 Wis.2d at 495, 433 N.W.2d at 612 (citation omitted). Most significantly for the instant case, ***D.F.R.*** specified that even "substantial compliance with sec. 48.356(2), Stats., is insufficient," ***Id***. at 493, 433 N.W.2d at 611, and "[o]ral warnings do not … satisfy the requirements of sec. 48.356(2)." ***Id***. at 497, 433 N.W.2d at 613.

In ***Cynthia E.***, the supreme court determined that notice had been accomplished and, in reversing this court's reversal of a termination, seemed to express certain reservations about ***D.F.R.***. *See* ***Cynthia E.***, 172 Wis.2d at 229-30, 493 N.W.2d at 61, The supreme court, however, did not retreat from ***D.F.R.***'s declarations that, under § 48.356, STATS., even "substantial compliance…is insufficient," ***D.F.R.***, 147 Wis.2d at 493, 433 N.W.2d at 611, and "*[o]ral warnings do not…satisfy the requirement of sec. 48.356(2).*" ***Id***. at 497, 433 N.W.2d at 613 (emphasis added). Indeed, in ***Cynthia E.***, the supreme court concluded that notice under § 48.356, STATS., was adequate "because … Cynthia E. received proper oral notice under sub. (1), *and*, as we read sec. 48.356(2), *Cynthia E. received proper notice in the written orders*." ***Cynthia E.***, 172 Wis.2d at 227, 493 N.W.2d at 60 (emphasis added). The court then went on to explain: "*To comply with sec. 48.356(2), the written orders need only have contained the*

same information as the oral notice under sub. (1) contained." ***Id***. (emphasis added).

Finally, the State and guardian ad litem also contend that accurate, yearly warnings pursuant to CHIPS orders under the old law somehow save an improper, new-law termination. They do not. *See* ***Patricia A.P.***, 195 Wis.2d at 862-63, 537 N.W.2d at 49.

Accordingly, because Robert and Catherine never received accurate written warnings of the potential basis for termination of their parental rights under the law by which their rights were terminated, this court must reverse.

By the Court.—Orders reversed.

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