COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1996 **Cir. Ct. No. 03TP000001**

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

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

CLARK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANTONIA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: CHARLES A. POLLEX, Judge. Affirmed.

¶1 VERGERONT, J.[1] Antonia R. appeals the order terminating her parental rights to Availon, d/o/b April 21, 2002. She contends that her right to due

[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.

process was violated because her parental rights were terminated on a ground that was listed, but not checked, on the "Notice Concerning Grounds to Terminate Parental Rights" that she was given when the dispositional order was entered in the earlier proceeding under WIS. STAT. § 48.13(10) (CHIPS). Based on the arguments presented and the record before us, we conclude that the written and oral warnings Antonia received were sufficient under the Fourteenth Amendment's due process guarantee.

BACKGROUND

¶2 By order entered on October 7, 2002, the court found that Availon was a child in need of protection and services under WIS. STAT. § 48.13(10)[2] and Availon was placed in a foster home. The order was to be in effect for one year and contained a number of conditions that Antonia had to meet in order to have Availon returned to her. The order also provided "[t]he parents have been advised of the applicable grounds for termination of parental rights and the conditions that are necessary for the return of the child to the home or restoration of visitation rights," and the box next to "Written TPR warnings are attached" was checked.

[2] WISCONSIN STAT. § 48.13 provides in part:

> The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
>
> ….
>
> (10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child;

The attached "Notice Concerning Grounds to Terminate Parental Rights" (written warning) stated:

> Your parental rights can be terminated against your will under certain circumstances. A list of the potential grounds to terminate a parent's rights is given below. Those that are check-marked are most applicable to you, although you should be aware that if any of the others also exist now or in the future, you parental rights can be taken from you.

Following was a list of ten major headings of grounds for termination of parental rights, which correspond to those set forth in WIS. STAT. § 48.415(1)-(10). The only one that was checked was the second one, which we will sometimes refer to as "the CHIPS ground," and which corresponds to § 48.415(2):

> ❑ **Continuing Need of Protection or Services**. *As proven by evidence that*:
>
> - A court placed your child outside your home after a judgment that your child is in need of protection or services (under §§ 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365).
>
> - The agency responsible for the care of the child has made a diligent effort to provide the services ordered by the court.
>
> - Your child has been outside your home for a cumulative total period of six months or longer under a court order.
>
> - You have failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to your home.
>
> - There is a substantial likelihood that you will not meet these conditions within the 12-month period following the fact-finding hearing under § 48.424.

The first major heading, which corresponds to § 48.415(1), and which was not checked, was:

- **Abandonment.** *Any of the following must be proven to exist:*
  - You have left your child without provision for care or support:
    - □ for a period of 60 days.
    - □ in a place or manner that exposes the child to substantial risk of great bodily harm or death.
  - You have failed to visit or communicate with your child for:
    - □ three months or longer after your child has been placed outside your home by a court order.
    - □ six months after leaving the child with any person, and you know or could discover the whereabouts of the child.

¶3 At the proceeding that led to the entry of this order, Antonia appeared without counsel. The conditions for return were read to her and at the close of the hearing the court stated as follows:

> THE COURT: [Antonia], your parental rights you should be aware can be terminated against your will under certain circumstances. A list of the potential grounds to terminate a parent's rights is given below and that will be part of the material that you can go over. There is one that is check-marked that is the most applicable to you, although you should be aware if any of the others exist now or in the future, your parental rights can be taken from you.
>
> What is checked is need of protection or services. If a child has been placed outside your home after a judgment that your child is in need of protection and services and that the agency responsible for care of the child has made a diligent effort to provide the services ordered by the court and that your child has been outside your home for a total of six-month period or longer and that you have failed to demonstrate substantial progress toward meeting the conditions established to return the child to your home and there is also established a substantial likelihood that you will not meet those conditions within a 12-month period following the fact-finding hearing prior, then your parental rights can be terminated. Do you understand that?

[ANTONIA]: Yes, I do.

¶4 On October 6, 2003, the petition for involuntary termination of parental rights was filed, alleging that grounds existed under WIS. STAT. § 48.415(1)(a)2 which provides:

> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

The facts alleged included the following. Antonia had been given her termination of parental rights warnings pursuant to WIS. STAT. § 48.356(2) on October 7, 2002; she had failed to visit or communicate with her child since May 8, 2003, a period exceeding three months; she knew where her daughter was placed, and in fact had lived for two weeks in the same foster home as her daughter; she knew the phone number of the foster home, as she called that number on May 8, 2003; and she could have called Gerry Smith, her social worker at the Clark County Department of Social Services to arrange visitation or ask about her daughter's condition and knew the phone number there, having called him previously on several occasions.

¶5 Antonia appeared through counsel, opposed the petition, and requested a jury trial. Antonia was represented by counsel at the trial before the jury. The State submitted as evidence the written warning and read into the record the court's oral warning on October 7, 2002, which we have quoted above in ¶3. Antonia testified. Her defense was that she had made attempts to contact the

foster parents and Gerry Smith by phone and she was unable to do more because of a lack of money and other resources. She did not provide any testimony on the written or oral warning she had received, and her attorney did not present any argument challenging them.

¶6 The jury returned a verdict as follows:

> 1. Was Availon S. [R.] placed, or continued in a placement, outside the home of Antonia [R.] pursuant to a court order which contained the termination of parental rights notice required by law?
>
> Answer: Yes
>
> 2. Did Antonia [R.] fail to visit or communicate with Availon S. [R.] for a period of three months or longer?
>
> Answer: Yes
>
> **Answer question 3 only if your answers to questions 1 and 2 were "yes[."]**
>
> 3. Did Antonia [R.] have good cause for having failed to visit with Availon S. [R.] during that period?
>
> Answer: No

¶7 Antonia also appeared, represented by counsel, at the disposition hearing and testified. The court entered an order finding that the jury had found the grounds for termination of Antonia's parental rights to be abandonment and that it was in the best interests of the child that her parental rights be terminated. Accordingly, the court ordered that Antonia's parental rights be terminated.[3]

[3] Availon's father's parental rights were terminated based on lack of declaration of paternal interest, failure to appear, and failure to assume parental responsibility.

DISCUSSION

¶8 On appeal, Antonia contends that her right to due process was violated because the written warning she was provided did not check the ground of abandonment and the court's oral warning did not specifically refer to this ground. She acknowledges that she did not raise this issue below, but asserts that it is nonetheless appropriate for us to decide the issue because the relevant facts are undisputed, the parties have had the opportunity to brief the issues, and it is in the interests of justice that we decide the issue. *See* ***In re Baby Girl K.***, 113 Wis. 2d 429, 448, 335 N.W.2d 846 (1983). Availon's guardian ad litem and Clark County dispute that there was a violation of Antonia's constitutional rights, and also argue that both the written and oral warnings conformed to WIS. STAT. § 48.356.[4] They do not object to our consideration of the adequacy of the written and oral warnings even though this issue was not raised below.

[4] WISCONSIN STAT. § 48.356(1) and (2) provides:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears 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 or expectant mother to be returned to the home or for the parent to be granted visitation.
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

¶9 In reply, Antonia asserts in one sentence that she disagrees with the construction of WIS. STAT. § 48.356 proposed by Clark County and the guardian ad litem, but she emphasizes that it is not dispositive of her position that the warnings were inadequate under the due process clause of the United States Constitution. We therefore address only the constitutional adequacy of the written and oral warnings.

¶10 All the parties agree that, if the facts are undisputed, the constitutional adequacy of the warnings is a question of law, which we review de novo. ***In re Jason P.S.***, 195 Wis. 2d 855, 862, 537 N.W.2d 45 (Ct. App. 1995). Presumably what all parties mean by the facts being undisputed is that there is no dispute regarding the contents of the written warning provided Antonia, and no dispute as to what the court advised her at the hearing on October 7, 2002. There is also no dispute that Antonia received the written warning.

¶11 A parent's interest in the parent-child relationship and in the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶22, 271 Wis. 2d 1, 663 N.W.2d 817. Thus, in order to comport with due process, the State must provide a parent with fundamentally fair procedures when it moves to terminate parental rights. ***Id.***, ¶23. In general, we determine what procedural protections are required by due process in termination of parental rights proceedings by balancing these factors: the private interest affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. ***Id.***, ¶40 (citing ***Santosky v. Kramer***, 455 U.S. 745, 754 (1982)).

¶12 Antonia does not analyze the written and oral warnings she received in terms of these factors, but instead relies on these two cases to support her position: ***Jason P.S.***, 195 Wis. 2d 855, and ***In re D.F.***, 147 Wis. 2d 486, 499, 433 N.W.2d 609 (Ct. App. 1988).

¶13 In ***Jason P.S.***, we held that, when

> 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.

Id. at 863. In that case, the parent had been notified in a CHIPS dispositional order that her parental rights could be terminated for conduct that was described in the terms of the standard then contained in WIS. STAT. § 48.415(2)(c) (1991-92). However, the petition to terminate her parental rights alleged as a ground the amended version of § 48.415(2)(c), which, we concluded, contained a less stringent standard than the prior version. ***Id.*** at 864. In arriving at our conclusion, we did not apply the three factors the supreme court identified in ***Steven V.***, but relied, by analogy on probation case law holding that due process requires a fair warning in advance of the conduct that may lead to a loss of liberty. 195 Wis. 2d at 863 (citing ***G.G.D. v. State***, 97 Wis. 2d 1, 9, 292 N.W.2d 853 (1980)).

¶14 We do not agree with Antonia that our holding in ***Jason P.S.*** supports her position. There the parent was specifically advised that one standard would be applied to evaluate her conduct and the State then attempted to apply a less stringent standard. The critical factual premise for our holding was that, because of the change in standards, the parent did not know in advance what conduct would lead to a termination of her parental rights. In contrast, in this case, the written and oral warnings given Antonia did accurately include as a potential

ground the abandonment ground on which the TPR petition was based. The written warning advised her that, although the check-marked ground—"Continuing Need of Protection or Services"—was "most applicable" to her, she "should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you." Abandonment, including the specific grounds that were the bases for the TPR petition, was the first ground listed, and the court orally repeated the warning to Antonia that any of the unchecked grounds could also be the basis for a termination of parental rights.

¶15 In ***In re D.F.***, 147 Wis. 2d 486, we considered the adequacy of the warning under WIS. STAT. § 48.356 (1983-84), which had then recently been amended (and has since been amended again to the current version). The version prior to the 1983 amendment to § 48.356(1) required oral notice only of "any grounds for termination of parental rights under s. 48.415 which may be applicable," and in § 48.356(2) written notice of "the grounds for termination of parental rights under s. 48.415." ***Id.*** at 492. The 1983 amendment altered both § 48.356 (1) and (2) so that both had to advise of "any grounds for termination of parental rights under s. 48.415 that may be applicable" as well as "the conditions necessary for the child to be returned to the home including any changes required in the parent's conduct, the nature of the home and the child's conduct." Section 48.356 (1983-84);[5] *see also* 147 Wis. 2d at 492-93.

¶16 The first CHIPS dispositional order in ***D.F.***, entered prior to the 1983 amendment, had attached a copy of WIS. STAT. § 48.415 to the order affecting the father, but not to the order affecting D.F., the mother; later orders

[5] Amended by 1983 Wis. Act 399, § 8, eff. May 10, 1984.

affecting the mother, entered after the amendment, did not contain any notice of the possible grounds for termination of the mother's parental rights or of the conditions the mother had to meet. ***Id.*** at 496-97. The TPR petition against the mother was based on § 48.415(2) (1983-84), the CHIPS ground. We viewed the amended language of WIS. STAT. § 48.356(2) (1983-94) as "mandatory, unequivocal and imperative," and stated that "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." ***Id.*** at 495. We concluded that

> the intent of the statute was to warn the parent of any "applicable" grounds for involuntary termination, and not merely to inform him or her of all possible grounds for termination, whether applicable or not. A specific warning was necessary to give the parent an opportunity to conform his or her conduct appropriately to avoid termination.

Id. at 496.

¶17 Although, as we have noted above, Antonia's challenge to the warnings she received is a constitutional, not a statutory one, she finds support for her constitutional argument in the following language from ***D.F.*** In rejecting the argument that we should apply a harmless error analysis to the State's failure to comply with the amended version of WIS. STAT. § 48.356(2) (1983-84), we stated: "Undoubtedly the warning requirement is imposed because of the legislature's concern for the due process rights of parents." ***Id.*** at 499. We went on to say: "Because the statute is mandatory, we may not substitute for the legislature's prescription alternative ways to satisfy the requirements of notice." ***Id.***

¶18 We do not agree with Antonia that ***D.F.*** supports the conclusion that the written and oral warnings given Antonia were inadequate on constitutional

grounds. First, our reference to "the legislature's concern for the due process rights of parents" was not the equivalent of an analysis that the due process clause requires a particular type of warning, but a way of expressing our view that the legislature, in amending WIS. STAT. § 48.356, intended to increase protections for parents. Second, Antonia overlooks the fact that in ***D.F.***, as in ***Jason P.S.***, the TPR was based on WIS. STAT. § 48.415(2), which refers to "conditions" that the parent must meet, § 48.415(2)(a)3,[6] but the conditions are not specified in the statute. Without a warning of the specific conduct the parent must engage in or refrain from, which cannot be determined from the statute, a parent does not have "the opportunity to conform his or her conduct appropriately to avoid termination." ***D.F.*** at 496. However, the conduct a parent must avoid to prevent a termination of parental rights based on abandonment is set forth completely in § 48.415(1), and the substance of this subsection was set forth in the written warning Antonia received. ***D.F.*** does not provide an analysis that would support Antonia's position that the warning was inadequate on due process grounds simply because this ground was not checked, given that the warning alerted Antonia to the fact that the existence of this and other unchecked grounds would permit the termination of her parental rights.

¶19 Finally, the precedential value of ***D.F.,*** even as to our statutory construction analysis, is significantly narrowed by a later supreme court decision, ***In re Jamie L.***, 172 Wis. 2d 218, 493 N.W.2d 56 (1992). There the TPR petition was based on WIS. STAT. § 48.415(2). ***Id.*** at 223. In the earlier CHIPS

[6] At the time we decided ***In re D.F.***, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), WIS. STAT. § 48.415(2)(c) (1983-84) used the language that the parent has "substantially neglected, willfully refused or been unable to remedy the conditions which resulted in removal of the child from the home…." ***Id.*** at 492.

proceeding, the court orally informed the parent of the CHIPS ground for termination and she was given a written list of the "recommendations" she had to meet in order to have her children returned, as well as a "Warning to Parents," which summarized the grounds for termination of parental rights under § 48.415. ***Id.*** at 222-23. This court, relying on ***D.F.***, concluded that the written warning was invalid because it did not give "specific notice" of grounds for termination under § 48.415(2), the only "applicable ground," but instead listed all the possible statutory grounds. ***Id.*** at 224. The supreme court reversed, concluding that listing all the possible grounds, including § 48.415(2), complied with the requirement in WIS. STAT. § 48.356(2) (by reference to § 48.356(1)) that the parent be informed of "any grounds for termination of parental rights under § 48.415 which may be applicable." ***Id.*** at 226-27. The supreme court rejected the parent's argument based on ***D.F.***, concluding that the language in ***D.F.*** about notice of the specific ground was dicta, because the mother in ***D.F.*** had never signed to show she had received the copy of § 48.415 when the initial order was entered, and the extension orders, entered after § 48.356 was amended to require notice of the conditions, did not contain any notice of the conditions for return of the child, or notice of any applicable grounds for termination.[7] ***Id.*** at 229-30.

[7] More recently in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, the supreme court again limited the precedential value of ***D.F.***—though for reasons that do not affect the resolution of this appeal. The court there held that WIS. STAT. §§ 48.415(2) and 48.356(2) do not require that each and every order removing a child from his or her home contain the written notice prescribed by § 48.356(2), but that the last order, which must be issued at least six months before the TPR petition is filed, must contain that notice. ***Id.***, ¶3. The supreme court approved of our "stress … [in ***D.F.*** on] the legislature's intent that a parent be put on notice that parental rights may be terminated in the future[,]" and our statement that the notice in § 48.356 as amended is "necessary to give a parent an opportunity to conform his or her conduct to avoid termination of parental rights. ***D.F.***, 147 Wis. 2d at 496." ***Id.***, ¶25. However, the supreme court observed that in ***D.F.*** none of the orders placing the child outside the home contained the written notice prescribed by § 48.356(2) and that case therefore did not govern the (continued)

¶20 Having concluded that the cases on which Antonia relies do not support her constitutional challenge to the warnings she was given, we return to the three factors the court identified in ***Steven V.*** to determine what procedural protections are required by the due process clause in TPR cases. The private interests affected by the TPR proceeding "is unquestionably very strong." ***Steven V.***, 271 Wis. 2d, ¶41. As for the risk of error created by the State's chosen procedure, we cannot conclude as a matter of law that a parent would not understand from the written and oral warnings Antonia received that, although the CHIPS ground was checked, she could nonetheless have her parental rights terminated in the circumstances described under "Abandonment" if those circumstances existed. If Antonia did not understand this, she had the opportunity to make a factual record in the trial court, but did not do so.[8]

---

case before it, in which the last order did contain the requisite notice. The court stated that ***D.F.*** "should be limited to the facts presented [there]." ***Id.***, ¶28

[8] The court in ***In re Jamie L.***, 172 Wis. 2d 218, 493 N.W.2d 56 (Ct. App. 1991), went on to discuss the parent's argument that giving a parent a list of all statutory grounds for termination could confuse a parent.

> Cynthia E. also argues that giving a parent too much information in the written warning could confuse a parent. We do not intend to discount the importance of parental rights. *See* ***In re Termination of Parental Rights to M.A.M.***, 116 Wis. 2d 432, 436-37, 342 N.W.2d 410 (1984). Parents facing CHIPS proceedings must often be distraught. However, Cynthia E. concedes she received actual notice. She makes no due process argument. The issue we review is not whether the procedure the Children's Code requires for terminating parental rights might confuse parents; it is simply whether the written notice complied with the legislature's clear directions in sec. 48.356(2), Stats. Accordingly, we reject Cynthia E.'s argument.

Id. at 230.

(continued)

¶21 As for the third factor, the State points out the difficulty in anticipating that a parent who is the subject of a CHIPS proceeding for failing to provide adequate care for her child will later engage in conduct that constitutes abandonment. On the day Antonia was given the oral and written warnings, she had recently been living with her child in the foster home and was in court objecting to her child remaining in the foster home. The State has a substantial interest in a warning that informs a parent of all possible grounds for termination without requiring the State to anticipate specific grounds that are not implicated at the time the warning is given. Again, there may be facts that would alter this analysis, but there are none in this record.

¶22 Based on the arguments presented and the record before us, we conclude that the written and oral warnings Antonia received were sufficient under the Fourteenth Amendment's due process guarantee.

By the Court.—Order affirmed.

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

This discussion supports Antonia's position, with which we agree, that compliance with WIS. STAT.§ 48.356 does not necessarily mean that a warning satisfies the requirements of due process. This discussion also suggests that a warning might be inadequate on due process grounds if it were not actually understood by a parent. However, as we point out above, there is no evidence showing that Antonia did not in fact understand the warnings given to her.