COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2015

Diane M. Fremgen
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. 2014AP2804
2014AP2805
2014AP2806
2014AP2807
2014AP2808
2014AP2809

Cir. Ct. Nos. 2014JC36
2014JC37
2014JC38
2014JC39
2014JC40
2014JC41

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

NO. 2014AP2804
IN THE INTEREST OF N.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

NO. 2014AP2805
IN THE INTEREST OF G.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

NO. 2014AP2806
IN THE INTEREST OF A.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

NO. 2014AP2807
IN THE INTEREST OF E.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

NO. 2014AP2808
IN THE INTEREST OF L.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

NO. 2014AP2809
IN THE INTEREST OF G.R., A PERSON UNDER THE AGE OF 18:

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

J.R. AND S.R.,

RESPONDENTS-RESPONDENTS.

APPEALS from orders of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Reversed and cause remanded with directions*.

¶1 GUNDRUM, J.[1] Ozaukee County appeals from orders of the circuit court, arguing that the court erred in dismissing the County's petitions alleging Ga.R., N.R., Gr.R., A.R., E.R., and L.R., who are the children of Respondents J.R. and S.R., are in need of protection and services (CHIPS petitions). We agree the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

court erred, and we reverse and remand for further proceedings consistent with this opinion.

Background

¶2 On September 19, 2014, Ozaukee County filed individual CHIPS petitions related to the six children identified above. Although each of the petitions reads a little differently, they essentially allege that in January 2014, C.R., the twelve-year-old son of J.R. and S.R., began initiating sexual contact with and among his younger siblings, N., Ga., A., and E.,[2] and did so on multiple occasions over a period of several months. The father, J.R., eventually learned of the activity, the matter was reported to the Ozaukee County Department of Human Services, and these petitions were filed.

¶3 J.R. and S.R. moved for dismissal of the petitions pursuant to WIS. STAT. § 48.21(7). The circuit court held a hearing on November 7, 2014, at which advocate counsel for L. and Gr., the two children who are older than C., joined the request for dismissal and the guardian ad litem for the four younger children agreed that dismissal would not be detrimental. The circuit court dismissed the petitions pursuant to § 48.21(7), concluding that "the best interests of the children might not be served" by the petitions continuing. Counsel for the father submitted to the court a proposed order for dismissal on November 13, 2014. The next day,

[2] Because all of the children have the same last initial, we will hereinafter refer to each child by only his or her first initial, or in the case of Ga. and Gr., by the first two letters of their first name.

the County filed a "Motion for Relief from Order and Motion for Leave to Amend Petition," as well as a brief and proposed amended petitions. Counsel for the parents filed briefs and affidavits objecting to the County's motions. On November 24, 2014, the court signed an order dismissing the petitions and the next day signed a decision denying the County's motions. The County appeals.

Discussion

¶4 The County argues that the circuit court erroneously dismissed the petitions based upon WIS. STAT. § 48.21(7). It contends § 48.21(7) only applies to minors who are in custody and the children in this matter are not in custody.[3] The parents, as well as L. and Gr.,[4] assert the court did have the power to dismiss the petitions under § 48.21(7). They additionally argue, for the first time in this case, that the dismissal was proper because the petitions were insufficient due to failing to state sufficient facts to afford the court jurisdiction over the children. Related to this point, the County argues that if the petitions are deemed insufficient, it should

[3] The parties do not dispute the County's statement of fact that the children are not in custody. Indeed, J.R.'s counsel stated at the hearing before the circuit court that the children are "at home, they've never been removed." In her brief on appeal, S.R. states, in arguing that WIS. STAT. § 48.21(7) applies, "The trial court had the authority in this matter authority to dismiss this action … although the children were not in custody." Similarly, advocate counsel for L. and Gr. state in their brief on appeal: "[T]he court had the authority to dismiss pursuant to WIS. STAT. § 48.21(7) even though the children were not in custody."

[4] L. and Gr. appear on appeal by their state public defender; the guardian ad litem for the four younger children did not file an appearance or brief.

be permitted to amend them pursuant to a motion to amend that it filed, and that the court denied, following the court's oral ruling dismissing the petitions.[5]

¶5 The parties' dispute over whether WIS. STAT. § 48.21(7), and the authority to dismiss a CHIPS petition contained therein, applies only to a child who is in custody or also applies to a child who is not in custody requires us to interpret and apply this statutory provision. The interpretation and application of a statute to undisputed facts is a matter of law we review de novo. ***State v. Jensen***, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415. When interpreting the language of a statute, we must interpret it "within the context of the entire statute and related sections." ***Graziano v. Town of Long Lake***, 191 Wis. 2d 812, 821, 530 N.W.2d 55 (Ct. App. 1995).

¶6 WISCONSIN STAT. § 48.21(7) provides:

> INFORMAL DISPOSITION. If the judge or circuit court commissioner determines that the best interests of *the* child and the public are served or, in the case of a child expectant mother who has been taken into custody under [WIS. STAT. §] 48.19(1)(cm) or (d)8., that the best interests of the unborn child and the public are served, he or she may enter a consent decree under [WIS. STAT. §] 48.32 or order the petition dismissed and refer the matter to the intake worker

[5] The County also suggests the circuit court erred in denying its motion for relief from the court's dismissal of the petitions. Because the County prevails on its main contention that the court erred in dismissing the petitions under WIS. STAT. § 48.21(7) and because the County fails to develop any arguments related to the court's denial of its motion for relief from judgment, we discuss this issue no further. *See* ***Hegwood v. Town of Eagle Zoning Bd. of Appeals***, 2013 WI App 118, ¶1 n.1, 351 Wis. 2d 196, 839 N.W.2d 111 (we need not address other issues when one is dispositive); *see also* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

> for informal disposition in accordance with [WIS. STAT. §] 48.245.

Sec. 48.21(7) (emphasis added). The phrase "the best interest of the child" is so commonly used in our statutes and case law that it has generally taken on a colloquial meaning of its own. In this instance, however, subsec. (7) requires a judge or court commissioner to consider not only the best interest of the "child" but also the best interest of the "public." In addition, subsec. (7) refers to "the" judge or circuit court commissioner. Accordingly, the words "the best interest[] of the child" in subsec. (7) appear to be used not in the colloquial sense, but rather as a reference to the best interest of a particular child whose well-being is under consideration before a particular judge or commissioner.

¶7 The legislature's use of "the child" instead of "a child" requires us to determine to what "child" WIS. STAT. § 48.21(7) is referring. Section 48.21(6), the statutory provision *immediately preceding* § 48.21(7) provides guidance:

> An order placing a child under sub. (4)(a) on conditions specified in this section may at any time be amended, with notice, so as to place the child in another form of custody for failure to conform to the conditions originally imposed. A child may be transferred to secure custody if he or she meets the criteria of [WIS. STAT. §] 48.208.

Sec. 48.21(6). Section 48.21(4)(a), referenced in subsec. (6), relates to a judge or circuit court commissioner finding that a child taken into custody should be continued in custody, entering an order placing the child with a responsible person, and imposing restrictions on the child during the period of placement. Subsection (6) then refers only to children who are in custody.

¶8 Considering WIS. STAT. § 48.21(7) along with subsec. (6)—again, which immediately precedes subsec. (7) and refers only to children who are in custody—we conclude that use of the term "the child" in subsec. (7) also refers only to children who are in custody. If the legislature had intended subsec. (7) to be interpreted as broadly as Respondents assert—to also apply to children who are not in custody—it would have utilized the words "a child" and "a judge or circuit court commissioner" instead of "the child" and "the judge or circuit court commissioner."

¶9 Our interpretation is also informed by other language within WIS. STAT. § 48.21(7). After reference to "the best interests of the child and the public," subsec. (7) states "or, in the case of a child expectant mother who has been taken into custody under [WIS. STAT. §] 48.19(1)(cm) or (d)8., that the best interests of the unborn child and the public are served." Again, the reference is to a child, here a child expectant mother, who is in custody. One might be tempted to conclude that because this language specifically uses the words "who has been taken into custody" with regard to child expectant mothers but does not use those same words after "the child" that "the child" is not limited to just those children who are in custody. Such a reading would be incorrect, however, because "who has been taken into custody" does not stand alone, but is immediately followed by "*under* [*§*] *48.19(1)(cm) or (d)8*." Sec. 48.21(7) (emphasis added). Thus, we do not believe the legislature added the words "who has been taken into custody" for the purpose of limiting the applicability of subsec. (7) to child expectant mothers who are in custody and also implying by the absence of those same words after "the child" that subsec. (7) applies to any child, regardless of whether or not the

child is in custody. Rather, it seems the legislature included "who has been taken into custody" where and as it did for the purpose of identifying the specific applicable provision under which the child expectant mother has been taken into custody, i.e., "under [§] 48.19(1)(cm) or (d)8."

¶10 WISCONSIN STAT. § 48.19(1)(cm) and (d)8. relate to a child expectant mother who is pregnant with an unborn child who is endangered by the mother's use of alcohol and/or drugs. Thus, it appears the legislature was indicating that for purposes of WIS. STAT. § 48.21(7), the best interests "of the *unborn* child and the public" are the considerations for the court when the child who is in custody is an expectant mother endangering her unborn child through her use of alcohol and/or drugs; however, in instances where a child expectant mother is in custody pursuant to a different statutory provision, one that does not relate to a risk to the unborn child due to the child expectant mother's use of alcohol and/or drugs, that the considerations for the court remain the best interests "of the child [the child expectant mother, not the unborn child] and the public." Use of the phrase "who has been taken into custody under [§]48.19(1)(cm) or (d)8." only continues to demonstrate that subsec. (7), like subsec. (6) before it, solely relates to children who are in custody.

¶11 Respondents take the position that our supreme court's decision in ***State v. Lindsey A.F.***, 2003 WI 63, 262 Wis. 2d 200, 663 N.W. 2d 757, should govern our decision here. They contend the ***Lindsey A.F.*** court's conclusion that a similar statutory provision, WIS. STAT. § 938.21(7), applies to juveniles who are both in and out of custody, *see* ***Lindsey A.F.***, 262 Wis. 2d 200, ¶¶7, 25, requires us

to conclude here that WIS. STAT. § 48.21(7) also must apply to children who are both in and out of custody. We are not bound by ***Lindsey A.F.***, however, in that the ***Lindsey A.F.*** court specifically stated that its holding was "confined to the applicability of § 938.21(7) to delinquency petitions." ***Lindsey A.F.***, 262 Wis. 2d 200, ¶9 n.6.

¶12 The ***Lindsey A.F.*** court's decision to confine applicability of that decision to delinquency situations is understandable in that, as the ***Lindsey A.F.*** court noted, a delinquent juvenile held in custody "usually poses a more serious threat to public safety than a juvenile who has not been placed in custody. Presumably, dismissal and referral for deferred prosecution is more likely to be appropriate in those cases in which the juvenile is not a serious threat to public safety." ***Id.***, ¶20. In the CHIPS context, however, the issue is generally the safety and well-being, *not the dangerousness*, of the child under consideration. Thus, the legislature could reasonably determine that in CHIPS cases where an innocent child is removed from familiar surroundings and taken into custody due to concern for his or her safety and well-being, it is appropriate to afford the circuit court separate authority to either "enter a consent decree … or order the petition dismissed and refer the matter to the intake worker for informal disposition," WIS. STAT. § 48.21(7), if dismissal serves the best interests of the child and the public, and yet not provide the court such authority with regard to a child who is not in custody.

¶13 Because we conclude that the plain language of WIS. STAT. § 48.21 shows that § 48.21(7) applies only to children who are in custody, we need not

resort to statutory titles to aid our interpretation. *See* ***State v. Black***, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994) (a statutory title may be used to resolve doubt as to the meaning of an ambiguous statute). Nonetheless, we note that our interpretation is bolstered by the fact that the title for § 48.21 reads "Hearing for child in custody" and that this statute is located in the subchapter entitled and addressing "HOLDING A CHILD OR AN EXPECTANT MOTHER IN CUSTODY." *See* WIS. STAT. ch. 48, subch. IV.

¶14 In sum, we conclude that the circuit court did not have authority to dismiss these petitions under WIS. STAT. § 48.21(7), its only articulated basis for the dismissals.[6]

¶15 Respondents argue alternatively that the petitions should be dismissed because they fail to state sufficient facts to afford the circuit court jurisdiction over the children. Although the County also discusses this issue on appeal, in the context of arguing that the circuit court should have granted its motion to amend the petitions, this sufficiency-of-the-petitions issue was never raised by any party before the circuit court. Generally, this court will not review issues that were not first raised to the circuit court. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We will not vary from that general rule here.

[6] We further point out that we can discern from the record no finding by the circuit court that the best interest of "the public" is served by dismissal of the petitions, as required for dismissal of a petition under WIS. STAT. § 48.21(7).

¶16 The County also appears to assert that the circuit court erred in denying its motion to amend the petitions. Because we reverse the circuit court's dismissal of the petitions and remand the matter for further proceedings, we do not fully address this issue. We do note, however, that the circuit court had denied the motion to amend based upon its assumption that it had appropriately dismissed the petitions pursuant to WIS. STAT. § 48.21(7). We have now concluded that that dismissal was in error. In light of the above, if motions to dismiss based upon insufficiency of the petitions and/or motions to amend the petitions are filed upon remand, the circuit court may address those matters as appropriate at that time.

By the Court.—Orders reversed and cause remanded with directions.

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