COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 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. 2014AP2570
2014AP2571

Cir. Ct. Nos. 2014TP1
2014TP2

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

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

DERRICK P.,

PETITIONER-RESPONDENT,

V.

ANITA P.,

RESPONDENT-APPELLANT.

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

DERRICK P.,

PETITIONER-RESPONDENT,

V.

ANITA P.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Anita P. appeals circuit court orders terminating her parental rights to her children, Amber P. and Ashley P.[2] The court terminated Anita's parental rights to both children pursuant to WIS. STAT. § 48.415(4), which provides that parental rights may be terminated when there is a continual denial of periods of physical placement or visitation of a parent's child. On appeal, Anita does not challenge the merits of the court's orders terminating her parental rights or claim error on the part of the court or counsel. Instead, she brings both a facial and an as-applied constitutional challenge to § 48.415(4)(a). Specifically, Anita argues, for the first time on appeal, that: (1) § 48.415(4)(a) violates the constitutional guarantee of equal protection because it requires a notice element for certain underlying court orders that deny physical placement but not for others; and (2) § 48.415(4)(a) is unconstitutional, as-applied, because her parental rights were removed without adequate protections and without any

[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.

[2] On counsel's motion, we granted Anita P.'s request to consolidate her appeals of the circuit court orders terminating her parental rights to both children.

court finding that she is unfit, which results in a due process violation. We affirm.[3]

BACKGROUND

¶2 This case originated in the family court. On August 22, 2011, the circuit court modified a prior order to grant sole legal custody and primary physical placement to the children's father, Derrick P. As grounds, the court found that "it would be detrimental to the children's well-being to have any ongoing contact … until such time as their mother has taken steps to deal with the issues that … make the children fearful of her," and that contact with Anita would "endanger the physical, emotional and mental health of the children." The court ordered that Anita have no contact with the children and granted sole legal custody and physical placement of the children to Derrick. During this hearing, the court also provided written notice to Anita, titled "Notice Concerning Grounds to Terminate Parental Rights," (hereinafter "the notice"), as required by WIS. STAT. § 767.41(4)(cm), however, Anita refused to sign the notice.

¶3 In 2014, Derrick filed a petition to terminate Anita's parental rights based on her continued denial of placement under WIS. STAT. § 48.415(4). The circuit court initially denied Derrick's petition after concluding that the notice was not attached to the court's 2011 order and that § 48.415(4)(a) requires the notice to be attached.

[3] Although we accepted counsel's reply brief filed on behalf of Anita P., we note that the reply was filed late without any accompanying explanation from counsel or a request for an extension to file a late brief.

¶4 However, on Derrick's motion for reconsideration, the court reversed its prior decision and determined that there were grounds for termination of Anita's parental rights. The court relied on ***Kimberly S.S. v. Sebastian X.L.***, 2005 WI App 83, ¶¶1, 7, 281 Wis. 2d 261, 697 N.W.2d 476, in which we held that the notice at issue is not a required element under WIS. STAT. § 48.415(4)(a) when the denial of physical placement occurred because of a family court order as opposed to a juvenile court order. At a subsequent hearing, the court found grounds to terminate Anita's parental rights and at a dispositional hearing the court terminated Anita's parental rights. Anita's counsel filed a notice of intent to pursue postdispositional relief. Appellate counsel subsequently filed a no-merit report.

¶5 On appeal, we reviewed counsel's no-merit report and were unable to determine whether any meritorious issues existed because the report failed to address whether a constitutional challenge to WIS. STAT. § 48.415(4) may have arguable merit. We then stated: "Because Anita's trial counsel did not raise this issue in the circuit court, any postdisposition challenge to the constitutionality of § 48.415(4) must be framed under the rubric of ineffective assistance of counsel." Subsequently, we converted the appeal to a merit appeal. Ultimately, Anita raised issues concerning equal protection and ineffective assistance of counsel in postdisposition motions; however, the circuit court denied both motions.

DISCUSSION

¶6 Although we previously indicated in our order on counsel's no-merit report that a challenge to the constitutionality of WIS. STAT. § 48.415(4)(a) brought for the first time on appeal would have to be raised in the context of ineffective assistance of counsel, Anita concedes that her counsel was not

ineffective. Instead, Anita raises two direct constitutional challenges to § 48.415(4)(a).[4] First, she asserts that § 48.415(4)(a), as interpreted by ***Kimberly S.S.***, violates equal protection because it requires a notice element when the underlying denial of physical placement originated from a juvenile court order, but requires no notice element when the underlying denial of physical placement originated from a family court order.[5] She also argues that § 48.415(4)(a) violates her due process rights because her parental rights were terminated without proper protections and without a finding that she is unfit. Both issues are raised for the first time on appeal.

¶7 The general rule is that we will not address issues raised for the first time on appeal. ***City of Mequon v. Hess***, 158 Wis. 2d 500, 506, 463 N.W.2d 687 (Ct. App. 1990). This is especially true when the issues raised involve a claim that

---

[4] WISCONSIN STAT. § 48.415 provides the grounds for involuntary termination of parental rights. Subsection (4) governs the termination of parental rights based on the grounds of "[c]ontinuing denial of periods of physical placement or visitation" and requires proof of the following:

> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

WIS. STAT. § 48.415(4)(a)-(b).

[5] We use the phrase "family court order" to refer to court orders entered under Chapter 767 of the Wisconsin Statutes. The phrase "juvenile court order" refers to those orders entered under either Chapter 48 (Children's Code) or Chapter 938 (Juvenile Justice Code) of the Wisconsin Statutes.

a statute is unconstitutional. ***Tomah-Mauston Broad. Co. v. Eklund***, 143 Wis. 2d 648, 657-58, 422 N.W.2d 169 (Ct. App. 1988).

¶8 It is, however, within our discretion to consider constitutional issues that are first raised on appeal. ***Laufenberg v. Cosmetology Examining Bd.***, 87 Wis. 2d 175, 187, 274 N.W.2d 618 (1979). We "will consider such an issue if it is in the interests of justice to do so, if both parties have had an opportunity to brief the issue and if there are no factual issues that need resolution." ***Id.***

¶9 Here, we decline Anita's invitation to exercise our discretion to consider whether WIS. STAT. § 48.451(4)(a) violates equal protection. Consideration of this issue is not in the interest of justice because the circuit court provided Anita with actual notice that continued denial of physical placement could constitute grounds for the termination of her parental rights. In any event, Anita does not explain or develop an argument as to why it is in the interest of justice to consider this particular constitutional question first raised on appeal. Accordingly, we decline to consider Anita's equal protection challenge.

¶10 Similarly, we decline to exercise our discretion to reach Anita's due process challenge to WIS. STAT. § 48.415(4)(a), which she also raises for the first time on appeal. As we understand it, Anita argues that she was denied due process because (1) a court has never made a finding that she was unfit, (2) the 2011 court order that denied her placement did not list conditions to resume visitation, and (3) she did not receive written notice as required by law. Addressing whether any of these issues violated her due process rights, however, is not in the interest of justice because each of her arguments lack arguable merit on other grounds.

¶11 First, Anita's argument that no court has ever deemed her unfit is disingenuous because the court's 2011 order implicitly, if not explicitly, indicated

that Anita was unfit. The order stated that Anita was "not capable of performing parental duties or making decisions in the best interest of the children" and that "contact with [Anita] will endanger the physical, emotional and mental health of the children." The order also states that "it would be detrimental [for the children] to have any contact until the mother takes steps to deal with the issues that make the children fearful." These words effectively and unambiguously convey to Anita that she is unfit to parent her two children.

¶12 Second, the circuit court's 2011 order provided primary placement of the children to Derrick "until further order of the court." While the order does not list specific conditions that Anita must meet to resume visitation, the order clearly indicates that the denial of placement could be modified. Here, Anita made no attempt to seek such modification.

¶13 Finally, Anita was given the written notice described above and she refused to sign the notice. The court acted in accordance with WIS. STAT. § 767.41(4)(cm)[6] when it provided the notice to Anita.

¶14 Accordingly, we decline to consider the issue of whether WIS. STAT. § 48.415(4)(a) violates Anita's due process rights.[7]

---

[6] WISCONSIN STAT. § 767.41(4)(cm) provides: "If a court denies periods of physical placement under this section, the court shall give the parent that was denied periods of physical placement the warning provided under s. 48.356."

Although we conclude that Anita received notice in accordance with WIS. STAT. § 767.41(4)(cm), we note that whether the court was required to provide Anita the notice at issue is not clear. This is because the court denied Anita placement by modifying a prior order in accordance with WIS. STAT. § 767.451 and curiously, § 767.451 does not appear to have a notice requirement similar to that of § 767.41(4)(cm).

CONCLUSION

¶15 For the above reasons, we affirm the orders of the circuit court that terminated Anita P.'s parental rights to her children, Amber P. and Ashley P.

By the Court.—Orders affirmed.

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

[7] There is another reason why we refuse to exercise our discretion to consider Anita P.'s constitutional claims. The record is devoid of any evidence that Anita has given notice to the attorney general of her constitutional claims, as required by WIS. STAT. § 806.04(11), and failure to do so deprives this court of subject matter jurisdiction over this appeal. *See* ***Walt v. City of Brookfield***, 2015 WI App 3, ¶36 n.7, 359 Wis. 2d 541, 859 N.W.2d 115.