COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2044

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF HONAI A.D-C., A PERSON UNDER THE AGE OF 18: SANDE D.-O.,

PETITIONER-RESPONDENT,

V.

PAUL E.K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed.*

VERGERONT, J.[1] Paul E.K. appeals an order terminating his parental rights to Honai A.D-C. Subsequent to a petition for termination of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

parental rights filed by Sande D.-O., the mother of Honai, the trial court determined that Paul had been denied periods of physical placement by a court order in an action affecting the family and at least one year had passed since the order was issued without modification to permit physical placement. The court also determined that Paul was unfit to continue as a parent and that termination of his parental rights was in the best interests of Honai A.D-C. On appeal, Paul contends that there was no court order denying him periods of physical placement within the meaning of § 48.415(4), STATS.,[2] that the prior orders issued by the court did not contain a notice as required by § 767.24(4)(cm), STATS.,[3] and that Sande failed to join a necessary party, a representative of the State of Wisconsin.

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[2] Section 48.415(4), STATS., provides in pertinent part:

> (4) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
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> (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, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
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> (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.

[3] Section 767.24 (1) and (4), STATS., provides in pertinent part:

> (1) GENERAL PROVISIONS. In rendering a judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (e), the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section.
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> ….

(continued)

We affirm the order terminating Paul's parental rights. We conclude that the court order issued on July 7, 1995, terminating telephone visitation between Paul and Honai for the remaining period of his incarceration and allowing only correspondence through a social worker is an order denying Paul's physical placement within the meaning § 48.415(4), STATS. We also conclude that because that order was a modification of the paternity judgment, § 767.325, STATS., rather than § 767.24, STATS., applies, and § 767.325 does not require the warning required by § 767.24(4)(cm). Finally, we conclude that Sande was not required to join a representative of the State.

BACKGROUND

Honai was born on September 5, 1990. Paul was adjudicated the father in a paternity action filed in Portage County. The judgment declaring him

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> (4) ALLOCATION OF PHYSICAL PLACEMENT. (a) Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2), the court shall allocate periods of physical placement between the parties in accordance with this subsection. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5).
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> (b) A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.
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> (c) No court may deny periods of physical placement for failure to meet, or grant periods of physical placement for meeting, any financial obligation to the child or the former spouse.
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> (cm) 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.
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> (d) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody and physical placement rights to provide the notice required under s. 767.327 (1).

the father, issued on July 10, 1991, awarded custody to Sande and allowed "[p]eriods of physical placement hereafter referred to as visitation"[4] to Paul, limited by a number of conditions. Among others, the visitation had to be supervised, approved by one of certain county agencies, and could be no more frequent than once a month. At the time, Paul lived in New Jersey.

Sande, Paul and a guardian ad litem for Honai stipulated to a modification of the terms of the paternity judgment, which was adopted by the court pursuant to an order entered on or about November 26, 1994. The stipulation provided that its terms would supersede the terms of the paternity judgment relating to physical placement. Under the stipulation, Paul was allowed telephone visitation with Honai while he was incarcerated, with a social worker to be present with Honai during these contacts. If Honai responded unfavorably to the telephone visitations, they were to be discontinued and no further visitation was to be attempted until Paul was no longer incarcerated. And, if the telephone visits went well and Honai expressed a desire to visit Paul, she would be allowed to do so providing that she did not visit him on prison grounds and was accompanied by a social worker. Upon his release from prison, Paul and Honai were to participate in the reunification program before any personal visitation took

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[4] "Physical placement" is defined in § 767.001(5), STATS., as:

> (5) "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

"Visitation" is not defined in ch. 767, STATS. We use "visitation" in this opinion when the orders we are discussing use that term.

place; Paul was to be re-evaluated then and visitation would be established based on those results.

On July 7, 1995, the court entered an order terminating telephone visitation between Paul and Honai for the remaining period of his incarceration and permitting Paul to address mail to Honai though a social worker, who was to share them with Honai. This order stated that Paul had requested that the stipulation be modified on the ground the Sande was interfering with his telephone visitation; that the court had appointed a guardian ad litem to investigate Paul's concerns and that the guardian ad litem had reported that he could find no inference of improper behavior by Sande, the telephone visits had gone unfavorably, and he recommended cessation of the telephone visits. In an order issued on December 12, 1996, the court denied Paul's motion "to enforce and modify the court judgment," finding that there was no contemptuous behavior by Sande or the county agency and concluding that there was no basis to modify the July 7, 1995 order.

On December 4, 1996, Sande filed a petition for termination of Paul's parental rights on two grounds: continuing denial of physical placement and failure to assume parental responsibility. In the affidavit supporting the petition, Sande averred that Paul had never seen Honai, never accepted or exercised parental responsibility, and never had a substantial parental relationship with Honai, although he knew he was her father.

The parties agreed that the court would first decide whether there were grounds for termination on the basis of a continuing denial of physical placement, because the facts pertinent to a resolution of that issue were not disputed. The court determined that the stipulation and order entered on

November 26, 1994, and the July 7, 1995 order were both orders denying Paul physical placement. The court also concluded that the warning required by § 767.24(4)(cm), STATS., when a court denies a parent physical placement, did not apply to paternity actions and therefore was not required for a termination of Paul's parental rights under § 48.415(4). STATS. Having concluded that grounds for termination existed under § 48.415(4), the court decided that termination of Paul's parental rights was in Honai's best interests, and entered an order terminating his parental rights.

DISCUSSION

On appeal, Paul contends that he was never denied physical placement by court order. Alternatively, he argues that, since none of the orders regarding his contact with Honai warned him that if that order were in effect for more than one year it would be grounds for termination under § 48.415(4), STATS., the requirements of § 48.415(4) were not met. Such a warning is required, in Paul's view, because it is required under § 767.24(4)(cm), STATS., and § 767.51(6), STATS., provides that § 767.24, (and certain other sections of ch. 767, STATS.) "where applicable, shall apply to a judgment or order under this [paternity] section."[5]

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[5] Section 767.51(3) and (6), STATS., provides in pertinent part:

> 767.51 Paternity judgment.
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> ….
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> (3) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the legal custody and guardianship of the child, periods of physical placement, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child.

(continued)

Resolution of these issues presents a question of statutory interpretation based on undisputed facts. This is an issue of law, which we review de novo. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis.2d 680, 703, 530 N.W.2d 34, 43 (Ct. App. 1995). We focus on the order of July 7, 1995, because that is dispositive. We conclude that this order denied Paul physical placement and that it was in effect for more than one year. We also conclude that this order did not need to contain a warning that the order, if in effect for one year, could be the basis for a termination of parental rights. Such a warning is not required by the plain terms of §§ 767.24(4)(cm) and 767.51(6), STATS., because this order was a revision of a physical placement order, and § 767.325, STATS., is therefore the applicable statute. Section 767.325, unlike § 767.24, contains no provision for a warning in an order denying physical placement.

We begin with the statutory ground for termination. Section 48.415(4), STATS., establishes these requirements for a termination of parental rights under this subsection:

> (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, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
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> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was

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> ….
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> (6) Sections 767.24, 767.245, 767.263, 767.265, 767.267, 767.29, 767.293, 767.30, 767.305, 767.31, 767.32 and 767.325, where applicable, shall apply to a judgment or order under this section.

> issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

With respect to § 48.415(4)(a), STATS., both parties agree that the potentially applicable portion is that "the parent has been denied periods of physical placement in an action affecting the family…." A paternity action is an action affecting the family. Section 767.02(1)(L), STATS. The statutes following "has been denied visitation under an order under …." refer to proceedings for children in need of protection and services (§§ 48.435, 48.357, 48.363, STATS.) or juvenile proceedings (§§ 938.357, 938.363, 938.356(2), STATS.). They have no application here because there have been no such proceedings concerning Honai.

"Physical placement" is defined in ch. 767, STATS., Actions Affecting the Family as:

> 767.001 Definitions.
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> ….
>
> (5) "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

The July 7, 1995 order terminated Paul's telephone visitation and permitted only written contact between Honai and Paul. This certainly denied Paul physical placement. We can see no other reasonable interpretation of this order.

Paul concedes that telephone contact is not physical placement and, presumably, he would also concede that written contact is not physical placement. However, he argues that this order is nevertheless not an order denying physical placement because it does not use the phrase "deny physical placement" and

because it does not contain a finding that physical placement with Paul would endanger Honai's health. The first argument requires little response. Section 48.415(4), STATS., does not require that an order denying physical placement use any particular phrase and we decline to read such a requirement into the statute. The plain language of the order denies Paul all contact with Honai except by mail. That is a denial of physical placement.

With respect to the second argument, Paul is referring to certain findings a court must make under ch. 767, STATS., when denying physical placement. By virtue of § 767.51(6), STATS., the provisions of §§ 767.24 and 767.325, STATS., apply in a paternity proceeding "where applicable."[6] Section 767.24 concerns the provisions for legal custody and physical placement that a court "shall make … in rendering a judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(e) [custody action]." Section 767.325 governs "modifications of legal custody and physical placement orders." Reading § 767.51(6) together with §§ 767.24 and 767.325, we conclude that, unless inconsistent with the statutory provisions governing paternity actions, or unless irrelevant to them, § 767.24 applies to legal custody and physical placement provisions in judgments of paternity, and § 767.325 applies to modifications of those provisions. Since the July 5, 1995 order was a modification (to a modification—the November 27, 1994 order) of the provisions in the paternity judgment concerning physical placement, § 767.325, not § 767.24, is the pertinent section.

[6] The other sections of ch. 767, STATS., referenced in § 767.51(6), STATS., concern child support.

Section 767.325(4), STATS., permits denial of physical placement "at any time" if a court "finds that the physical placement rights would endanger the child's physical, mental, or emotional health." (The counterpart for denial of physical placement in the initial judgment is § 767.24(4)(b), STATS.[7]) We conclude that the July 7, 1995 order meets this requirement. Under the November 26, 1994 order, telephone visitation was permitted but was to continue only if Honai responded favorably. No in-person visitation was permitted until Paul was released from prison, and even then in-person visitation was not assured; an evaluation had to take place first and the results of that would determine whether there was in-person visitation and the nature of it. Some telephone contacts occurred, but after an investigation the guardian ad litem recommended that they be discontinued because they had gone unfavorably. Although the court did not use the words of § 767.325(4), we conclude that the only reasonable interpretation of the July 7, 1995 order, in the context of the prior proceedings, is

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[7] Section 767.325(4), STATS., provides in pertinent part:

> (4) DENIAL OF PHYSICAL PLACEMENT. Upon petition, motion or order to show cause by a party or on its own motion, a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

Section 767.24(4)(b), STATS., provides in pertinent part:

> (4) ALLOCATION OF PHYSICAL PLACEMENT. (a) Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2), the court shall allocate periods of physical placement between the parties in accordance with this subsection. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5).
>
> (b) A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.

that the court was determining that the telephone contacts were harmful to Honai's emotional health.[8] Just as we concluded that an order denying physical placement need not use those exact words to come within § 48.415(4)(a), STATS., so also we conclude that the findings supporting such an order under § 767.325(4) need not contain the precise terms used in that subsection.

We now address Paul's argument that the July 7, 1995 order cannot constitute grounds for termination under § 48.415(4), STATS., because it does not contain a warning on the potential effect of such an order on termination of his parental rights. Paul points to § 767.24(4)(cm), STATS., as the source of this requirement. That subsection provides:

> (cm) 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.[9]

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[8] We do not intend to suggest that the telephone visitation was physical placement. We agree with the trial court that the November 26, 1994 order, which conditionally permitted telephone visitation at that time but prohibited any in-person contact until Paul was released from prison, was an order denying physical placement.

[9] Section 48.356, STATS., provides:

> Duty of court to warn. (1) Whenever the court orders a child to be placed outside his or her home or denies a parent visitation 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 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 outside the home or denies visitation under sub. (1) shall notify the parent or parents of the information specified under sub. (1).

However, as we have explained above, § 767.325, STATS., is the section applicable to modifications of physical placement orders. That section contains no such requirement, and there is nothing in the language of § 767.325 that references § 767.325(4)(cm). As we have noted above, § 767.325(4) contains essentially the same required finding to support a denial of physical placement as does § 767.24(4)(b), STATS., but the warning required by § 767.24(4)(cm) is nowhere repeated or referenced in § 767.325. In interpreting a statute, we begin with the plain language, and if it is clear, our inquiry stops there. ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 201, 496 N.W.2d 57, 61 (1993). The plain language of § 767.325 does not require a warning when provisions in an original judgment concerning physical placement are modified to deny physical placement, and there is nothing in the sections governing paternity actions that require such a warning. We therefore conclude that the July 7, 1995 order did meet the requirements of § 48.415(4)(a), STATS.

There is no dispute that if § 48.415(4)(a), STATS., is satisfied para. (b) is satisfied. The July 7, 1995 order was entered more than a year before the petition for a termination of parental rights was filed. Not only was the July 7 order not modified, but on December 12, 1996, the court entered an order expressly finding that there was no basis to modify that order or any previous orders.

Paul also argues that Sande failed to join a necessary party—a representative of the State—and we should reverse on that basis. Sande responds that Paul did not raise this issue before the trial court. Paul does not contradict this in his reply brief, and we therefore take it as true. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). We generally do not consider issues not raised before the trial court, *see* ***County of Columbia v.***

Bylewski, 94 Wis.2d 153, 171, 288 N.W.2d 129, 138-39 (1980), and that is particularly true where the claimed error, if it was error, could have been corrected by the trial court. *See* ***State v. Holt,*** 128 Wis.2d 110, 123, 382 N.W.2d 679, 686 (Ct. App. 1985).

Even were we to consider this issue, we would conclude it does not provide a basis for reversal. Section 48.42, STATS., governs the procedure for termination of parental rights. Section 48.42(1) permits either a child's parent or an agency or person authorized by § 48.25, STATS., (including a "district attorney, corporation counsel or other appropriate official" § 48.25(1)) or § 48.835, STATS., (a relative, in connection with adoption by a relative) to file a petition for termination of parental rights. Section 48.42(2) prescribes the person who must be served with the summons and petition, but does not mention a representative of the State.[10]

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[10] Section 48.42(2), STATS., provides in pertinent part:

> (2) WHO MUST BE SUMMONED. Except as provided in sub. (2m), the petitioner shall cause the summons and petition to be served upon the following persons:
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> (a) The parent or parents of the child, unless the child's parent has waived the right to notice under s. 48.41 (2) (d).
>
> (b) If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60 and paternity has not been established:
>
> 1. A person who has filed a declaration of interest under s. 48.025.
>
> 2. A person or persons alleged to the court to be the father of the child or who may, based upon the statements of the mother or other information presented to the court, be the father of the child unless that person has waived the right to notice under s. 48.41 (2) (c).

(continued)

Paul relies on § 48.09(5), STATS., as authority for his argument. That section provides:

> 48.09 Representation of the interests of the public. The interests of the public shall be represented in proceedings under this chapter as follows:
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> (5) By the district attorney or, if designated by the county board of supervisors, by the corporation counsel, in any matter arising under s. 48.13 or 48.977. If the county board transfers this authority to or from the district attorney on or after May 11, 1990, the board may do so only if the action is effective on September 1 of an odd-numbered year and the board notifies the department of administration of that change by January 1 of that odd-numbered year.
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> (6) By any appropriate person designated by the county board of supervisors in any matter arising under s. 48.14.

We conclude that this section speaks to which person represents the State when the State is a party to an action under ch. 48, STATS. It is unreasonable to construe this section as requiring that such persons represent the State in every proceeding under ch. 48, even if the State is not a party to the proceeding under the sections specifying the procedure for the particular type of proceeding and even if the State has not chosen to become a party. Therefore, § 48.09 does not require that Sande join the State or a representative of the State.

> 3. A person who has lived in a familial relationship with the child and who may be the father of the child.
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> (c) The guardian, guardian ad litem and legal custodian of the child.
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> (d) Any other person to whom notice is required to be given by ch. 822, excluding foster parents and treatment foster parents.
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> (e) To the child if the child is 12 years of age or older.

In summary, we conclude that the court correctly determined that the requirements of § 48.415(4), STATS., were met, although it reached this conclusion for different reasons than we have. We also conclude that the failure of Sande to join a representative of the State as a party is not a basis for reversal. We therefore affirm the order terminating Paul's parental rights.

By the Court.—Order affirmed.

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