

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 16, 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 No. 2014AP2431**

**Cir. Ct. No. 2013TP10**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO MATTHEW D.,  
A PERSON UNDER THE AGE OF 18:**

**ST. CROIX COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**MICHAEL D.,**

**RESPONDENT,**

**JUANITA A.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for St. Croix County:  
EDWARD F. VLACK III, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.<sup>1</sup> Juanita A. appeals an order terminating her parental rights to Matthew D.<sup>2</sup> Juanita argues the termination order must be vacated because the last order placing Matthew outside the home did not contain the requisite written notice of the applicable grounds for termination and conditions for return pursuant to WIS. STAT. §§ 48.356(2) and 48.415(2)(a)1. We reverse and remand for vacation of the termination order and dismissal of the termination of rights petition.

### BACKGROUND

¶2 Matthew was born on March 23, 2009. On March 31, 2009, he was removed into foster care by a temporary physical custody order. He was returned to Juanita on May 26, 2009. On June 12, 2009, the St. Croix County circuit court entered an order deeming Matthew a child in need of protection or services (CHIPS). The court allowed Matthew to remain with Juanita, subject to conditions.<sup>3</sup> The circuit court granted several extensions of the original dispositional order.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Matthew's father, Michael D., consented to the voluntary termination of his parental rights to Matthew; however, his termination of parental rights (TPR) was stayed pending the outcome of Juanita's contested TPR proceedings.

<sup>3</sup> The conditions provided:

That Matthew continue with regularly scheduled appointments with the Public Health Nurse.

That Matthew not have unsupervised contact with Michael [D.] until the Department [St. Croix County Department of Health and Human Services] can further investigate the past allegations made on Michael.

(continued)

¶3 On August 2, 2011, the court granted a request to place Matthew in a foster home and issued a dispositional order for a change of placement.<sup>4</sup> The court conducted a hearing concerning a request for revision of the dispositional order on October 5, 2011, and issued a revision of the August 2 dispositional order on October 11, 2011. The October 11 revision order incorporated fourteen conditions for Matthew's return.<sup>5</sup> Also included in the revision was a "Notice Concerning

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That Juanita contact the on-going social worker as arranged to discuss her child's welfare, case progress, individual progress and to arrange visits.

That Juanita continue to work with a parent aide on parenting skills until determined unnecessary by the parent aide and the social worker.

That Juanita cooperate with the assigned social worker, including attending requested meetings with the social worker and provide her current address, telephone number and employment to the Department.

[...]

The Department shall provide specific recommendations to both parents to address conditions for the return of the child. Said recommendations shall be put forth in writing.

<sup>4</sup> The order for the change of placement included the court's finding that placement in Juanita's home at that time was contrary to Matthew's welfare because of Juanita's "inability to provide appropriate care and supervision, lack of supervision, as well as not capable of maintaining an appropriate environment and could not get him if he was in danger." The court also found reasonable efforts to prevent removal were made by the Department.

<sup>5</sup> Those conditions were:

1. Juanita A[.] shall demonstrate the ability to supervise Matthew at all times. The matter shall be set for a 45 day review.
2. Juanita A[.] shall demonstrate the ability to provide, enforce and follow through with age appropriate discipline techniques with Matthew, when necessary.
3. Juanita A[.] shall continue to learn parenting skills with the assistance of the Parent Aide with St. Croix County Family & Children's and demonstrate the ability to use these skills.

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4. Juanita A[.] shall provide a structured routine, including but not limited to, meals, naps, bedtime, bathing, etc., for Matthew and follow through with this routine.

5. Juanita A[.] shall keep her home free of all safety hazards that may endanger Matthew's health and/or safety, out of his reach including, but not limited to, all sharp objects, food that has been out longer than 2 hours, raw meat, heavy objects that are at risk of falling on or near Matthew, plastic bags, hangers, electric cords, electric outlets, and medications, and will demonstrate the ability to follow through.

6. Juanita A[.] shall learn and practice basic housekeeping skills and basic home management skills which will also help in keeping the home free from safety hazards. Juanita will demonstrate the ability to keep her home relatively picked up to ensure safety.

7. Juanita A[.] shall demonstrate the ability to keep Matthew safe while playing outside by following him where he is playing, holding his hand when walking to different areas and staying within 10 feet or less of him in non-enclosed settings.

8. Juanita A[.] shall follow through with Birth to 3, Early Head Start and Speech Therapy recommendations when it comes to teaching Matthew verbal skills and having Matthew use his words to enhance his speech and communications skills. Juanita A[.] will demonstrate this ability without the assistance, guidance or support of other individuals.

9. Juanita A[.] shall follow through with all recommendations made by her physicians when it pertains to her physical health and well-being. Juanita A[.] shall follow through with basic hygiene and self-care techniques to improve overall basic functioning and health.

10. Juanita A[.] shall sign any and all releases deemed necessary and appropriate by the Department. This includes releases to be signed for the social [w]orker to discuss Juanita's health and well-being with her various health care providers. These will be signed at the time requested. If a request is deemed by Anita [sic] to be unreasonable the Court shall be notified for a review hearing to be scheduled as soon as possible.

11. Juanita A[.] shall not have any other individuals living with her (aside from her eldest son ... or her sister ...) without permission of the social worker and GAL.

(continued)

Grounds to Terminate Parental Rights,” signed by Juanita on October 5. That notice warned that Juanita’s rights to Matthew could be terminated against her will, based on the ground of continuing CHIPS. The notice stated the court informed Juanita orally of the applicable grounds for termination of parental rights, and that she had received a copy of the notice. The parties agree the revision order was the first and only order to incorporate a written warning of the applicable grounds for which Juanita’s parental rights could be terminated and the conditions she must meet for Matthew’s return, as required by Wis. Stat. §§ 48.356(2) and 48.415(2)(a)1.

¶4 Between the original dispositional order removing Matthew from Juanita’s home on August 2, 2011, and the filing of the petition to terminate Juanita’s parental rights on June 18, 2013, the court conducted multiple hearings and issued multiple orders. The court’s orders included the October 11 revision of the August 2 dispositional order, two extension orders filed December 19, 2011 and September 11, 2012, and permanency plan orders filed June 22, 2012 and June 5, 2013.

¶5 St. Croix County petitioned to involuntarily terminate Juanita’s parental rights to Matthew on June 18, 2013. The County alleged continuing

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12. Warnings for Termination of Parental Rights shall be administered to Juanita A[.]

13. Juanita A[.] shall meet with the assigned social worker as deemed necessary and appropriate and will also acknowledge unannounced home visits.

14. In all other respects, the current CHIPS Court Order recommendations are still in effect and will continue to be followed.

CHIPS, pursuant to WIS. STAT. § 48.415(2), as well as a failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6).

¶6 The court conducted a fact-finding hearing December 16-18, 2013. Juanita moved to dismiss, arguing the County had not proven either ground for termination, and asserting the written TPR warnings had not been provided to Juanita in the extension order filed September 11, 2012, as required by WIS. STAT. § 48.356. The circuit court denied Juanita's motion to dismiss in a written decision issued January 27, 2014. The court detailed the procedural history of the case and determined "that the notice given to [Juanita] was sufficient under § 48.356(2) to inform her that her parental rights were in danger of being terminated and advising her of the conditions necessary for the return of the child." It explained:

Although only one TPR warning was written, this Court finds it is not fatal that the 2012 extension order did not contain written TPR warnings. From the date of the October 5, 2011, extension hearing, the Respondent appeared before the court, with counsel, on at least ten different occasions related to this matter.<sup>6</sup> She was given

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<sup>6</sup> These ten occasions included the following seven hearings where oral warnings were required under WIS. STAT. § 48.356:

- July 28, 2011 hearing on the request for a change of placement;
- October 5, 2011 hearing on the request to revise the dispositional order;
- December 6, 2011 extension hearing;
- December 12, 2011 extension hearing;
- June 22, 2012 permanency plan hearing;
- September 6, 2012 extension hearing;

(continued)

a written TPR warning on October 5, 2011, and given oral TPR warnings on three occasions including: October 5, 2011, December 12, 2011, and September 6, 2012.

¶7 On January 31, 2014, the court found grounds to terminate Juanita’s parental rights based on CHIPS, but it also found Juanita did not fail to assume parental responsibility under WIS. STAT. § 48.415(6)(a). After two additional hearings, the court issued a permanency order on May 15, 2014, noting Juanita “continues to struggle with cognitive and physical limitations as well as ongoing health concerns that inhibits [sic] her ability to provide the appropriate supervision, care and safety of the child on a consistent basis.” The court orally terminated Juanita’s parental rights on May 23, 2014, after a dispositional hearing on May 16. The court stated:

[Juanita] has attempted to her best ability to provide Matthew’s basic needs but without a lot of services and even with the services it’s not possible and that was the reason for the out of home placement. Since that out of home placement as I mentioned before [Matthew has] caught up developmentally. Again, she’s tried to the best of her ability. But even with the assistance has not met Matthew’s needs in my opinion.

The court granted the petition for termination, and Juanita now appeals.

## DISCUSSION

¶8 Wisconsin law requires that when a child is placed outside the home, his or her parents must be provided oral and written notice describing any applicable grounds for termination of parental rights, as well as the conditions necessary for the child to be returned to the home. WIS. STAT. § 48.356.

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- June 5, 2013 permanency plan hearing.

WISCONSIN STAT. § 48.356 establishes the court's duty to warn and states, in relevant part:

(1) Whenever the court orders a child to be placed outside his or 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 and whenever the court reviews a permanency plan under s. 48.38(5m), 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 or expectant mother of the information specified under sub. (1).

(Emphasis added.) The second relevant statute regarding these vital notifications to parents at risk of TPR is WIS. STAT. § 48.415(2), which defines the grounds for involuntary termination of parental rights and requires that the notice requirement in WIS. STAT. § 48.356(2) be met:

**Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights ... Grounds for termination of parental rights shall be one of the following: ... (2) Continuing need of protection or services, which shall be established by proving any of the following: (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home *pursuant to one or more court orders* under s. 48.345, 48.347, 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).*

WIS. STAT. § 48.415(2) (emphasis added).



¶9 Juanita argues the termination order must be vacated because the last order placing Matthew outside the home did not contain the required written TPR warnings and conditions for his return.<sup>7</sup>

¶10 She asserts the outcome of her case is controlled by *Waukesha County v. Steven H.*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. *Steven H.* involved a father’s challenge to his TPR proceedings when some of the orders placing his daughter outside the home did not contain written notices prescribed by WIS. STAT. § 48.356(2), but the last order did include the statutorily prescribed notice. *Id.*, ¶23. In *Steven H.*, the supreme court considered whether WIS. STAT. §§ 48.356(2) and 48.415(2) require that each and every order placing a child outside the home must contain the written notice prescribed by § 48.356(2). *Id.*, ¶2. The court “hasten[ed] to point out that although § 48.356(2) speaks of written notice in *any order* placing the child outside the home, § 48.415(2) speaks of *one or more court orders* placing the child containing the written notice.” *Id.*, ¶22.

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<sup>7</sup> The written notice of the applicable grounds for TPR and conditions for return required by WIS. STAT. §§ 48.356 and 48.415(2) is confined to orders placing a child outside his or her home in certain circumstances. Those circumstances are defined in Section 48.356(1) as when the child has been adjudged to be in need of protection or services under one of five statutory provisions: §§ 48.345, 48.347, 48.357, 48.363, or 48.365. Section 48.345 concerns the entry of orders directing the disposition of children adjudged to be in need of protection or services (CHIPS dispositional orders). Section 48.347 is not relevant here. Section 48.357 concerns placement changes after a dispositional order has been entered. Section 48.363 concerns revision of dispositional orders. Section 48.365 concerns the extension of dispositional orders, including dispositional orders previously revised.

Here, the court entered a CHIPS dispositional order on August 2, 2011 placing Matthew outside the home. The dispositional order was revised in an order filed October 11, 2011. The court filed extension orders December 19, 2011 and September 11, 2012. The parties do not dispute that only the revised order filed October 11, 2011 contained the written TPR warnings and the conditions for return. *See, supra*, ¶4.

¶11 The *Steven H.* court examined previous cases interpreting WIS. STAT. §§ 48.356(2) and 48.415(2). It distinguished *D.F.R. v. Juneau County Department of Social Services*, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), where none of the orders placing the child outside the home contained requisite notice, and *Marinette County v. Tammy C.*, 219 Wis. 2d 206, 579 N.W.2d 635 (1998), where all orders placing the child outside the home contained the requisite notice, but some temporary physical orders did not. *Steven H.*, 233 Wis. 2d 344, ¶¶26-28. The court stated, “We do not agree with the court of appeals in *D.F.* that the statutory notice must be given ‘each time an order places a child outside his or her home’ in order to continue a termination of parental rights proceeding.” *Id.*, ¶29 (citation omitted). The court explained,

Although WIS. STAT. § 48.356(2) reads that “any order” placing a child outside the home is to include the statutorily prescribed notice, § 48.415(2) reads that “one or more orders” placing a child outside the home is to include the statutorily prescribed notice. Reading §§ 48.356(2) and 48.415(2) together, and in light of the legislative purpose expressed in § 48.01(1)(a) by the 1995 revisions in the Children’s Code, we conclude that these statutes do not require the statutorily prescribed written notice to be in *every order* placing a child outside the home.

*Id.*

¶12 The court continued its discussion of the inconsistent statutory language of the two provisions, and examined the legislative purpose of the Children’s Code. *Id.*, ¶¶30-33. It concluded:

The notice required by WIS. STAT. §§ 48.356(2) and 48.415(2) is meant to ensure that a parent has adequate notice of the conditions with which the parent must comply for a child to be returned to the home. The notice is also meant to forewarn parents that their parental rights are in jeopardy. In this case Steven H. received notice one year before the filing of the petition to terminate parental rights and was thus adequately informed of the steps he had to

take to avoid termination and was given time in which to take those steps. Based on the statutory language and the expressed legislative purpose, we conclude that [the statutes] were satisfied in this case ....

*Id.*, ¶37. Ultimately, the court held, “[W]e conclude that WIS. STAT. §§ 48.356(2) and 48.415(2) require that the last order specified in 48.356(2) placing a child outside the home, which must be issued at least six months before the filing of the petition to terminate parental rights, must contain the written notice prescribed by § 48.356(2).” *Steven H.*, 233 Wis. 2d 344, ¶3. Juanita argues *Steven H.* is binding precedent mandating that the last order affecting placement must contain the written notice of the possibility of TPR and the conditions for return in order for TPR proceedings to be valid.

¶13 The County argues *Steven H.* did not create a categorical rule that the last order must contain the written notice. It contends the court did not exclude other possibilities for providing notice to a parent facing TPR so long as a parent was given notice that his or her rights may be terminated in the future and provided an opportunity to conform his or her conduct to avoid TPR. We disagree. The supreme court’s language was unequivocal. The last order must contain the notice prescribed by WIS. STAT. § 48.356(2).

¶14 Nevertheless, in arguing Juanita received adequate notice despite the last order’s noncompliance with WIS. STAT. § 48.356(2), the County directs us to a court of appeals case issued shortly after *Steven H.* In *Waushara County v. Lisa K.*, 2000 WI App 145, 237 Wis. 2d 830, 615 N.W.2d 204, we concluded that not incorporating the conditions for return in the last order did not require dismissal of the TPR action. We detailed the notice provided to the mother and

found she had received adequate notice sufficient to satisfy the statutory requirements.<sup>8</sup> *Id.*, ¶¶9-10.

¶15 Here, TPR proceedings were initiated after Juanita was warned in writing of the applicable grounds for termination and the conditions for return on only one occasion—importantly, not in the last order affecting placement prior to the petition for involuntary TPR. Despite the circuit court’s assertion that Juanita was provided adequate notice because of the number of proceedings conducted regarding Matthew’s placement, WIS. STAT. § 48.415(2)(a)1. explicitly requires more than oral warnings to satisfy the grounds for involuntarily terminating parental rights.<sup>9</sup> *Lisa K.* notwithstanding, we conclude that *Steven H.* directly

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<sup>8</sup> *Lisa K.* distinguished its own facts from those in *Waukesha County v. Steven H.*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, and concluded:

From August 11, 1997, to July 19, 1999, the trial court held five hearings concerning Lisa K.’s children. Between those dates, Lisa K. received on four occasions requirements that she was to meet, on three occasions she received the conditions necessary for the return of her children to her, and on four occasions a notice or warning of the grounds for the termination of her parental rights. Considering *Steven H.*’s dual focus on adequate notice of the conditions with which a parent must comply and the warning that parental rights are in jeopardy, we conclude that Lisa K. had more than adequate notice of what was expected of her for the return of her children to her, and was more than adequately forewarned that her parental rights were in jeopardy. Thus, it is not relevant in this case that the final order of July 19, 1999, did not contain a description of those conditions she must meet to regain custody of her children.

*Waushara Cnty. v. Lisa K.*, 2000 WI App 145, ¶10, 237 Wis. 2d 830, 615 N.W.2d 204.

<sup>9</sup> Notably, the oral warnings required by WIS. STAT. § 48.356(1) were also insufficient here. As previously detailed, there were seven hearings that required oral warnings of the possibility of TPR and the conditions for return. *See, supra*, footnote 6. Juanita was provided oral warnings at only three of those hearings, most recently at the September 6, 2012 extension hearing. She was not provided oral warnings at the subsequent June 5, 2013 permanency plan hearing.

controls the resolution of this case, and accordingly, we follow the supreme court's unequivocal precedent mandating that the last order contain the statutorily prescribed notice. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from a prior published opinion). Written notice describing the applicable grounds for TPR and the conditions a parent must meet to ensure his or her child's return must be incorporated in the last order under WIS. STAT. § 48.356(2). That indisputably did not occur here.

¶16 We conclude the notice requirements of WIS. STAT. §§ 48.415(2)(a)1. and 48.356(2) were not satisfied when the last order concerning Matthew's placement did not include the written notice of the applicable grounds for termination or the conditions for Matthew's return.<sup>10</sup> The County therefore failed to meet its burden of proof on the continuing CHIPS ground under § 48.415(2)(a)1. Accordingly, we reverse and remand for dismissal of the termination of rights petition and vacation of the termination order.

*By the Court.*—Order reversed and cause remanded with directions.

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

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<sup>10</sup> Therefore, we need not reach Juanita's second argument that the County failed to prove the ground of continuing CHIPS by clear and convincing evidence. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

