

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2005

Cornelia G. Clark
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. 2004AP2553

Cir. Ct. No. 2002TP05

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

ASHLAND COUNTY,

PETITIONER-RESPONDENT,

v.

LISA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ashland County:
ROBERT E. EATON, Judge. *Reversed.*

¶1 PETERSON, J.¹ Lisa R. appeals an order terminating her parental rights to her son, Bruce. Lisa argues she received ineffective assistance of counsel because her attorney stipulated that, in a prior CHIPS proceeding, Lisa had received a written order containing the TPR notice required by statute. Lisa claims she did not receive notice in a written order. We are compelled by *D.F.R. v. Juneau Cty. DSS*, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), to reverse the termination order.

BACKGROUND

¶2 Ashland County sought to terminate Lisa's parental rights to her son, Bruce, alleging he was in need of continuing protection and services pursuant to WIS. STAT. § 48.415(2)(a). Among other things, the County was required to prove that, in the preceding CHIPS case, Lisa had received a written order that included the statutory termination of parental rights warnings. At the TPR fact finding hearing, Lisa's attorney stipulated that Lisa had received the warnings in a written order. The circuit court accepted the stipulation, and Lisa's rights to her son were ultimately terminated.

¶3 Lisa filed a motion alleging her attorney provided ineffective assistance by entering into the stipulation. At the CHIPS dispositional hearing on August 30, 2001, the court had ordered Bruce removed from Lisa's home and had set conditions to be met before he could return home. The clerk then had handed Lisa a written notice of potential grounds for termination of rights. The actual

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

written order resulting from the dispositional hearing was not issued until September 10. The order did not contain the grounds for termination.

¶4 In support of her ineffective assistance motion, Lisa argued that, although she received actual notice, the notice was not part of the written order removing Bruce from her home, as required by WIS. STAT. § 48.356(2). Lisa's attorney testified that she knew Lisa had received written notice and assumed it was legally adequate. The court denied Lisa's motion, stating:

Although all aspects of an order are commonly contained in one document, this is not always true. For instance, at times the Court will grant a judgment of divorce in one document and will set forth a property division and maintenance award in another document. These two documents combine to be the order of the Court. Similarly, in the case at bar, more than one document contained components of the Court's order. The documents, taken together and integrated as a whole, comprise the order of the Court. Accordingly, there was compliance with WIS. STAT. § 48.356 and it was not ineffective assistance of counsel for trial counsel to stipulate that there had been compliance.

DISCUSSION

¶5 A parent in an involuntary termination of parental rights proceeding has a right to effective assistance of counsel. *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992). The test to determine whether counsel was ineffective is the two-pronged *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *A.S.*, 168 Wis. 2d at 1005. The parent must show that: (1) trial counsel's performance was deficient, and (2) the deficient performance so prejudiced the parent as to deprive him or her of a proceeding with a fair and reliable result. *A.S.*, 168 Wis. 2d at 1005. The test presents mixed questions of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). While the trial

court's findings of fact regarding counsel's performance will not be overturned unless clearly erroneous, whether that performance fell below an objective standard of reasonableness is a question of law we review independently. *Id.* at 634. Further, whether counsel's performance prejudiced the parent is a question of law. *Id.*

¶6 As grounds for terminating Lisa's parental rights, the petition alleged WIS. STAT. § 48.415(2)(a)1:

That the child has been adjudged to be a 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 ... containing the notice required by s. 48.356(2)

WISCONSIN STAT. § 48.356, which establishes the notice requirement, states:

(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).

Here, the order placing Bruce outside Lisa's home did not contain the required notice. Without the proper notice, the County could not have proved an essential element of the grounds for terminating Lisa's parental rights. *See* WIS. STAT. § 48.415(2)(a)1; **D.F.R.**, 147 Wis. 2d at 498-99.

¶7 Our conclusion is required by **D.F.R.**, which states that WIS. STAT. § 48.356(2) is mandatory and substantial compliance is insufficient. **D.F.R.**, 147 Wis. 2d at 493. We find no support in case law or statute that multiple separate documents can satisfy the statutory notice requirement in TPR cases. According to statute and **D.F.R.**, the notice must be part of the written order. Here, the notice Lisa received was a separate document. Furthermore, harmless error cannot apply. *Id.* at 499. The **D.F.R.** court concluded that “we may not substitute for the legislature’s prescription alternative ways to satisfy the requirements of notice.” *Id.*

¶8 Lisa does not contend she never received notice, but merely that the notice was not part of the written order removing Bruce from her home. In this court’s opinion, strict application of the statute is hypertechnical when applied to this case. However, we are bound by our prior decisions. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). As a result, we conclude that Lisa’s counsel’s performance was deficient and prejudicial.

By the Court.—Order reversed.

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

