

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

**Nos. 01-0025
01-0026**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

NO. 01-0025

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

RHEA F.,

RESPONDENT-APPELLANT.

NO. 01-0026

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO BRANDON C.M.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

RHEA F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
WAYNE J. MARIK, Judge. *Reversed.*

¶1 ANDERSON, J.¹ Rhea F. contends that there was a failure of proof that she was denied physical placement or visitation by reason of a court order containing notice of the conditions of return. We agree and reverse the orders terminating Rhea's parental rights to her children. We reach this conclusion because the warning to a parent that his or her parental rights are in jeopardy must contain notice of substantive conditions addressing the conduct or home environment that contributed to the out-of-home placement of the children. Since the warnings to Rhea did not include substantive conditions, they did not comply with the requirements of WIS. STAT. § 48.356(2); consequently, no evidence was presented that Rhea received a warning in compliance with the statute.

¶2 The significant facts are not in dispute. In early October 1998, Rhea left her children in Racine and took a bus to Mississippi. The Racine County Human Services Department (HSD) took custody of the children and placed them in foster care with Rhea's sister. On November 4, 1998, the circuit court found Rhea's children to be in need of protection and services (CHIPS) on the grounds

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

that they were receiving inadequate care while she was missing, WIS. STAT. § 48.13(8), and that because of reasons other than poverty, Rhea was unable to adequately care for them, § 48.13(10). The court entered a one-year order for the physical placement of the children with their aunt. The court's dispositional orders did not include a statement of conditions with which Rhea was expected to comply as required by WIS. STAT. § 48.355(2)(b)7.²

¶3 Rhea was not present at the hearing. A copy of the court's dispositional orders along with the statutorily required warning that Rhea's parental rights could be terminated were mailed to her in Mississippi. Neither the dispositional orders nor warning contained a listing of the conditions necessary for the return of the children to Rhea. WIS. STAT. § 48.356(2).

² The only mention of conditions that had to be fulfilled before the children would be returned to Rhea were included in ¶¶37 and 38 of the court's November 4, 1998 orders:

¶37 NO CONDITIONS FOR RETURN: That the Court does not establish any conditions for return of the child to mother until she submits to jurisdiction of court and request[s] that conditions be established.

¶38 MANDATORY COURT APPEARANCE BEFORE RETURN OF CHILD: The Court does not establish any conditions for return of the child to the home of the mother until such time that the parent(s) submits himself and/or herself to the jurisdiction of this Court and requests the Court to establish such conditions for return.

Further, that such parent(s) have no contact, either direct or indirect, until said parent(s) submit themselves to the jurisdiction of this Court.

¶4 Rhea returned to Wisconsin on September 4, 1999, because she realized that it had been wrong to leave her children.³ On September 18, a HSD caseworker interviewed Rhea in the county jail and Rhea asked that conditions be set for the return of her children. HSD filed petitions for the termination of Rhea's parental rights to the children on October 5, 1998, alleging that Rhea had abandoned them. WIS. STAT. § 48.415(1). While the TPR petitions were pending, HSD asked the circuit court to set conditions for the return of the children. After being informed that HSD was requesting conditions for return because Rhea requested conditions and HSD believed that in the event the TPR petitions were denied it would be appropriate to have resources in place, the court revised the dispositional orders and included conditions for return of the children.⁴

¶5 Rhea contested the TPR petitions by filing a motion to dismiss arguing that the abandonment ground alleged in the petitions was defective because it included time when she was prohibited by judicial order from visiting

³ On February 17, 1999, the circuit court revised its dispositional orders, at the request of HSD, to reflect a change in the permanency plan from reunification to legal guardianship. A copy of the revised dispositional orders and the mandatory TPR warning were mailed to Rhea. Neither the revised orders nor the warning contained conditions for the return of the children. The dispositional orders were revised again on July 28, 1999, changing the permanency plan from legal guardianship to termination of parental rights. There is no record if the revised orders and warning were mailed to Rhea.

⁴ The conditions established for the return of the children required Rhea to (1) complete a parenting program; (2) demonstrate child caring principles; (3) demonstrate ability to provide for the physical and emotional needs of the children; (4) follow through with all recommendations made by treating therapists; (5) not consume any alcohol or nonprescription drugs prior to or during any visitation; (6) participate in an AODA assessment and completion of any recommended treatment; (7) provide random urinalysis; (8) participate in all counseling deemed appropriate; (9) participate in a psychological or psychiatric evaluation; (10) not discuss with the children the circumstances of the pending action; (11) make reasonable efforts to obtain and maintain employment; (12) participate in the children's educational programs; (13) participate in the children's medical health programs; (14) obtain suitable daycare; and (15) remain free of alcohol and nonprescription drugs for six months before the return of the children.

either child. In response to this motion, amended TPR petitions were filed alleging as an alternate ground for termination, under WIS. STAT. § 48.415(4), that Rhea had been denied physical placement or visitation by court order for more than a year. After a bench trial, the court found that the State had proven by clear and convincing proof that for more than one year, a court order had denied Rhea physical placement of her children or visitation with them. At a dispositional hearing, the court ordered Rhea's parental rights terminated to both children.

¶6 Rhea filed a motion to vacate the orders. In her motion, she argued that she was deprived of due process of law because the circuit court failed to establish conditions for the return of her children as required by WIS. STAT. § 48.355(2)(b)7. The court denied her motion, reasoning that requiring Rhea to submit to the jurisdiction of the court and requesting that conditions for return of the children be established fulfilled the statutory requirement. The court concluded that this was sufficient notice to Rhea of what she must accomplish before the children would be returned to her physical care. Rhea appeals.

¶7 Before us Rhea argues that as a matter of law the facts as found by the circuit court did not meet the statutory requirement that the orders denying physical placement or visitation contain the notice required by WIS. STAT. § 48.356(2). She maintains that requiring her to submit to the jurisdiction of the court and requesting that conditions be imposed does not meet the statutory criteria. Rhea submits that the conditions for return must relate to changes in her behavior or home environment. Because she was not given notice of how she must change before her children would be returned, there was no evidence of

whether or not she complied with the conditions; consequently, Rhea argues that the evidence was insufficient to prove the elements of WIS. STAT. § 48.415(4).⁵

¶8 The issue presented is whether WIS. STAT. § 48.356(2), as referenced in WIS. STAT. § 48.415(4)(a), requires that every CHIPS order affecting the out-of-home placement of a child and the accompanying written TPR warning contain substantive conditions for the return of the children to the parent. Resolving this issue requires us to interpret and apply §§ 48.356(2) and 48.415(4)(a). Questions of statutory interpretation and the application of statutes to undisputed facts are questions of law which we review without deference to the circuit court. *Marinette County v. Tammy C.*, 219 Wis. 2d 206, 214, 579 N.W.2d 635 (1998).

¶9 Our statutory interpretation of provisions of the Children's Code will be assisted by the statement of legislative purpose. *Waukesha County v. Steven H.*, 2000 WI 28, ¶32, 233 Wis. 2d 344, 607 N.W.2d 607.

Although the legislature has declared that the Children's Code is to be construed liberally to protect children and preserve the unity of the family, the legislature also

⁵ There are two elements that must be proven when the State seeks to involuntarily terminate parental rights on the grounds of a continuing denial of periods of physical placement or visitation:

1. that (parent) has been denied periods of physical placement by a court order in an action affecting the family under Chapter 767 or has been denied visitation under an order pursuant to §§ 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by § 48.356(2) or 938.356(2).
2. that at least one year has elapsed since the order denying periods of physical placement or visitation to (parent) was issued and the court has not subsequently modified its order to permit periods of physical placement or visitation.

emphasized that a court may determine whether it is in the best interests of a child for that child to be removed from his or her parents. The courts have the authority, according to the legislature, in appropriate cases, not to reunite a child with his or her family. The legislature emphasized that courts should recognize that instability and impermanence in family relationships are contrary to the welfare of children. The legislature also entreated the courts to recognize the importance to children of eliminating unreasonable periods while their parents try to correct the conditions that prevent the child's return to the family.

Id. (footnotes omitted). Also, to fulfill the paramount goal of the Children's Code to "preserve the unity of the family," the legislature has directed the courts and agencies to assist parents in changing any circumstances in the home which might harm the child or which may require the child to be placed outside the home. WIS. STAT. § 48.01(1)(a).

¶10 We begin our discussion by recalling the Wisconsin Supreme Court's reflections on the involuntary termination of parental rights:

It has been reiterated by this court and the United States Supreme Court that the power to terminate parents rights is an awesome power. When someone seeks to terminate a parent's right to "the companionship, care, custody, and management of his or her children," they seek to infringe on "an interest far more precious than any property right." "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."

Odd S.-G. v. Carolyn S.-G., 194 Wis. 2d 365, 378, 533 N.W.2d 794 (1995) (citations omitted). We will keep this admonition in mind, as well as the statements of legislative purpose, as we analyze the applicable statutes.

¶11 In the circuit court's November 4, 1998 dispositional orders, Rhea was denied visitation with her children.⁶ In the amended petition to terminate

⁶ WISCONSIN STAT. § 48.355(1) and (3) permit the circuit court to deny a parent visitation as a part of any disposition ordered under WIS. STAT. § 48.345.

Rhea's parental rights, the State alleged that the grounds for termination fell under WIS. STAT. § 48.415(4):

(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:

(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. (Emphasis added.)

¶12 Rhea received the warning notice required whenever a child is placed outside of the home:

(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, 48.347 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)*.

WIS. STAT. § 48.356 (emphasis added).

¶13 We have previously held that the circuit court's duty to warn and inform a parent of the grounds for termination of parental rights *and* the conditions necessary for the return of the child, WIS. STAT. § 48.356(2), be "included in that

‘panoply of substantive rights and procedures to assure that … parental rights will not be terminated precipitously [or] arbitrarily.’’ *In re D.F.*, 147 Wis. 2d 486, 495, 433 N.W.2d 609 (Ct. App. 1988), *cited with approval in Stephen H.*, 2000 WI 28 at ¶25. We concluded that the mandatory nature of this warning “was necessary to give the parent an opportunity to conform his or her conduct appropriately to avoid termination.” *D.F.*, 147 Wis. 2d at 496.

¶14 The supreme court has also held that, when read together, WIS. STAT. §§ 48.365 and 48.415 demonstrate that the legislative intent is to protect a parent’s rights by directing a mandatory written notice so the parent can work to alleviate the type of behavior that would justify a termination of parental rights. *Stephen H.*, 2000 WI 28 at ¶24. In another decision, the supreme court pointed out that the “necessity of giving a parent every opportunity to remedy the situation is supported” by the express legislative intent that a parent be assisted in changing any circumstance that required the child to be placed outside of the home. *Winnebago County DSS v. Darrell A.*, 194 Wis. 2d 627, 644 n.6, 534 N.W.2d 907 (Ct. App. 1995).

¶15 We conclude that these decisions require that when WIS. STAT. §§ 48.365 and 48.415 are read together, the conditions necessary for the return of the child must be substantive conditions. These substantive conditions must directly address the parent’s conduct, the child’s conduct and/or the nature of the home which precipitated the out-of-home placement of the child.

¶16 An express legislative purpose also supports this conclusion. Along with the legislative purposes we have already mentioned is the purpose “[t]o allow for the termination of parental rights at the earliest possible time after

*rehabilitation*⁷ and reunification *efforts are discontinued* in accordance with this chapter and termination of parental rights is in the best interest of the child.” WIS. STAT. § 48.01(gr) (emphasis added). Unless substantive conditions for the return of the child are established by the court and included in the mandatory warning, there can be no efforts at rehabilitation.

¶17 In Rhea’s case, neither of the requirements of the court’s orders and notice rehabilitates or restores the parent-child relationship. The court’s requirements for the return of Rhea’s children compelled her to submit to the court’s jurisdiction and to request that conditions be established. There is no authority in WIS. STAT. § 48.356(2) for the court to delay in advising the parent of “the conditions necessary for the child … to be returned to the home.” There is no authority in the statute for the court to require the parent to meet any prerequisite before rehabilitative conditions for the child’s return are established. The purpose of the warning requirement is to give “a parent every possible opportunity to remedy” the behavior or environment that caused the child to be placed outside of the home, *Darrell A.*, 194 Wis. 2d at 644 n.6; failing to set substantive conditions deprives the parent of any opportunity for rehabilitation necessary for reunification.

¶18 Neither of the requirements was a substantive condition. While the requirement that Rhea submit to the jurisdiction of the court addresses her failure to appear at previous CHIPS hearings, it does not address any behavior that precipitated the placement of her children with a relative. And, requiring Rhea to

⁷ “Rehabilitation” is defined as “a : to restore to a former state (as of efficiency, good management, or solvency) b : to restore or bring to a condition of health or useful and constructive activity.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 985-86 (10th ed. 1997).

ask that conditions be imposed shifts the burden to her, relieving the circuit court and the supervising agency of their legislatively mandated duty to assist in changing any circumstances that caused the placement of the children outside of the home. WIS. STAT. § 48.01(1)(a). The legislature has intended that the court and involved agencies partner with the parent to change the behavioral and environmental conditions which precipitated the child's placement outside of the home; the court abdicates its partnership role when it does not set substantive conditions.

¶19 This court is troubled by the unfolding of events in this case. Granted, Rhea did abandon her children when she left for Mississippi. However, Rhea did return to Wisconsin ten months after the first dispositional orders were issued. When Rhea was interviewed by a social worker, Rhea asked that conditions necessary for her reunification with her children be established. Despite Rhea's request, HSD filed petitions for the involuntary termination of Rhea's parental rights approximately three weeks after the interview. Then, while the TPR petitions were pending, HSD requested the circuit court to establish conditions for the return of the children to serve as "therapeutic resources pending the TPR proceeding." Notwithstanding Rhea's submission to the jurisdiction of the court and request that conditions necessary for the return of her children be established, HSD continued to pursue the involuntary termination of Rhea's parental rights. This court is at a loss to understand why Rhea's fulfillment of the court's prerequisites to the establishment of conditions did not stop, or at least delay, the TPR proceedings. At a minimum, Rhea was entitled to sufficient time to show whether she was willing and able to comply with substantive conditions meant to remedy the behavior that precipitated the out-of-home placement of her children.

¶20 In conclusion, when the State sought the involuntary termination of Rhea's parental rights because of a continuing denial of periods of physical placement or visitation, WIS. STAT. § 48.415(4), it was required to prove that the dispositional orders placing the children outside of the home contained the mandatory warning required by WIS. STAT. § 48.356(2). WIS JI—CHILDREN 335. The mandatory warning must include substantive conditions necessary for the child to be returned to the home. The warning given Rhea did not contain any substantive conditions and was inadequate as a matter of law. Because there were no substantive conditions, there was no evidence on whether Rhea used every possible opportunity for rehabilitation; therefore, the evidence was insufficient to support a finding that the State had met its burden of proof.

By the Court.—Orders reversed.

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

