COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-1224

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

In re the Termination of Parental Rights of Mathew A.H., a Person Under the Age of 18:

Taylor County Human Services Department,

Petitioner-Appellant,

v.

Christine A.J.,

Respondent-Respondent,

Troy W.,

Respondent.

APPEAL from an order of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed in part; reversed in part, and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.[1]

[1] Originally assigned as a one-judge appeal, this case was reassigned to a three-judge panel by

CANE, P.J. The Taylor County Human Services Department (County) appeals a trial court order that dismissed the County's petition and amended petition to terminate Christine A.J.'s parental rights.[2] The trial court concluded that the County could not proceed with its termination action because the § 48.415(2)(c), STATS., conduct alleged in the original petition differed from the conduct about which Christine had been warned pursuant to § 48.356, STATS.[3] The trial court also dismissed the County's amended petition because it alleged as a partial basis for termination conduct described in § 48.415(2)(c), STATS., 1991-92, which is no longer in effect. We conclude the County may bring its original petition under § 48.415(2), but in order to protect Christine's due process rights, the jury must find that her conduct satisfied that described in the former § 48.415(2)(c), STATS., 1991-92, about which Christine had been warned. Therefore, we reverse that part of the order dismissing the original petition, affirm that part of the order dismissing the amended petition, and remand the case for further proceedings on the original petition consistent with this opinion.

Christine is the mother of Mathew A.H., a child adjudged to be in need of protection or services since February 1991, who has been placed outside the home continuously since June 1991. The dispositional orders Christine received in 1993, 1994 and 1995[4] contained a written warning that her parental

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order of the chief judge dated June 19, 1996.

[2] The petitions also sought to terminate the parental rights of Troy W., Mathew's father, based on the ground of abandonment. The legitimacy of that ground is not at issue in this appeal.

[3] 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 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.
>
> (2) In addition to the notice required under sub. (1), any written order which places a child outside the home under sub. (1) shall notify the parent or parents of the information specified under sub. (1).

[4] The County acknowledges that in February 1995, it erroneously gave Christine a written

rights could be terminated on a variety of grounds, including that there is a continuing need of protection or services. *See* § 48.415(2), STATS. The warning informed Christine that the County could establish continuing need of protection or services by showing several factors, including that Christine had substantially neglected, wilfully refused or was unable to meet the conditions established for the return of her child to her home, the language found in § 48.415(2)(c), STATS., 1991-92.

In December 1995, the County filed a petition to terminate Christine's parental rights, alleging Mathew was in continuing need of protection or services, in part because Christine had failed to demonstrate progress[5] toward meeting the conditions established for returning Mathew to her home. This allegation reflects the language found in the new § 48.415(2)(c), STATS., which became effective May 5, 1994. The County also included in its petition extensive documentation of facts supporting its petition to terminate Christine's rights. This included a history of the previous CHIPS proceedings and copies of the written warnings Christine received with each of the dispositional orders.

Christine moved to dismiss the petition on the basis that her due process rights were violated because the conduct alleged as a partial basis for the termination differed from the conduct described in the warnings she received. In response, the County filed an amended petition that reflected the language of the former § 48.415(2)(c), STATS., 1991-92. After a hearing, the trial court found that the original petition was defective because it alleged conduct that differed from the warnings Christine received, and that the amended petition was defective because the conduct it alleged was no longer current law. The County appeals the trial court's order dismissing the action.

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warning that incorporated the language of the former § 48.415(2)(c), STATS., 1991-92, rather than the language of the new § 48.415(2)(c), STATS., which became effective May 5, 1994. However, this fact does not alter our conclusion.

[5] The petition omitted the word "substantial" from the allegation. The precise phrase as provided in § 48.415(2)(c), STATS., is "failed to demonstrate substantial progress toward meeting the conditions established." However, no party has identified this as an issue on appeal.

At issue is whether the County can file a termination action alleging as a partial basis for termination under § 48.415(2), STATS., conduct described in the new § 48.415(2)(c), even though Christine was warned only about the conduct listed in the former § 48.415(2)(c), STATS., 1991-92. Because the facts are undisputed, the application of ch. 48 and the United States Constitution to those facts presents a question of law which we decide without deference to the trial court's ruling. *See* ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

We begin by examining the relevant statutes. Pursuant to § 48.356(2), STATS., whenever a court orders that a child be placed outside his or her home, the written order which places a child outside the home must notify the parent of any grounds for termination under § 48.415, STATS., which may be applicable, and of the conditions necessary for the child to be returned to the home. The purpose of the trial court's duty under § 48.356 is to give a parent every possible opportunity to remedy the situation. ***Winnebago County DSS v. Darrell A.***, 194 Wis.2d 627, 644, 534 N.W.2d 907, 913 (Ct. App. 1995). This is so because

> the power of the state to terminate the parental relationship is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised. The parental right is accorded paramountcy in most circumstances and must be considered in that light until there has been an appropriate judicial proceeding demonstrating that the state's power may be exercised to terminate that right.

> It is apparent that the Wisconsin legislature has recognized the importance of parental rights by setting up a panoply of substantive rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well considered, fact-finding process utilizing all the protections afforded by the statutes unless there is a specific, knowledgeable, and voluntary waiver.

M.W. v. Monroe County Dept. of Human Servs., 116 Wis.2d 432, 436-37, 342 N.W.2d 410, 412-13 (1984) (footnote omitted).

Pursuant to § 48.356(2), STATS., Christine received written notices in 1993, 1994 and 1995 that described the potential grounds for termination under § 48.415, STATS., 1991-92:

> Grounds for termination of parental rights shall be one of the following:
>
> ....
>
> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services may be established by a showing of all of the following:
>
> (a) That the child has been adjudged to be 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, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356(2).
>
> (b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders, *the parent has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home* and there is a substantial likelihood that the parent will not meet these conditions in the future. (Emphasis added.)

It is undisputed Christine did not receive written notice of the amended version of § 48.415(2)(c), STATS., effective May 5, 1994, which provides:

> That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders or, if the child had not attained the age of 3 years at the time of the initial order placing the child outside of the home, that the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that *the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home* and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424. (Emphasis added.)

In ***Patricia A.P.***, we examined the amended version of § 48.415(2)(c), STATS., and held that a person is deprived of parental rights without due process of law when the parent is warned that such rights can be terminated for the conduct stated in § 48.415(2)(c), STATS., 1991-92, before its amendment, but has his or her rights terminated on the basis of conduct provided in the new § 48.415(2)(c). ***Patricia A.P.***, 195 Wis.2d at 863-64, 537 N.W.2d at 50-51. We explained that when the state warns a parent that his or her parental rights may be terminated because of the parent's future conduct, if the state substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the state applies a fundamentally unfair procedure. ***Id.*** at 863, 537 N.W.2d at 50. In ***Patricia A.P.***, the jury was instructed solely under the new statute and did not consider whether the conduct described in the former statute had been satisfied. ***Id***. at 861, 537 N.W.2d at 49. We concluded the parent had been deprived of her parental rights without due process and, therefore, reversed the order terminating her parental rights. ***Id***. at 865, 537 N.W.2d at 51.

Our reasoning in ***Patricia A.P.*** was based on our conclusion that the amendment to § 48.415(2)(c), STATS., 1991-92, modified the definition of the conduct that could form part of the basis for terminating parental rights. Under the former statute, parents faced termination of their parental rights for substantially neglecting, wilfully refusing or being unable to meet the conditions established for the return of the child to the home. *See* § 48.415(2)(c), STATS., 1991-92. Under the amended statute, parents face termination of their parental rights if they fail to demonstrate substantial progress toward meeting

the conditions established for the child's return. *See* § 48.415(2)(c), STATS. The amendment eliminates the reasons why a parent has failed to make substantial progress. We noted in ***Patricia A.P.***:

> The change in the type of conduct for which termination is possible changes the burden on the State. The ground under the new law is far easier to establish than the grounds under the old law. Under the new law, the ground for termination is purely objective: whether there has been a lack of substantial progress. Under the old law, the grounds are more stringent and are partly subjective.

Id. at 864, 537 N.W.2d at 51.

It is clear that under ***Patricia A.P.***, parents are deprived of their parental rights without due process when they are warned only about the conduct listed in a former statute, yet have their rights terminated after a jury finds only that the easier to establish conduct listed in a new statute is present. However, ***Patricia A.P.*** did not answer the question raised by this appeal: Can a parent's parental rights be terminated under the current version of § 48.415(2), STATS., when the parent was warned only as to what conduct could lead to termination under the former § 48.415(2)(c), STATS., 1991-92? Implicit in this issue is the question of whether there would there be any way to terminate a parent's rights under § 48.415(2) between May 5, 1994, the effective date of the amended version of § 48.415(2)(c), and May 5, 1995.[6]

In light of the legislature's concern for the emotional and physical safety of children, as illustrated by the amendment to § 48.415(2)(c), STATS., that

[6] As counsel for Christine conceded at the trial court hearing, if the only way to terminate a parent's parental rights is to petition under the new version of § 48.415(2), STATS., and to warn parents about the conduct described in the amended § 48.415(2)(c) one year before filing a petition, it could be impossible to terminate parental rights under § 48.415(2) for twelve months after the effective date of the new § 48.415(2)(c), because warnings given to parents before the effective date of the new statute warned parents solely about the conduct described in the former version of § 48.415(2)(c), STATS., 1991-92.

makes it easier to terminate a parent's rights, it is inconceivable that the legislature would have created a one-year moratorium on termination proceedings under § 48.415(2). Such a moratorium would make it impossible to terminate a parent's parental rights, even where the best interests of the child require termination of those rights. A fundamental premise of statutory construction is that it should avoid any result that would be absurd or unreasonable. ***State v. Moore***, 167 Wis.2d 491, 496, 481 N.W.2d 633, 635 (1992). We conclude the legislature did not intend to prohibit the termination of a parent's rights based in part on the new § 48.415(2)(c), where the parent had received warnings solely under § 48.415(2)(c), STATS., 1991-92. Our next question is how the legislature's intent can be accomplished without infringing a parent's due process rights.

We conclude there is a procedure to allow termination based in part on conduct provided in § 48.415(2)(c), STATS., where the parent was only given a written warning about the conduct listed in § 48.415(2)(c), STATS., 1991-92. Our reasoning is based on our conclusion that although the amended § 48.415(2)(c) makes it easier to terminate a parent's rights, the concept of failure to demonstrate substantial progress is implicit in the conduct listed in the former § 48.415(2)(c), STATS., 1991-92.

Under the former statute, the need for continuing protection or services could be established in part where the parent had substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home. Section 48.415(2)(c), STATS., 1991-92. Under the new statute, the parent must have failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home. Section 48.415(2)(c), STATS. We conclude that, by definition, a parent who has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home has necessarily failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home.

In other words, we conclude that when a parent was warned under the former § 48.415(2)(c), STATS., 1991-92, the parent was implicitly warned about the conduct found in the new § 48.415(2)(c), STATS., because the conduct listed in the new statute was implicitly present in the former statute. Thus, as long as a jury finds a parent was warned under the former statute and

that the County has established conduct described in the former statute, the parent's due process rights are not violated by terminating his or her parental rights under § 48.415(2).

The proper procedure to follow to effectuate the legislature's intent and to protect the parent's due process rights is as follows. The petition should allege as conduct supporting termination that the parent has failed to demonstrate substantial progress toward meeting the conditions established for returning the child to the home, *see* § 48.415(2)(c), STATS., because the parent either substantially neglected, wilfully refused or was unable to meet the conditions established for the return of the child to the home, *see* § 48.415(2)(c), STATS., 1991-92. The jury should be instructed about the conduct required for termination under the former version of § 48.415(2)(c), STATS., 1991-92. Then, the jury should be instructed that if it finds the conduct described in the former statute has been established, it may find the conduct supporting termination has been established under the new statute. Using this procedure, the jury will have found the parent satisfied both the conduct about which he or she was warned, and the conduct described in the new statute which was implicitly present in the former statute.

Our holding today does not affect our holding in ***Patricia A.P.*** In ***Patricia A.P.***, the jury was instructed solely under the new statute and did not consider whether the conduct supporting termination under the former statute had been established. *See* ***id***. at 861, 537 N.W.2d at 49. Under the procedure we have established here, the parental rights of parents who were warned only of the conduct described in the former § 48.415(2)(c), STATS., 1991-92, cannot be terminated unless the jury finds the County has established the conduct described in the former § 48.415(2)(c).

For the foregoing reasons, we reverse the trial court's dismissal of the original petition, but we affirm the trial court's dismissal of the amended petition. We remand the case for further proceedings consistent with this opinion. We have examined the original petition and conclude that although it does not allege conduct supporting termination exactly as we have suggested in this opinion, the allegations and facts it offers to support it are sufficient so that the original petition can be used for the further proceedings.

By the Court.—Order affirmed in part; reversed in part, and cause remanded. No costs on appeal.

Recommended for publication in the official reports.