

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2006

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 Nos. 2006AP2343
2006AP2344**

**Cir. Ct. Nos. 2005TP16
2005TP17**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2006AP2343

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

PETER D. H.,

PETITIONER-RESPONDENT,

v.

KERI L. H.,

RESPONDENT-APPELLANT.

No. 2006AP2344

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

PETER D. H.,

PETITIONER-RESPONDENT,

V.

KERI L. H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Outagamie County:
RAYMOND S. HUBER, Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.¹ Keri H. appeals orders terminating her parental rights.² Keri argues the trial court erred by denying her motion to dismiss due to the lack of TPR warnings. Keri also argues the trial court erred by granting summary judgment to her ex-husband, Peter H., and not dismissing the petition because there was no court order denying her placement for a year or more.³ We conclude TPR warnings were not required in this case. However, there was no court order denying placement for a year or more. Therefore, we reverse and remand with directions that the trial court dismiss Peter's TPR petition.

BACKGROUND

¶2 Keri and Peter were divorced on March 2, 2001. On September 11, 2002, the family court commissioner granted Peter temporary primary physical

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.

² By order of the Court of Appeals dated September 29, 2006, this is a consolidated appeal of two termination of parental rights cases as to Marissa L. H. in Outagamie County case No. 2005TP16 and Karley C. H. in Outagamie County case No. 2005TP17.

³ While summary judgment was granted in this case, the court did not enter a separate judgment but instead entered an order terminating Keri's parental rights.

placement. The court required any placement with Keri was to be supervised by her parents.

¶3 The court held another hearing on December 27, 2002. At that hearing, the court ordered:

The supervised periods of placement shall continue using the grandparents as supervisors or, if they are unable or unwilling to do so, Global Crossing shall supervise. If the petitioner misses two or more visits in the next three months, her placement with the children will be suspended until the further order of the court.

The order was filed February 26, 2003.

¶4 The guardian ad litem assigned to the case received information that Keri had missed two or more visits and sent a letter on March 7, 2003, to the parties stating:

[I]t would appear to me, based upon what has been communicated to me by the parties that the mother has missed two or more visits pursuant to Paragraph 3A. Therefore her visitation is suspended. I would request that both parties contact me before the end of March so I can review the matter as required by the Court.

A further review hearing took place on September 18, 2003. As a result of that hearing, the court entered an order on October 16, 2003, stating:

[Keri] shall be entitled to reintegrate into the children's life through therapy. ... It is anticipated that the first visits out of therapy will be supervised by a supervisor to be determined by Dr. Breen[] in conjunction with the guardian ad litem. The therapist will provide a recommendation 60 days after contact commences.

On October 28, 2003, the guardian ad litem wrote to the attorneys stating that she had been advised that "Keri has had a relapse and an arrest that was alcohol

related.” The court held a final hearing on May 24, 2004, and entered an order requiring Keri to “immediately make an appointment to see Dr. Breen[] as a first step toward getting placement time with her children.”

¶5 Peter filed a petition for the termination of Keri’s parental rights on March 28, 2005, alleging continued denial of periods of physical placement pursuant to a court order. Keri moved to dismiss on the grounds that the family court orders did not contain required TPR warnings. After briefing, the trial court denied the motion, determining that TPR warnings were not necessary in this case.⁴

¶6 On December 1, 2005, Peter filed a motion for summary judgment with a supporting affidavit and brief. Keri did not file a response. The court heard arguments on Peter’s motion on December 27, 2005. Keri asked the court to grant summary judgment in her favor and to dismiss Peter’s motion. The court granted Peter’s motion for summary judgment stating:

I’m satisfied there was a court order in existence from the 27th of December, 2002. Clearly in excess of a year has elapsed since that order was put into place. I’m satisfied that all of the language in subsequent orders would refer to reunification or reintegration; and, in fact, quite frankly, in the February 26 signed order from the December 27 hearing, which provided that missing the two visits would result in the suspension, there was always the hope that she would deal with her problems and be successfully reintegrated into the children’s lives.

To date that has not happened. She has not had placement since ... early March of 2003 pursuant to that order; and there really are no conflicting facts to dispute any of that.

⁴ Neither party provides a citation to the record proving the trial court in fact made such a finding. However, both parties agree the trial court did make such a determination.

DISCUSSION

¶7 Keri argues Peter's TPR petition should be dismissed because the family court orders denying placement or visitation did not contain TPR warnings. However, the requirement for TPR warnings contained in WIS. STAT. §48.356(2) only applies to children's code and juvenile code orders and does not apply to family court orders that deny physical placement. *In re Jillian K.L.*, 2005 WI App 83, ¶¶7-9, 281 Wis. 2d 261, 697 N.W.2d 476.

¶8 Keri also argues the trial court erred by granting summary judgment because there was no court order denying her placement for a year or more. "We review summary judgment without deference, using the same methodology as the trial court. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law." *Gumz v. Northern States Power Co.*, 2006 WI App 165, ¶29, 721 N.W.2d 515 (citations omitted). In this case, both parties moved for summary judgment, and neither party disputed the facts.

¶9 Peter asked the court to terminate Keri's parental rights based upon a court order denying Keri's placement for one year or more. WISCONSIN STAT. § 48.415(4) permits termination of parental rights when:

(a) [T]he parent has been denied periods of physical placement by court order in an action affecting the family.... [and]

(b) [A]t 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.

In support of his case, Peter references the order filed on February 26, 2003, which stated:

The supervised periods of placement shall continue using the grandparents as supervisors or, if they are unable or unwilling to do so, Global Crossing shall supervise. If the petitioner misses two or more visits in the next three months, her placement with the children will be suspended until the further order of the court.

Peter also references the letter sent by the guardian ad litem on March 7, 2003, which stated “the mother has missed two or more visits pursuant to paragraph 3a. Therefore her visitation is suspended.” Finally, Peter argues the October 16, 2003, court order also denied placement.⁵ The October 16 order stated:

The petitioner shall be entitled to reintegrate into the children’s life through therapy She is to meet with the children in therapy It is anticipated that the first visits out of therapy will be supervised by a supervisor to be determined by Dr. Breen[] in conjunction with the guardian ad litem. The therapist will provide a recommendation 60 days after contact commences.

¶10 None of these orders denies Keri placement. The February 26 court order did not deny placement on the date it was issued. To the contrary, the order stated “periods of placement shall continue....” The order did provide a condition by which placement could be denied, namely, missing two visits in the next three months. But the order itself did not deny placement. The statute requires proof that at least a year has passed since the order denying placement. It would defeat the purpose of the statute to measure the year from the date of an order that did not constitute an actual denial of placement. Second, the letter the guardian ad litem

⁵ Peter also states the May 24, 2004 order denies placement. We do not address whether this order actually denies placement because the order was entered less than one year before Peter filed the TPR petition.

sent on March 7 was not a court order. Finally, the October 16 order also does not deny placement; rather, it places conditions upon Keri's placement time.

¶11 Therefore, at the time Peter filed for termination of Keri's parental rights, there was no court order denying placement for a year or more. As a result, Keri's request for summary judgment should have been granted. We therefore reverse and remand with directions to the trial court to grant summary judgment in Keri's favor and dismiss Peter's TPR petition.

By the Court.—Orders reversed and cause remanded with directions.

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

