

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2007

David R. Schanker
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. 2006AP3009
2006AP3010
2006AP3011
2006AP3012**

**Cir. Ct. Nos. 2005TP55
2005TP56
2005TP57
2005TP58**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2006AP3009

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

HOLLY K.,

RESPONDENT-APPELLANT.

No. 2006AP3010

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOLLY K.,

RESPONDENT-APPELLANT.

NO. 2006AP3011

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOLLY K.,

RESPONDENT-APPELLANT.

NO. 2006AP3012

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOLLY K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
T.J. GRITTON, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Holly K. appeals from orders terminating her parental rights to four of her children. She had pled no contest to the grounds alleged in the petitions for the Terminations of Parental Rights (TPRs) but contested the dispositions. She later moved to withdraw her pleas, alleging that her lawyer, John Kuech, was ineffective for advising her that, under WIS. STAT. § 48.415(10), the TPRs could not serve as grounds for a later potential involuntary TPR involving her fifth child, Aysia. After a *Machner*² hearing, her motion was denied. We hold that Kuech did not provide prejudicially deficient assistance because Aysia's birth date and her CHIPS (child in need of protection or services) status during Kuech's representation render § 48.415(10) inapplicable. We affirm.

¶2 Aysia was born on June 17, 2005.³ On November 10, 2005, the Winnebago County Department of Health & Human Services (the Department) filed petitions to terminate the parental rights of Holly and her husband, Edward K., to the couple's four older children.⁴ Holly had received a variety of services over an eight-year period for issues of child neglect and abuse and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

³ The parties stipulated to Aysia's date of birth after Holly filed her appellate brief. We take judicial notice of the stipulation filed with the Winnebago County Register in Probate.

⁴ During the proceedings, another man was adjudicated the father of one of the four.

unclean home conditions. Aysia was under a CHIPS order when the four TPR petitions were filed.

¶3 At the December 1 plea hearing, Edward consented to a voluntary TPR and Holly requested an attorney. Holly later pled no contest to the TPR grounds, but contested the dispositional phase of the proceedings. Over Holly's objections, the trial court terminated her rights to the four children. Represented by post-termination counsel, Holly moved to withdraw her pleas, alleging that Kuech provided ineffective assistance because (1) he encouraged her to plead no contest despite being unsure whether, by not contesting the grounds, the TPRs still would be considered involuntary under WIS. STAT. § 48.415 and (2) he did not accurately advise her that, if involuntary, they could serve as grounds for a possible future involuntary TPR as to her fifth child.

¶4 At the ensuing *Machner* hearing, Kuech testified that he advised Holly to plead no contest to the grounds because he did not believe she could prevail at trial since the children had been out of the home for a substantial period, she had not met the conditions necessary to their return, and she faced criminal charges in connection with the abuse allegations. Kuech also testified that he advised Holly that the TPRs did not now apply to Aysia, who already was under a CHIPS order, but they could serve as grounds for an involuntary TPR to Aysia if a new CHIPS action involving her was commenced within three years. Kuech also discussed with Holly the TPRs' potential impact on her rights to subsequent children besides Aysia and advised her that a no contest plea arguably was not an "involuntary" termination because she did not challenge the grounds in the petition. Holly's motion was denied, and she appeals.

¶5 The issue is whether Holly’s attorney was ineffective for advising her that, given the circumstances as they stood then, the four TPRs could not be used to terminate her parental rights to Aysia. To show ineffective assistance of counsel, Holly must prove both that Kuech’s performance was deficient and that the deficiency prejudiced her defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not embark on a full ineffectiveness analysis here because the issue is readily answered by WIS. STAT. § 48.415(10). The interpretation of this statute is a question of law subject to our independent review. *Oneida County DSS v. Nicole W.*, 2007 WI 30, ¶9, ___ Wis. 2d ___, 728 N.W.2d 652.

¶6 WISCONSIN STAT. § 48.415, “Grounds for involuntary termination of parental rights,” provides in relevant part:

At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

....

(10) PRIOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS TO ANOTHER CHILD. Prior involuntary termination of parental rights to another child, which shall be established by proving all of the following:

(a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13(2), (3) or (10); or that the child who is the subject of the petition was born after the filing of a petition under this subsection whose subject is a sibling of the child.

(b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, a court has ordered the

termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

Stated a bit more simply, the four TPRs, if involuntary, could be used sometime later as grounds for an involuntary TPR concerning Aysia if it were proved that:

- (a) Aysia was adjudged CHIPS *or* she was born *after* the November 10 filing of the four TPR petitions *and*
- (b) the court ordered the four TPRs within three years *before* Aysia was adjudged CHIPS *or* within three years *before* Aysia was born on June 17.

¶7 The Department⁵ argues that on its face the statute cannot apply to Holly's rights to Aysia at this time based on the following undisputed timeline: Aysia was born on June 17, 2005, the Department filed the four petitions on November 10, 2005, and the court ordered the TPRs on September 1, 2006. Further, Aysia already was under a CHIPS order at the time the petitions were filed. We agree with the Department. Aysia's birth and CHIPS order clearly predated the filing of the petitions. Thus, the four TPRs were not ordered within three years *before* she either was adjudged CHIPS or born. We deem Holly to admit this argument because she did not file a reply brief or otherwise attempt to refute it. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (proposition asserted by respondent and not disputed in appellant's reply brief is taken as admitted).

⁵ The four older children's guardian ad litem filed a statement that he was not filing a brief but registered his agreement with the position taken by the Department.

¶8 We also observe that WIS. STAT. § 48.415 applies only to a prior *involuntary* TPR. Kuech testified that he told Holly that the law was unsettled as to whether a TPR is “involuntary” if the parent does not contest the grounds. We need not consider either the status of the law on this point or Kuech’s understanding of it because either way the statute does not apply. If the TPRs were voluntary because Holly did not contest the grounds, the statute does not apply on its face; if they were involuntary because she contested the disposition, it still does not apply because of Aysia’s date of birth. We see no deficient representation, prejudicial or otherwise.

By the Court.—Orders affirmed.

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

