

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2009

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. 2008AP1775
2008AP1776
2008AP1777**

**Cir. Ct. Nos. 2007TP22
2007TP23
2007TP24**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2008AP1775

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

DUNN COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DEBRA O.,

RESPONDENT-APPELLANT,

CRAIG D.,

RESPONDENT.

No. 2008AP1776

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

DUNN COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DEBRA O.,

RESPONDENT-APPELLANT,

CRAIG D.,

RESPONDENT.

NO. 2008AP1777

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

DUNN COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DEBRA O.,

RESPONDENT-APPELLANT,

CRAIG D.,

RESPONDENT.

APPEALS from orders of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Reversed and causes remanded with directions.*

¶1 BRUNNER, J.¹ Debra O. appeals orders terminating her parental rights to Deanna D., Daniela D., and Dominique D. Debra contends she was given inadequate notice of the conditions necessary to return her children to the home or to grant visitation, in violation of WIS. STAT. § 48.356. She also argues a condition for visitation was improper because it was not within her power to satisfy the condition. We agree with both contentions, reverse the orders, and remand with directions.²

BACKGROUND

¶2 Dunn County³ filed a petition to terminate Debra's parental rights in November 2007, alleging, as the single ground, a continuing denial of periods of physical placement or visitation under WIS. STAT. § 48.415(4). A September 2004 permanency plan order had allowed visitation, but only if each child agreed to the visitation.⁴ That order did not otherwise specify what conditions were necessary for either return to the home or visitation. Attached to the order was a two-page

¹ Debra O. filed a motion to consolidate these appeals, and we granted that motion on July 31, 2008. These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² We exercise our authority to extend the time for issuing our decision in these appeals until today's date. *See Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). As evidenced by the four filing extensions requested by the parties, these were complicated appeals and the extension was necessary to permit us to examine the briefs and voluminous record and give the appeals the careful consideration the parties deserve.

³ Although these cases are captioned with Dunn County Human Services as the petitioner-respondent, we refer instead to Dunn County throughout this opinion. Human Services did not file the TPR petitions in the circuit court.

⁴ For ease of reference, we will refer to orders in the singular because, although there were typically separate orders prepared as to each child, it appears the orders were identical in all relevant respects.

document titled Conditions for Disposition and another sheet titled Additional Conditions Ordered by the Court. The attachments contained lists of items, some of which might have been conditions for either return or visitation, and others which clearly were not. The provision concerning the children agreeing to visitation appeared on the “Additional Conditions” sheet. The court did not check the box on the order indicating Debra was advised of the conditions necessary for return or visitation.⁵ The permanency plan itself contained a section to include the court-ordered conditions for return of the child to the home. However, neither of the boxes on the form was checked and the space for listing conditions was left blank.

¶3 Some visitation occurred following the September 2004 order, but the children were opposed to it and ultimately terminated visitation. A September 2006 Order for Revision of Dispositional Order then denied Debra physical

⁵ The court also did not mark the box indicating that the previous dispositional order remained unchanged. However, no concurrent dispositional order was issued. The next earlier order was a permanency plan order filed December 22, 2003, which was the same day an earlier TPR petition was dismissed following a jury trial. That permanency plan order, however, contained no conditions and stated the previous dispositional order remained unchanged. The most recent dispositional order was a May 19, 2003 Order for Revision of Dispositional Order that did contain four explicit conditions for gaining visitation. Three of the conditions were to be satisfied by June 1, 2003, and the fourth did not apply unless the others were first satisfied. Additionally, the May 2003 order adopted all prior orders not in conflict with it. The next earlier order was a December 2002 Order to Revise and Extend Dispositional Order. It prohibited any contact with the children due to a criminal bond requirement and therefore did not provide any conditions for placement or visitation.

The TPR petition that was dismissed in December 2003 had alleged a continuing need of protection or services under WIS. STAT. § 48.415(2). The petition pertained to the three children involved in this case and one additional child. The jury concluded the County did not prove the social services agency made a reasonable effort to provide the services ordered by the court.

placement and visitation with the three children.⁶ That order did not list any conditions necessary for granting placement or visitation. However, the form order stated: “All provisions of the dispositional order not changed by this order remain in full force and effect.”

¶4 The County moved for summary judgment at the grounds stage of the termination proceeding, contending Debra had been denied both placement and visitation by an order in effect for over one year, based on the September 2006 order. Debra filed a motion to dismiss and a response to the County’s motion, arguing she was not provided with the notice of conditions required by WIS. STAT. § 48.356. The court concluded the conditions set forth in the September 2004 permanency plan order were still applicable and granted the County’s motion for summary judgment.

DISCUSSION

¶5 Motions to dismiss and for summary judgment are both subject to our de novo review. *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶13, 296 Wis. 2d 273, 281, 722 N.W.2d 633. The County argues the documentary evidence established it was entitled to summary judgment that grounds existed for TPR under WIS. STAT. § 48.415(4). That statute states:

Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:

⁶ Debra regained placement of two other children just prior to the September 2004 order. At some point, one turned eighteen and moved out of the home. Debra still had placement of the other child when the TPR petition was filed in November 2007.

(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 [numerous sections] *containing the notice required by s. 48.356(2)*

(b) That at least one year has elapsed since the order denying ... placement or visitation was issued and the court has not subsequently modified its order so as to permit ... placement or visitation. (Emphasis added.)

WISCONSIN STAT. § 48.356, in turn, requires the court to inform the parent “of the conditions necessary for the child ... to be returned to the home or for the parent to be granted visitation.”

¶6 The notice required by WIS. STAT. §§ 48.356 and 48.415(4) is “necessary to give a parent an opportunity to conform his or her conduct to avoid termination of parental rights.” *Waukesha County v. Steven H.*, 2000 WI 28, ¶25, 233 Wis. 2d 344, 607 N.W.2d 607.⁷ The circuit court’s duty to warn is part of the “panoply of procedures” the legislature created “to assure that parental rights will not be terminated precipitously or capriciously when the state exercises its awesome power to terminate parental rights.” *Id.*

¶7 The County acknowledges the September 2006 Order for Revision of Dispositional Order failed to include the WIS. STAT. § 48.356 conditions, but argues the form language referring to the prior dispositional order was sufficient to provide notice. Specifically, the County asserts the form language adequately referred Debra to the September 2004 permanency plan order, and that order

⁷ *Steven H.* involved a termination of parental rights under WIS. STAT. § 48.415(2), rather than subsec. (4). *Waukesha County v. Steven H.*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. However, both sections contain the WIS. STAT. § 48.356 notice requirement.

satisfied the notice requirement. The County's argument is flawed for three primary reasons.

¶8 First, there were three permanency plan orders and one dispositional order filed between the September 2004 and September 2006 orders.⁸ There were also three more permanency plan orders issued before the TPR petition was filed. Not one of those seven orders referenced any conditions for placement or visitation.

¶9 Second, the form language refers to "provisions of the dispositional order." A dispositional order is not the same as a permanency plan order, in title or substance. Thus, it was not clear that Debra should attempt to refer to an old permanency plan order to locate the necessary conditions. Further, the interceding August 2005 Order for Revision of Dispositional Order was limited to the issue of baptism and did not include any conditions for return or visitation. Rather, it stated that all court-ordered conditions from any prior dispositional orders remained in effect. Thus, if Debra were able (in September 2006) to locate the May 2003 Order for Revision of Dispositional Order, she would need to refer to it to find the latest notice of conditions.

¶10 It is unreasonable to expect a parent to refer back through so many orders to determine whether expired conditions were still relevant.⁹ This is especially true given that those conditions were established six months prior to the

⁸ Permanency plan orders were filed on 12/10/04, 8/31/05, 3/6/06, 9/19/06, 3/5/07, and 9/17/07. One Order for Revision of Dispositional Order was filed on 8/31/05.

⁹ As noted above, the conditions were to be achieved by June 2003. In any event, it appears Debra complied with those conditions.

dismissal of the earlier TPR petition filed against Debra. Given the number of intervening and subsequent orders lacking a notice of conditions, and the fact the form language referred to the prior *dispositional* order, the September 2006 order did not adequately refer Debra to the September 2004 permanency plan order conditions.

¶11 Third, even if we assumed Debra was adequately referred to the September 2004 permanency plan order, that order fails to satisfy the statutory notice requirement for three reasons. First, the order did not prohibit visitation; it permitted visitation if there was agreement by, among others, the children. Visitation then occurred, without the circuit court having to enter a new order. Hence, the order was not one described by WIS. STAT. § 48.415(2). Second, the permanency plan itself did not list any conditions in the designated location on the form. Finally, the order failed to clearly identify what conditions applied to gaining visitation and/or placement. In fact, looking at the three pages of attachments, with two exceptions, this court cannot determine what conditions Debra had to comply with in order to gain visitation or placement.

¶12 The County asserts that the “same conditions that were necessary for Debra to have the children returned to her home were also necessary for Debra to be granted visitation.” While this is a convenient statement, the County provides no citation or explanation demonstrating why this is true. The only condition that references visitation is the one requiring the children’s consent to visitation. Certainly the County does not contend that, without further court order, Debra could have also gained placement if the children simply agreed to it. Conversely, there is a requirement that Debra provide “adequate clothing, food, and furniture, so as to allow for future potential placement” of the children. Would failing to do

so prevent her from having supervised visits with her children? In addition, the attachments to the order listed numerous other general requirements, such as a prohibition against Debra violating any laws, as well as other items that cannot be described as conditions or requirements.¹⁰ The various items are not listed in any particular order, some are repetitive, and there are no headings indicating which items are the conditions for placement or visitation.

¶13 In *Waushara County v. Lisa K.*, 2000 WI App 145, ¶¶9-10, 237 Wis. 2d 830, 615 N.W.2d 204, we recognized there was a distinction between specific conditions for gaining placement or visitation, as opposed to general requirements in an order. Parents should not be left to guess what it is they must accomplish in order to gain visitation or placement of their children. Rather, WIS. STAT. § 48.356 requires parents be informed of concrete conditions that, once achieved, will entitle them to reunification. Indeed, in these cases, the court's orders and the county agency's reports often stated Debra substantially complied with the permanency plan. The agency reported that Debra attended therapy and tried very hard and that the primary obstacle to reunification was the children's unwillingness to have contact with her.

¶14 To the extent the visitation condition in the September 2004 permanency plan order is relied on to demonstrate compliance with the notice requirement, we agree with Debra that it is inappropriate to set conditions for visitation that are beyond a parent's control. See *Steven H.*, 233 Wis. 2d 344,

¹⁰ For instance, various items stated the county agency retained custody of the children, that a given child would remain in a specific foster care placement, or that previous dispositional orders remained in effect until the child's eighteenth birthday.

¶¶24-25, 32, 37 (the intent of the notice is to permit the parent to make necessary changes); *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶¶49-56, 293 Wis. 2d 530, 716 N.W.2d 845 (courts cannot terminate parental rights based solely on a failure to satisfy an impossible condition of return). It is especially inappropriate to place the conditions within the children's exclusive control.

¶15 Finally, we recognize it may not be necessary in every TPR case to demonstrate that the parent was provided the requisite notice of conditions in every single order, as long as the parent had adequate notice given the facts of the case. *See Steven H.*, 233 Wis. 2d 344; *Lisa K.*, 237 Wis. 2d 830. However, these cases are not a close call. There was substantial noncompliance here. On remand, the circuit court is directed to enter summary judgment in favor of Debra, dismissing the TPR petition.¹¹

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

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

¹¹ Nothing in this opinion prohibits the County from filing a new petition to terminate parental rights, if it believes grounds exist now or in the future. However, we realize the issue is now moot as to Daniela, who has already turned eighteen. Nonetheless, adult adoption remains an option.

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