STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP532

In re the termination of parental rights to K. V.,
a person under the age of 18:

BROWN COUNTY DEPARTMENT OF
HUMAN SERVICES,

Petitioner-Respondent-Petitioner,

v.

J. V.,

Respondent-Appellant.

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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REASONS FOR DENYING REVIEW

I. The county's first issue is a nonissue because the court of appeals did not conclude and Jennifer did not contend that the county failed to establish the ground due to a lack of oral notice of termination.

The first issue presented for review is a nonissue. The petitioner, Brown County Department of Human Services, describes the issue as follows:

> Is oral notice of the grounds for termination of parental rights required if the statute under Wis. Stat. § 48.415 requires an order containing written notice under Wis. Stat. § 48.356(2)?

(county's petition, p. 4). The plain language of Wis. Stat. § 48.415(4), the termination ground based on the continuing denial of visitation (referred to as the "continuing denial" ground), does not require proof that the circuit court provided the parent with oral notice of potential termination. Only proof of written notice is required. As the court of appeals correctly recognized, Jennifer[1] did not contend otherwise.

In its brief in the court of appeals (pp. 15-16), the county made a similar claim that Jennifer's challenge to the circuit court's grant of summary judgment on

[1] Pursuant to Wis. Stat. § (Rule) 809.19(1)(g), J.V. will be referred to by a pseudonym, Jennifer.

the continuing denial ground was somehow premised on the circuit court's failure to provide her with oral notice of termination. In her reply brief, Jennifer responded:

> Contrary to the county's claim (brief, pp. 15-16), Jennifer does *not* contend that the continuing denial ground requires proof of *oral* notice. Her argument is that the county could not prove the continuing denial ground because the order denying visitation does not contain adequate *written* notice that Jennifer's parental rights were in jeopardy under the continuing denial ground.

(Jennifer's reply brief, p. 7) (emphasis in original). The court of appeals correctly recognized that Jennifer does not argue that § 48.415(4)(a) requires proof of an oral warning. *Brown County DHS v. J.V.*, No. 2022AP532, slip op., ¶17 n.5 (Wis. Ct. App. July 28, 2022) (App. 12-13).

In its petition, the county writes that the court of appeals "found that oral warnings are directly incorporated into the statute for written warnings, yet in a footnote does not discuss any further." (county's petition, p. 12). That statement is inaccurate and reflects an apparent misunderstanding of the two statutes in play here, specifically, § 48.415(4), the continuing denial ground, and Wis. Stat. § 48.356, governing the circuit court's duty to warn parents of termination.

As relevant here, the continuing denial ground requires proof of all of the following:

> (a) That the parent has been … denied visitation under an order under s. … 48.363 … containing the notice required by s. 48.356 (2) ….
>
> (b) That at least one year has elapsed since the order denying … visitation was issued and the court has not subsequently modified its order so as to permit … visitation.

Wis. Stat. § 48.415(4). Jennifer has not disputed that she was denied visitation under Wis. Stat. § 48.363, which governs revision of CHIPS orders, and that at least one year had elapsed without the order denying visitation being modified. At issue was whether the county could prove the element of § 48.415(4)(a) requiring proof that the order denying visitation contained "the notice required by s. 48.456(2)", which provides in relevant part:

> (2) In addition to the notice required under sub. (1), any written order which … denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

Because sub. (2) requires that the written notice contain "the information specified under sub. (1)", the court of appeals correctly concluded that "our legislature defined the necessary information to be provided in the written notice as 'the information specified under sub. (1).'" *J.V.*, slip op., ¶18 (App. 13). Subsection (1) provides in relevant part:

> (1) Whenever the court … denies a parent visitation … the court shall orally inform the parent … of any grounds for termination of

> parental rights under s. 48.415 *which may be applicable* and of the conditions necessary … for the parent to be granted visitation.

Wis. Stat. § 48.356(1) (emphasis added). Thus, as the court of appeals rightly concluded, critical to the issue on appeal – whether Jennifer received an adequate written warning – is the legislature's decision to define the necessary information as "'*any grounds* for termination of parental rights under [Wis. Stat. §] 48.415 *which may be applicable*.'" *J.V.*, slip op., ¶18 (bracketed language and italics in opinion) (App. 13).

Contrary to the county's claim (petition, pp. 4-5), the court of appeals did not incorporate the oral warning requirement into sub. (2). Rather, consistent with the plain language of §§ 48.356 and 48.415(4)(a), the court of appeals correctly concluded that the continuing denial ground requires proof that the order denying visitation contained written notice that informed the parent of any grounds for termination which may be applicable. The court did not hold or imply or suggest that the continuing denial ground requires proof of an oral warning.

The county's contention that review is warranted to provide "specific guidance" on "whether oral warnings are needed in order to file a termination of parental rights case that requires an order containing written notice under 48.356(2)" is without merit. (county's petition, p. 6). The plain language of the statutes and even the county's own statement of the "issue" leaves no doubt. When a termination ground requires proof that the parent received written

notice under § 48.356(2), the ground does not require proof that the parent received oral notice.

Indeed, any such claim to the contrary was rejected 30 years ago in *M.P. v. Dane County DHS*, 170 Wis. 2d 313, 324, 488 N.W.2d 133 (Ct. App. 1992), where the court held that the plain language of the statues "requires only proof of the written notification in termination proceedings based on the earlier CHIPS adjudication." At issue there was the continuing CHIPS ground for termination in § 48.415(2) which, like § 48.415(4), contains an element requiring proof that the CHIPS order contained the notice required by § 48.356(2). The court concluded that while the CHIPS judge must provide oral and written notice of termination, "in later termination proceedings … it is enough … that the written CHIPS order contains the required information." *Id*. at 326.

The county is asking this court to accept review to resolve an issue that is not an issue in this case. Jennifer's challenge was to the adequacy of the written notice. She never claimed that the continuing denial ground required proof of an oral warning. The court of appeals determined that the *written* warning provided to Jennifer when her visits were denied did not provide the notice required by §§ 48.415(4) and 38.356(2). Review is not warranted.

II. The court of appeals' holding that the written notice provided to Jennifer was inadequate is consistent with the plain language of the statutes as interpreted by this court, making review inappropriate.

The county also asks this court to accept review because it contends that the court of appeals' conclusion that the written notice provided to Jennifer was statutorily inadequate conflicts with *Eau Claire County DHS v. S.E.*, 2021 WI 56, 397 Wis. 2d 462, 960 N.W.2d 391. The county is wrong.

At issue in *S.E.* was the applicability of a legislative change in the continuing CHIPS ground under § 48.415(2) that eliminated any forward-looking consideration of whether the parent would meet the conditions of return when the child had already been out of the home for at least 15 of the most recent 22 months. *Id.*, ¶3. S.E. argued, in part, that the 15/22-months timeframe began to run after she received notice of the amended version of the continuing CHIPS ground. The supreme court disagreed, holding that the period ran from when S.E. received the written notice accompanying the initial CHIPS order. *Id.*, ¶5.

Nothing in *S.E.* conflicts with the court of appeals' opinion. Rather, the supreme court's discussion of the notice required under § 48.356(1) and (2) supports the holding in this case. Interpreting the meaning of "may be applicable" in § 48.356(1), the court wrote that "the circuit court must give the parent

notice of the grounds that may form the basis for a future TPR hearing—at the particular time the notice is given." *Id.*, ¶24 (emphasis in original). The court emphasized that the notice accompanying the initial CHIPS order identified continuing CHIPS as a possible ground for termination. *Id.*, ¶¶7 & 26. From that, it is only reasonable to conclude that when, as here, a circuit court enters an order denying visitation, it "must" give the parent written notice of the continuing denial ground because "at the particular time the notice is given" that ground "may be applicable." *See Id.*, ¶24.

Prefatory language on the form notice "cautioning the parent" that their rights could be terminated if other grounds "exist now or in the future" does not eliminate the circuit court's obligation to identify the grounds that exist "at the time" of the CHIPS order. *Id.*, ¶27 (emphasis in original). Consequently, here, the court of appeals correctly held that the prefatory language was insufficient to satisfy the statutory requirement to provide the parent notice of any ground that "may be applicable," which certainly included the continuing denial ground. *J.V.*, slip op., ¶17 (App. 12).

The court of appeals correctly concluded that the fact that three of the thirteen grounds on the notice form were check-marked but *not* the continuing denial ground is particularly "problematic" because "[t]his omission resulted in a form that was not merely nonspecific, but was actually misleading." *Id.*, ¶20 (App. 14).

> Because the form's prefatory language describes the check-marked grounds as "those that may be most applicable to you," its recipient could reasonably interpret those grounds as the relevant, timely grounds affecting his or her parental rights. Although the prefatory language notes "that if any of the others also exist now or in the future, your parental rights can be taken from you," it is conversely unlikely that a recipient of the form would necessarily make the assumption that one of the unchecked boxes would be immediately relevant—or, as in the case of the continuing denial of visitation ground, start the running of a one-year clock threatening one's parental rights.

Id. (App. 14-15).

Nothing about the court of appeals' holding or reasoning is in conflict with *S.E.*, where this court wrote that, in order to fulfill the Children's Code purpose of assisting parents in fulfilling the conditions necessary to be reunited with their children, the circuit court must provide them with notice of "the particular circumstances under which a CHIPS adjudication may result in the termination of their parental rights." *S.E.*, 397 Wis. 2d 462, ¶23. The court of appeals was correct that the circuit court failed to do that in this case.

The county's claim that the court of appeals' decision may "bring into question" the standard notice form is without merit. (county's petition, p. 7). The problem was not with the form but with how the county used it. Although three of the thirteen grounds

on the form were check-marked, "the continuing denial ground *was not among them*." *J.V.*, slip op., ¶20 (emphasis in original) (App. 14). Jennifer conceded below that had the continuing denial ground been one of the check-marked grounds, that likely would have been sufficient notice. *Id.*, ¶15 (App. 11). But the county chose to use an out-of-date form that had been completed four months *before* the hearing at which visitation was denied. Nothing in the court of appeals' decision discourages use of the standard form; it merely encourages counties to complete it properly.

Finally, in its Statement of Facts and of the Case, the county writes, in a paragraph referring to the October 30, 2018 hearing at which the court denied visitation, that "the transcript is complete" and then posits a reason why a new form was not used. (county's petition, p. 13). Those statements are made without citation to the record and, therefore, should not be considered.

In any case, however, Jennifer is unaware of any requirement that the written notice be signed by the parent, nor does the county cite any such authority. Indeed, as the county acknowledges (petition, p. 14), the current notice forms are incorporated into the respective orders and do not include space for the parent's signature. *See* Court Forms JC-1611T (Dispositional Order – Protection and Services with TPR Notice) & JD-1786T (Order for Revision of Dispositional Order with TPR Notice). Rather, § 48.356(2) simply requires that the written order shall "notify the parent" of any applicable grounds for

termination. An affidavit showing the county had mailed the order, including a properly complete notice form, would certainly constitute notice to the parent. Thus, nothing prevented the county from serving Jennifer with a notice form that had the continuing denial ground check-marked.

CONCLUSION

For the reasons set forth, Jennifer respectfully requests that the court deny the county's petition for review.

Dated this 9th day of September, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this response is 2,169 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this response, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 9th day of September, 2022.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender