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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2024AP000472

In the Interest of: S.G., a person under the age of 18.

S.G.,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES
AND WAUPACA COUNTY,

Respondents-Respondents.

On Appeal from an Order Dismissing S.G.'s Petition for Protection or Services;
the Honorable Troy L. Nielsen, Presiding, Entered in the Waupaca County
Circuit Court

BRIEF OF RESPONDENTS-RESPONDENTS

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ISSUES PRESENTED

1. Did the Circuit Court err in granting party status to Waupaca County Corporation Counsel with power to contest Sara's petition for protection or services, brought pursuant to Wis. Stats. § 48.13(9)?

The Circuit Court found that Waupaca County Corporation Counsel, as the representative of the interest of the public, pursuant to Wis. Stats. § 48.09, was a party who could contest the petition.

This Court should affirm.

2. Should the Circuit Court have addressed the issue of venue raised by Corporation Counsel before addressing any other issues?

Venue should have been addressed by the Circuit Court because Wis. Stats. § 48.185 is specific as to where cases under Chapter 48 may be filed.

This Court should address venue and should find that Sara's petition for protection or services should have been dismissed for improper venue.

3. Is this matter moot and not subject to one of the exceptions to mootness?

This Court should find this matter is moot and no exception to mootness applies in this case.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Waupaca County Corporation Counsel does not seek oral argument as it believes the briefs fully present the issues on appeal. Wis. Stats. § 802.22(2)(b). Nor does Respondents-Respondents seek publication as this is a one-judge appeal. Wis. Stats. § 809.23(b)(4)

INTRODUCTION

The Circuit Court concluded that Respondents-Respondents, Waupaca County, (hereinafter, Corporation Counsel) is a party as a representative of an interest of the public, pursuant to Wis. Stats. § 48.09. Corporation Counsel is tasked pursuant to that statute with representing the public interest in cases of children in need of protection or services. Corporation Counsel did not need to intervene because it was a party pursuant to section 48.09. However, Assistant Corporation Counsel Dominic Weisse did file a letter on April 13, 2023, requesting to be added as an interested party pursuant to Wis. Stats. § 48.09(5). This request was made as an administrative request to be permitted to e-file documents in the Circuit Court case as required pursuant to Wis. Stats. § 801.18(3).

Attorney Weisse also filed a motion to dismiss for improper venue. The motion was never heard because the Court focused on the timing of the petition and Corporation Counsel's contestation of the petition. The motion regarding venue should have been decided before addressing the other arguments.

STATEMENT OF THE CASE AND FACTS

Corporation Counsel does not dispute Sara's statement of the case and facts. In addition, Corporation Counsel notes the following facts. Sara filed a Petition for Protection or Services pursuant to Wis. Stats. § 48.13(9) on April 11, 2023. (R. 3:1-2). She had been placed by her guardian, who was authorized to act by proceedings venued in Vernon County, in Weyauwega, Waupaca County, Wisconsin for four days prior to filing of the petition. (R. 14:5). Sara's guardian had placed her in group homes in Amery, Polk County, Wisconsin for three months and then in River Falls, Pierce or St. Croix County, Wisconsin for 17 days. (R. 14:5). Sara is a child whose parents' rights had been terminated in Vernon County case number 21-TP-02 and the Vernon County CHIPS case was dismissed. (R. 14:5). At that time, guardianship and custody of Sara were transferred to

Wisconsin Department of Children and Families. (R. 14:3). Vernon County Circuit Court ordered the termination of parental rights of Sara's parents on April 22, 2021, without having an identified adoptive resource for Sara. (R. 14:3).

Upon termination of the parental rights of her parents, Sara was placed by her guardian to the underlying Vernon County Termination of Parental Rights order in a foster home for four months. (R. 14:3). She had several different placements in group homes and foster homes until her placement in Weyauwega, Wisconsin on April 7, 2023. There was a request for change of placement filed on April 7, 2023, in the Vernon County TP case. (R. 14:3). The change of placement became an order on April 17, 2023, changing placement to the foster home in Weyauwega, Wisconsin. (R. 14:5). It was absolutely clear that Sara would turn 18 on April 21, 2023. (R. 14:1).

Assistant Corporation Counsel Dominic Weisse filed a letter with the Circuit Court on April 13, 2023, requesting that Corporation Counsel be added as a party, pursuant to Wis. Stats. § 48.09, and for electronic filing access, pursuant to Wis. Stats. § 801.18(3). (R. 11:1). He filed a Notice of Motion and Motion to Dismiss Petition (R. 16:1) and Memorandum of Law in Support of Motion to Dismiss Petition (R. 17:1-5) on April 18, 2023, challenging venue and jurisdiction. The plea hearing was held on April 19, 2023, before the Honorable Troy L. Nielsen. Judge Nielsen asked Corporation Counsel if it was contesting the petition and Corporation Counsel answered in the affirmative. (R. 31:4). Sara's counsel objected to Corporation Counsel being a party to the action. Corporation Counsel stated that it was there representing the interest of the public pursuant to Wis. Stats. § 48.09. (R. 31:7). The Circuit Court reasoned that because Corporation Counsel represents the interest of the public and could file petitions under Chapter 48, it had the right to participate in a plea hearing and to enter an objection or contest the petition. (R. 31:19). The Court found Corporation Counsel to be a party. (R. 31:20). The Court further found that a fact-finding hearing could not reasonably be scheduled prior to Sara's 18th birthday, which was in two business days, and the Court dismissed the petition. (R.31:23).

Sara filed a Motion for Reconsideration and it was denied by the Circuit Court. (R. 21:1-4 and R. 23:1). This appeal follows.

ARGUMENT

1. Waupaca County Corporation Counsel had authority to contest Sara's CHIPS petition pursuant to Wis. Stats. § 48.09.

Corporation Counsel agrees with Sara's counsel that review for statutory interpretation is a question of law reviewed or decided independently. *In re Termination of Parental Rights to Max G.W.*, 293 Wis.2d 530, 544, 716 N.W.2d 845 (2006) and *In re Marquette S.*, 301 Wis.2d 531, 553, 734 N.W.2d 81 (2007).

Corporation Counsel filed a letter with the Circuit Court requesting to be added as a party pursuant to Wis. Stats. § 48.09, entitled Representation of the Interest of the Public. Black's Law Dictionary defines "representation" as "the act or instance of standing for or acting on behalf of another, esp. by a lawyer on behalf of a client." "Representative" is defined as "one who stands for or acts on behalf of another." Black's Law Dictionary. Section 48.09 states that the interest of the public "shall" be represented in proceedings under Chapter 48. In Waupaca County, the agency designated by the Waupaca County Board of Supervisors to represent the public's interest in Chapter 48 cases is Corporation Counsel. The statute states that interests of the public shall be represented by corporation counsel in **any matter** (emphasis added) arising under section 48.13. Wis. Stats. § 48.09(5). Sara filed her Petition for Protection or Services under section 48.13(9).

Sara cites a number of statutes in her brief, referencing the applicable statutes and alleging that they are in conflict with one another. Wis. Stats. § 48.13 provides who the court has jurisdiction over Chapter 48 cases. The statute used by Sara to file her petition, section 48.13(9), indicates that the court has jurisdiction over a child at least 12 years old, who signs a petition and who is in need of special treatment or care because a parent or guardian is not providing it. Nowhere in section 48.13 does it designate who is a party in CHIPS cases. Nor does the section state that Corporation Counsel cannot represent the public's interest or is not a party in a case filed under Wis. Stats. § 48.13(9).

Section 48.24(3) of the Wisconsin Statutes references what happens when an intake worker, as a result of an intake inquiry, determines that a child should be referred to the court under section 48.13. "The intake worker shall request that the district attorney, corporation counsel or other official specified in section 48.09

file a petition.” Wis. Stats. § 48.24(3). This statute refers back to section 48.09 as the authority for Corporation Counsel to file a CHIPS petition and be a party in the case.

Those authorized to file a petition under section 48.13 or Chapter 48 is outlined in Wis. Stats. § 48.25(1). Corporation Counsel may file a petition if the proceeding is under section 48.13. Section 48.25(1) references section 48.09 and Corporation Counsel’s authority to represent the public’s interest in Chapter 48 cases and become a party by filing a petition.

Sara’s counsel points to various statutes that do not mention Corporation Counsel or do not require that Corporation Counsel receive a copy of the petition or notice when it is not the petitioner. Wis. Stats. § 48.255 states who shall receive a copy of the petition. If Corporation Counsel is the petitioner, it must follow this statute. The statute does not state that Corporation Counsel receives a copy of the petition if filed by someone else. However, the vast majority of Chapter 48 cases are filed by either the district attorney’s office or the Corporation Counsel. While this statute does not require a copy of the petition to be given to Corporation Counsel when it is not the Petitioner, it does not state that Corporation Counsel cannot become a party.

Section 48.27 indicates who should receive notice after a petition has been filed. Wis. Stats. § 48.09 already gives Corporation Counsel authority to file the petition. Section 48.27 outlines who gets notice once Corporation Counsel files its petition. Corporation Counsel concedes that there is no mention of it receiving notice if someone else files the petition. This statute does not prohibit Corporation Counsel from being a party when someone else files the petition. Sara’s brief argues that because these statutes do not specifically state that Corporation Counsel shall receive a copy of the petition or notice when filed by someone other than Corporation Counsel, Corporation Counsel is not a party. Corporation Counsel is designated in section 48.09 as the representative of the interest of the public in all cases under Chapter 48. All cases means all cases. Additionally, Corporation Counsel has the dual role of Petitioner in some cases and may act as the Petitioner under section 48.13, and as Petitioner would be required to file the notice provisions to other parties as set forth in section 48.255(4).

None of the statutes cited by Sara's counsel specifically exclude Corporation Counsel as a party. Sara's counsel can point to no statutes that specifically state that Corporation Counsel is not a party when the petition is filed by a child or a child's parent. In fact, the opposite is true under section 48.09(5). It does not say Corporation Counsel represents the public interest in some cases or only when it has filed the petition. It states, "the interests of the public shall be represented in proceedings under this chapter . . . by the corporation counsel in any matter arising under section 48.13" Wis. Stats. § 48.09(5). "Arising under" means brought by any Petitioner, as set forth in Wis. Stats. § 48.25.

While the other statutes regarding the petition and notice do not specifically list Corporation Counsel as one who receives a copy of the petition or notice when it is not the Petitioner, section 48.09 provides Corporation Counsel a way to intervene into any matter brought under chapter 48. When it intervenes, Corporation Counsel becomes a party.

Wis. Stats. § 803.09 allows a party to intervene in a civil action. CHIPS proceedings are civil in nature and the rules of civil procedure govern unless "there is a distinctly different procedure established in another statute." *State ex rel. Kenneth S. v. Circuit Court for Dane County*, 313 Wis.2d 508, 513, 756 N.W.2d 573 (Ct. App. 2008). Under section 803.09, a party who wishes to intervene must file a timely motion, "claim an interest sufficiently related to the subject of the matter," show that the decision of the action "may impair or impede" the intervenor's ability to protect the interest, and show that the parties in the action cannot "adequately represent the movant's interest." *Helgeland v. Wisconsin Municipalities*, 307 Wis.2d 1, 20-21, 745 N.W.2d 1 (2008).

Assistant Corporation Counsel Weisse did not argue intervention under section 803.09 because section 48.09 authorized Corporation Counsel to represent the interests of the public. It is already recognized by the legislature that Corporation Counsel as the representative of the public interest clearly meets the requirement of section 803.09 because of the nature of the cases under section 48.09. Attorney Weisse's motion to be added as a party was timely, being filed on April 13, 2023. (R.11:1). The petition was only filed on April 11, 2023, and the hearing was held on April 19, 2023. Clearly Corporation Counsel has an interest in a CHIPS case when the county may have to provide funding and services to a child in need of protection or services and a decision of the court may impair its

ability to provide and fund services to all children subject to child welfare court ordered services. The other parties in the case, there were two: Sara and her guardian, who was authorized to act due to Vernon County's Termination of Parental Rights order. The Vernon County guardian's authority to act would terminate upon Sara's eighteenth birthday on April 21, 2023. Neither had the same interests as Corporation Counsel in representing the public's interest. Sara wanted a CHIPS finding and the Court's entry of a dispositional order, which would require Waupaca County services, and placement until her nineteenth birthday. The guardian's authority would terminate within 48 hours of the hearing. Neither Sara nor the guardian represented the interest of the public. It is not reasonable to expect a county to provide funding, services, profession staff time, and resources without having a representative in a case deciding its obligation.

The Circuit Court made its finding that Corporation Counsel is a party in cases brought by others under Chapter 48.

You know, I – I struggle with the idea that the agency or the entity or the office in charge of representing the public's interest has the right and ability to petition, but not the ability to participate and be a party in cases in which they don't petition.

(R. 31:17)

I think whichever entity has the responsibility of representing the public interest has a right to, you know, participate in a plea hearing, has the right to enter, you know, an objection or, you know, indicate they're contesting a petition, because I think it just – it just – it would strike me to – to not make sense to me, because again, they have the right to petition. And, you know, they're – you know, they're part of these cases.

(R. 31:19).

Attorney Weisse requested to be added as a party under section 48.09 because it provides that Corporation Counsel represents the public's interest in these types of cases. The legislature recognized that the public had the interest and established a specific statute to intervene in cases where that interest would be affected by a decision of the court. Therefore, the Circuit Court did not err in allowing Corporation Counsel to be added as a party and Corporation Counsel had authority, as an intervening party, to object to or contest the petition.

2. The Circuit Court should have addressed the issue of venue raised by Assistant Corporation Counsel Weisse.

Attorney Weisse filed a Memorandum of Law in Support of Motion to Dismiss Petition. (R. 17:1-5). He argued that Waupaca County was an improper venue for the case. The Wisconsin Supreme Court has found that venue is most appropriate in the county where the child is domiciled, to be determined at the time of the filing of the petition. *In the Interest of Corey J.G.*, 215 Wis.2d 395, 417, 572 N.W.2d 846 (1998). “Domicile means living in that locality with intent to make it a fixed and permanent home.” *Id.* at 415. At the time of the filing of the petition and hearing, Sara had been accepted to UW-Milwaukee and was hired to paint dorm rooms in the summer. It was possible that she would be able to live on campus during the summer. (R. 14:5). She had no intention to make Weyauwega, Wisconsin her fixed and permanent home. Other than the respite foster home she was placed in by her guardian on April 7, 2023, she had no ties to Waupaca County. The Petition for Protection or Services she filed in Waupaca County listed her guardian’s address as Appleton, Outagamie County, Wisconsin.

Sara was physically present in Waupaca County from April 7, 2023, until the time of the hearing on April 19, 2023. She had no prior contact with Waupaca County Department of Health and Human Services. (R. 15:1-14). The Affidavit of Jasmine Peterson, CPS Supervisor at Waupaca County DHHS referenced the Wisconsin Inter-County Agreement. It is not binding authority but is an agreement to which Vernon County is a party. There had been no contact by the Vernon County DHHS workers requesting change of venue. The change of placement was not filed in the Vernon County Termination of Parental Rights case until after the Petition was filed in Waupaca County. The change of placement order was signed on April 17, 2023, just two days before the hearing in Waupaca County. An order for change of placement does not confer residency to a minor child. The child remains subject to personal jurisdiction in Vernon County.

Sara was present in Waupaca County for four days before the petition was filed. Pursuant to Wis. Stats. § 48.185, her presence is the only means by which the Circuit Court could have had jurisdiction in this case. However, the statute states that venue “may” be in the county where the child resides or where the child is present. The statute gives the Circuit Court discretion by the use of the word

“may” and if the Court finds there is a more proper venue, the Court may dismiss for improper venue. In Sara’s case, Vernon County was the proper venue. The original CHIPS case was venued in Vernon County. The Termination of Parental Rights case was venued in Vernon County. Sara was still subject to juvenile court jurisdiction in Vernon County due to the TPR order entered in Vernon County in April 2021. There was no request to change venue to Waupaca County. Frankly, Vernon County failed Sara when it dismissed her CHIPS case without having an identified adoptive resource for her.

Ironically, had Sara’s guardian notified Vernon County child welfare professionals that Sara wanted services and placement to continue beyond her eighteenth birthday as permitted under Wis. Stats. § 48.355(4)(b), the guardian would have to concede that the allegations in Sara’s petition filed pursuant Wis. Stats. § 48.13(9) were true: that Sara is in need of special treatment or care which the guardian is unwilling, neglecting, unable or needs assistance to provide. Vernon County child welfare professionals, and its Corporation Counsel or District Attorney, could have filed a Petition for Protection or Services pursuant to section 48.13(10), where the guardian would also concede the guardian was neglecting the child due to being unable to provide necessary care to Sara resulting in substantial risk of physical harm to the child.

The Circuit Court should have addressed venue before deciding the other issues. If it had done so, it would have found Waupaca County was not the proper venue for the case.

3. The case is moot and not subject to one of the exception to mootness.

Sara filed a petition under s. 48.13(9) on April 11, 2023, 10 days before her 18th birthday. The timing of filing the Petition is of absolute control of the Petitioner and no other party. The earliest the Circuit Court could hear the matter was April 19, 2023. The Petition for Protection or Services was filed on April 11, 2023. Pursuant to Wis. Stats. § 48.273(1)(c), notice must be given by mail at least seven days prior to the hearing, unless there was personal service. There is not affidavit of service in the court record. Corporation Counsel contested the petition. (R. 31:4). Judge Nielsen asked Sara’s counsel:

So, Attorney Drury, my question is kind of start things out her today recognizing, your client turns 18 in two days, what legal authority

would I have to find today that your client is in need of protection or services when one of the non-petitioning parties is contesting the petition?

(R. 31:5).

The Circuit Court was then unable to schedule a fact-finding hearing before Sara's 18th birthday. The Court found it unreasonable to do so. (R. 31:23). The Court cited Wis. Stats. § 48.355(4) and stated that a dispositional order needed to be entered before Sara turned 18. (R. 31:24). Pursuant to Wis. Stats. § 48.33, a court report is required to be completed by an agency defined in Wis. Stats. §48.38((1)(a) and filed with the Court prior to a dispositional hearing. There was not enough time before Sara turned 18 years old for the report to be completed by Waupaca County Department of Health and Human Services, an agency that had no information about this child. In the decision on Sara's Motion for Reconsideration, the Circuit Court found that the legal issues in the motion were "moot due to the child turning 18 years of age" on the day he wrote the decision and order on the motion. (R. 23:1).

"A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct.1382, 146 L.Ed.2d 265 (2000)). "As a general rule, this court will not consider questions which have become moot due to a change in circumstances." *State ex. rel. Waldeck v. Goedken*, 84 Wis.2d 408, 413, 267 N.W.2d 362 (1978). Sara is now 19 years old. There is no CHIPS case pending and there is no jurisdiction available to her under Wis. Stats. § 48.13.

In order for Sara's case to be addressed when moot, she must show "exceptional or compelling circumstances." *City of Racine v. J-T Enters. of Am., Inc.*, 64 Wis.2d 691,702, 221 N.W.2d 869 (1974). Mootness may be examined if one of the following exceptional or compelling circumstances exist: (1) "the issues are of great importance," (2) "the constitutionality of the statute is involved," (3) the situation arises so often "a definitive decision is essential to guide the trial courts," (4) "the issue is likely to arise again and should be resolved by the court to avoid uncertainty," or (5) the issue is "capable and likely of repetition and yet evades review." *Matter of Commitment of J.W.K.*, 386 Wis.2d 672, 683-684, 927 N.W.2d 509 (2019) (quoting *G.S. v. State*, 118 Wis.2d 803, 805, 348 N.W.2d 181 (1984)).

Sara cannot show one of the exceptional or compelling circumstances. Sara was two days shy of her 18th birthday when the hearing was held on her petition. She had been accepted at UW-Milwaukee and was going to be staying in Milwaukee in the summer. She had not shown in her petition that she was a child in need of protection or services. She had already arranged for herself a place to stay, had been accepted to college and had plans of where she was going to stay for the summer. Pursuant to Wis. Stats. § 48.13(9), she needed to show she was in need of special treatment or care. Like so many children who turn 18 and graduate from high school, Sara went on to college. She has moved on with her life.

The situation that Sara found herself in is not the usual way that cases come to the circuit court under Chapter 48 petitions. Sara had been physically present in several other counties before being placed by her guardian in Waupaca County. The petition could have been filed in any one of those counties well in advance of her 18th birthday if the court is inclined to consider physical presence of a child who is also subject to the jurisdiction of a Children's Court order in Vernon County. She had lived for 4 months in one county. However, Vernon County did not lose jurisdiction regarding child welfare issues involving Sara as she was subject to the TPR order entered in Vernon County.

Sara's counsel argues that the statutory interpretation presented in this case is of great importance. It is not of great importance when the statutes cited are not in conflict with one another. As evidenced by the lack of case law on the subject, the interpretation of the statutes cited in Chapter 48 is not an issue that has been appealed. It is not something that is occurring so often with differing results from the courts that it needs addressing. The same set of facts presented in this case are not found in any case law, indicating that the issues raised in this appeal are not likely to present themselves again, or dissuade someone from appealing a different case.

Sara cannot meet one of the exceptional or compelling circumstances to warrant this Court finding an exception to the mootness doctrine. Therefore, this Court should find this case is moot.

CONCLUSION

This case is moot because Sara turned 18 years old two days after the Circuit Court made its ruling and Sara cannot show exceptional or compelling circumstances to meet one of the exceptions to the mootness doctrine. However, if this Court finds an exception to the mootness doctrine, this Court should affirm the findings and decision of the Circuit Court. The Circuit Court did not err when it granted Corporation Counsel's request to be added as a party in the CHIPS case filed by Sara. Corporation Counsel is a party in Chapter 48 cases when representing the interests of the public under Wis. Stats. § 48.09, whether it is the Petitioner or not. Had the Circuit Court addressed the motion to dismiss because of improper venue, it would have found that Waupaca County was not the proper venue based upon Vernon County being better suited to hear the case.

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 15 pages.

Dated this 19th day of July 2024.

Signed:

Electronically signed by

Angela F. Boelter

ANGELA F. BOELTER

Assistant Corporation Counsel