COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-3033

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE TERMINATION OF PARENTAL RIGHTS OF BRITTANY ANN H., A PERSON UNDER THE AGE OF 18:

WAUKESHA COUNTY,

PETITIONER-RESPONDENT,

V.

STEVEN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed.*

BROWN, J. Steven H. appeals from an order terminating his parental rights to his daughter, Brittany Ann H. When the order was issued removing Brittany from her home due to her mother's cocaine use, the written warning required by § 48.356(2), STATS., was not included. Steven asserts that trial counsel's failure to object to this deficiency amounted to ineffective

assistance of counsel. Despite our firm belief that substantial compliance should apply in this case, we are compelled by ***D.F.R. v. Juneau County Department of Social Services***, 147 Wis.2d 486, 433 N.W.2d 609 (Ct. App. 1988), to reverse the termination order.

This case should not be about Steven; it should be about his biological daughter Brittany. Brittany was born in February 1995. Her mother, Amy M., was incarcerated for cocaine use when Brittany was born. No doubt as a result of her mother's cocaine use during pregnancy, Brittany is severely developmentally disabled. At nine months old, when she was placed in the home of her current foster parents, she was still unable to make a fist or follow objects with her eyes. Despite these disabilities, her current foster parents would like to adopt her. Steven has been incarcerated for most of Brittany's life, but still wishes to maintain his parental rights.

The procedural history behind Waukesha County's efforts to help Brittany is as follows. A petition alleging Brittany was in need of protective services (CHIPS petition) was filed in February 1995, the same month she was born. Proceedings on this petition were held in March and April of 1995, at which Steven did not appear. Conditions of supervision relating to Amy's behavior were approved by the court on April 24, 1995. In November 1995, Brittany was removed from her mother's home and placed with her paternal grandparents because her mother was using crack cocaine. Brittany was then transferred to a foster home on December 11, 1995. Neither of the orders dictating these changes in placement contained warnings to the parents that they were in danger of losing their parental rights. In March 1996, the County extended the order placing Brittany outside her home. Attached to this order were conditions the parents must meet to have Brittany returned to their care and a warning to them that they

were in danger of having their parental rights terminated. Both Steven and Amy were present in court that day and the record shows adequate evidence that the trial court gave both parents an oral warning as well.

The County petitioned to terminate Amy's and Steven's parental rights on April 23, 1997, on the grounds that Brittany was in continuing need of protective services, or, alternatively, that Steven and Amy had abandoned her. *See* § 48.415(1), (2), STATS. Amy did not contest the petition. The County later dropped the abandonment grounds in exchange for Steven's waiver of factfinding on the continuing CHIPS grounds. Steven's parental rights were terminated at a dispositional hearing on April 8, 1998.

Steven appeals on two grounds. First, Steven claims the court "erred in failing to take testimony ... which would support its determination that there were grounds for termination of parental rights." Second, Steven asserts that his trial counsel rendered ineffective assistance by failing to move to strike the continuing need of protective services grounds based on lack of written notice. Because we reluctantly agree with Steven's second argument, we need not address the first. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Section 48.23(2), STATS., guarantees parents effective representation in involuntary termination of parental rights (TPR) proceedings. *See* ***A.S. v. State***, 168 Wis.2d 995, 1003, 485 N.W.2d 52, 54 (1992). The test to determine whether counsel was ineffective in a TPR case is the two-pronged ***Strickland*** test. *See* ***A.S.***, 168 Wis.2d at 1005, 485 N.W.2d at 55; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Thus, the parent alleging ineffective assistance must show that: (1) trial counsel's performance was deficient, and (2) the deficient performance so

prejudiced the parent as to deprive him or her of a proceeding with a fair and reliable result. *See* ***A.S.***, 168 Wis.2d at 1005, 485 N.W.2d at 55. Both components of the test are mixed questions of fact and law. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). While the trial court's findings of fact regarding counsel's performance will not be overturned unless clearly erroneous, *see* ***id.*** at 634, 369 N.W.2d at 714, whether that performance fell below an objective standard of reasonableness is a question of law we review de novo, *see* ***id.*** at 634, 369 N.W.2d at 715. Further, whether counsel's performance prejudiced the parent is a question of law. *See* ***id.***; ***A.S.***, 168 Wis.2d at 1005, 485 N.W.2d at 55.

Here, Steven alleges that it was deficient performance for trial counsel to fail to move to strike the continuing CHIPS grounds of the TPR petition. Trial counsel should have moved to strike, according to Steven, because Steven did not receive written notice of the grounds for TPR with the November and December 1995 orders changing placement as required by §§ 48.356(2) and 48.415(2)(a)1, STATS. Continuing CHIPS can only be a basis for TPR if the required statutory warning is given. *See* ***D.F.R.***, 147 Wis.2d at 498-99, 433 N.W.2d at 613-14. Steven claims that this omission prejudiced him because had he known about this defense, he would not have waived his right to factfinding on the continuing CHIPS grounds for TPR.

The County responds that Steven has failed to show prejudice. The guardian ad litem for Brittany (GAL) makes the same claim, but fleshes out his argument. First, he urges that written notice was not required in this case since Brittany was taken from her mother's home under emergency conditions and there was no time to formulate conditions for return, which are required with the written notice. Second, the GAL argues that § 48.356(2), STATS., by referring to §

48.356(1), incorporates that subsection. Thus, he argues, written notice under subsec. (2), like the oral notice under subsec. (1), is only required to parents who appear in court. Finally, the GAL elaborates his claim that Steven showed no prejudice by pointing out that the County had alleged both continuing CHIPS and abandonment. So, argues the GAL, even if Steven had known he had a defense to the CHIPS ground and thus had not waived factfinding on that ground in exchange for dropping the abandonment ground, the County would have proceeded on the abandonment ground. The result would have been the same, so there is no prejudice.

Because we find the case law clearly controlling, we decline to discuss all of the parties' arguments. Section 48.356(2), STATS., requires written notice whenever any written order places a child outside his or her home pursuant to certain statutes. Section 48.357, STATS., "Change in placement," is one of these listed statutes. Thus, *any* order removing a child from his or her home under that statute must contain the written notice. *See* ***D.F.R.***, 147 Wis.2d at 498-99, 433 N.W.2d at 613-14. This is regardless of whether the parent shows up in court. The GAL's contention that written notice is required only to those parents who show up in court makes no sense. The logical interpretation of the written notice is that it is meant to reach precisely those parents who do not show up in court. Here, the initial order removing Brittany from her mother's home, titled "Notice of Change in Placement," did not contain the statutory warning. It needed to.[1]

[1] There is no emergency exception in this statute. Section 48.357, STATS., does contain a subsection addressing emergency placements. *See* ***id.*** at subsec. (2). But no exception is made for this subsection in the "Duty of court to warn" statute. *See* § 48.356, STATS. Had the legislature meant to make an exception for emergency placements it would have.

Trial counsel's failure to notice this defect constituted deficient performance. Trial counsel did move to dismiss based on the lack of notice in the April 1995 conditions of supervision. The problem is, no notice was required there. That order was not a "written order which places a child … outside a home." Section 48.356(2), STATS. At the ***Machner*** hearing,[2] when asked why he moved to dismiss for lack of notice in that order but not the change of placement orders, trial counsel's reason was that "[a]t the time ... I did not believe [the change in placement notice] required the warnings, and that is why I didn't file a motion pursuant to it." This failure to realize that a change in placement requires the written § 48.356(2) warnings was error. While "judicial scrutiny of counsel's acts will be highly deferential," ***Pitsch***, 124 Wis.2d at 637, 369 N.W.2d at 716, an omission such as this falls below the reasonable attorney standard applicable in ineffective assistance cases.

We fail to see how it can seriously be argued that the failure to object to the lack of notice did not prejudice Steven. Without proof of the required notice, the County could not have proved an essential element of the continuing CHIPS grounds for TPR. *See* § 48.415(2)(a)1, STATS.; ***D.F.R.***, 147 Wis.2d at 498-99, 433 N.W.2d at 613-14. Certainly this may have entered into Steven's

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

calculus in deciding to waive factfinding on that ground. That the petition also alleged abandonment grounds does not change this conclusion.[3]

This is an extremely unfortunate case. However, the result is compelled by the statutes and ***D.F.R.*** The author of this opinion has believed ***D.F.R.*** to be incorrect from the beginning. This court believed when ***D.F.R.*** was decided, and still believes now, that substantial compliance is a viable and reasonable tool with which to reach the correct result in a case like this one. When a parent receives actual notice, like the one Steven orally obtained from the trial court at the March 27, 1996 hearing, the hypertechnical notice requirements of the statute should not have to be followed to the letter.

The purpose of the notice requirement is to alert a parent so that he or she can work to alleviate the kind of behavior which is destructive of the parent-child relationship. Here, Steven received notice, albeit not the type of notice set forth by statute. *See* § 48.356(2), STATS. ***D.F.R.***'s focus on technical compliance with the statute is especially unfortunate when we should be focusing on the interests of the child involved. As stated by our supreme court, children should not:

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[3] We note that written notice is required in abandonment cases as well. *See* § 48.415(1)(a)2, STATS. The County cites ***Rock County Dep't of Social Services v. K.K.***, 162 Wis.2d 431, 469 N.W.2d 881 (Ct. App. 1991), for the proposition that in a TPR relying on abandonment grounds only one order need fulfill the written notice requirement, as opposed to all orders when the grounds are continuing CHIPS. *See* ***id.*** at 438-39, 469 N.W.2d at 884. Thus, the theory goes, the lack of notice did not prejudice Steven because the County would merely have proceeded with the abandonment grounds. We reject this argument. The assertion that the County would have proceeded and prevailed on the abandonment ground is speculative enough to "undermine[] confidence in the outcome." *See* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 719 (1985). Testimony conflicted about the amount of contact Steven has had with Brittany, through cards and letters, during the last few years. We cannot say, as a matter of law, that there was not a "reasonable probability that ... the result of the proceeding would have been different." ***Id.*** (quoted source omitted).

> remain in the impermanence of foster care until the defects in written notice [can] be cured. This result would be contrary to the express policy of the Children's Code. *See* secs. 48.01(1)(g) ("To provide children in the state with permanent and stable family relationships."); 48.01(1)(gg) ("To promote the adoption of children into stable families rather than allowing children to remain in the impermanence of foster care."); 48.01(1)(gr) ("To allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued and termination of parental rights is in the best interest of the child.").

Cynthia E. v. La Crosse County Human Servs. Dep't, 172 Wis.2d 218, 228, 493 N.W.2d 57, 61 (1992). However, ***D.F.R.*** is the law and this court sees no way around it.

The facts of this case demonstrate the folly of the hypertechnicality ***D.F.R.*** requires. Under ***D.F.R.***, continuing CHIPS "can be a basis for involuntary termination of parental rights only if the statutory warning required by sec. 48.356(2), Stats., is given *each time* an order places a child outside his or her home pursuant to secs. 48.345, 48.357, 48.363 or 48.365." ***D.F.R.***, 147 Wis.2d at 498-99, 433 N.W.2d at 613-14 (emphasis added). Those four statutes encompass a variety of stages in the protective services intervention process. A CHIPS case could have an entire string of such orders, all but one containing the required written notice. In such a case, all TPR proceedings would be halted, only to be begun anew, all because of the one defective order. In the meantime, a child remains in limbo. That, in this court's view, is tragic.

This court urges the supreme court and the legislature to consider the result of this case. ***D.F.R.***, while mentioned in subsequent cases, and narrowed in ***Rock County Department of Social Services v. K.K.***, 162 Wis.2d 431, 469 N.W.2d 881 (Ct. App. 1991), has never been squarely reviewed by the supreme court. There is every reason to graft upon the notice statute the substantial

compliance standard rejected by ***D.F.R.*** *See* ***D.F.R.***, 147 Wis.2d at 493, 433 N.W.2d at 611. Furthermore, this case demonstrates that the statutory scheme clearly is in need of an actual notice exception to the written requirements.

This court closes by noting that the result here is especially grating considering how easily it could have been avoided. Had the County added a paragraph explaining the possible TPR, we would not be reversing today. And we would give this same chastisement regarding conditions for return. The County was familiar with the parties involved here. Brittany had been the subject of CHIPS proceedings since she was born. The County had on file the April 1995 conditions for supervision for Amy, which were very similar to the conditions for return ultimately issued. The change of placement order was issued thirteen days after Brittany was actually removed from her mother's home. That is nearly two weeks in which the County could have found the time to write up a warning and conditions for return. Now, its failure to do so means that it must start all over, costing Britanny precious time in which she could have been adopted.

By the Court.—Order reversed.

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