335 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION [WIS. STAT. § 48.415(4)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 335 comment was approved in 1996 and revised in 1997, 1999, 2005, 2010, 2011, 2016, and 2019.

Wis. Stat. § 48.415(4) reads:

> **48.415. Grounds for involuntary termination of parental rights.** 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:
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> **(4)** CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
> (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 s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

To establish this ground for termination, a petitioner must prove the following two elements:

1. that (parent) has been denied periods of physical placement by a court order in an action affecting the family under Chapter 767 or has been denied visitation under an order pursuant to §§ 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by § 48.356(2) or 938.356(2).

2. that at least one year has elapsed since the order denying periods of physical placement *or visitation* to (parent) was issued and the court has not subsequently modified its order to permit periods of physical placement or visitation.

Use of Summary Judgment. The Wisconsin Supreme Court has held that summary judgment is available in the first phase of a TPR proceeding at which parental unfitness is determined. *In re Termination of Parental Rights to Alexander V.*, 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856. See Wis JI-Children SM-2 which discusses this decision and the use of summary judgments and directed verdicts.

See also *Dane County DHS v. Ponn P.*, 2005 WI 32, 279 Wis.2d 169, 694 N.W.2d 344 and an unpublished opinion in *Dane County Dep't of Human Services v. J.D.*, 2015AP1800 (one-judge).

If a parent contests a petition alleging this ground, a trial court may be best advised to convene a fact-finding hearing, receive evidence establishing the prior order and the lack of a modification to that order for at least one year, and direct a verdict in favor of the petitioner.

Required Contents of Order Denying Visitation. Writing in two unpublished decisions, the Court of Appeals has held that grounds can only exist under Wis. Stat. § 48.415(4) if there is a single order that (1) denies periods of physical placement or visitation pursuant to the relevant statutes, (2) states the conditions the parent must meet to resume placement or visitation, and (3) contains a written warning regarding grounds for termination of parental rights. In *Jackson County Dept. of Human Services v. R.H.H. Jr.*, 2018AP2440-43 (April 4, 2019) (unpublished one-judge opinion), the trial court entered an order suspending contact between the parent and children that contained a written notice concerning grounds to terminate parental rights, but did not contain a written notice of the conditions necessary for the parent to resume visitation. Later, the trial court issued a separate order containing the conditions necessary for visitation to be reinstated, but that order lacked a written TPR warning. The court reversed the grant of summary judgment for the petitioner and directed that summary judgment be entered in favor of the defendant, because no single order contained all three of the necessary elements. The court of appeals issued a similar ruling under similar circumstances in *Brown County Dept. of Health and Human Services v. L.F.H., Sr.*, 2019AP145 (April 23, 2019) (unpublished one-judge opinion), holding that an earlier order suspending visitation was not implicitly incorporated into the dispositional order. "Wisconsin Stat. § 48.415(4)(a)'s plain language does not permit the Department to rely on two separate orders to create one that satisfies § 48.415(4)(a)'s requirements." Id. at ¶ 16.

Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

Substantive Due Process; Individualized Finding of Unfitness. In 2006, the supreme court in *Kenosha County v. Jodie W.*, 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, addressed whether a finding of unfitness pursuant to the failure to meet the conditions of return in a continuing need of protection and services (CHIPS) order violated the parent's right to substantive due process under Wis. Stat. § 48.415(2)(a), where the fact of the parent's incarceration was the sole reason for the determination of unfitness. *Id.*, ¶ 40. Other grounds for termination including denial of periods of physical placement present the same constitutional issue: whether a finding of unfitness impermissibly burdens the substantive due process rights of an incarcerated parent where the parent in unable to change the underlying circumstances used as a basis for the termination.

In *Jodie W.*, the court held that "a parent's incarceration is not itself a sufficient basis to terminate parental rights." Instead, the *Jodie W.* court stated that the substantive due process provisions of the Wisconsin and United States Constitutions preclude the state from terminating parental rights without "an individualized determination of unfitness." To make such a determination, the court must consider factors in addition to incarceration, which include the following: (1) "the parent's relationship with the child and any other child both prior to and while the parent is incarcerated"; (2) "the nature of the crime committed by the parent"; (3) "the length and type of sentence imposed"; (4) "the parent's level of cooperation with the responsible agency and the Department of Corrections"; and (5) "the best interests of the child." Applying this test to the termination order, the *Jodie W.* court reversed, concluding that the

order was based solely on the parent's incarceration without regard to her actual parenting activities. See also *Dane County DHS v. Ponn P.*, 2005 WI 32, 279 Wis.2d 169, 694 N.W.2d 344; and an unpublished opinion *Dane County Dep't of Human Services v. J.D.*, Appeal No. 2015AP1800 (one-judge).

Impossibility. See Wis JI-Children 324A (comment); Wis JI-Children 346 and 346B; *Kenosha County v. Jodie W.*, 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI-Children 420-424.