

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2008

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 No. 2008AP1974

**Cir. Ct. No. 2002TP121
2008JC91**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF JASMINE D.

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

JASMINE D.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Dane County Department of Human Services (DHS) appeals from an order denying its motion for reconsideration following the court's order temporarily holding Jasmine D. in nonsecure physical custody at a shelter home. DHS argues that the trial court erred in requiring DHS to file a new CHIPS petition to continue Jasmine's placement at the shelter home. We conclude that DHS has not explained what it requested from the trial court, and thus we cannot assess whether the trial court erred in response to that request. We therefore affirm.

Background

¶2 The following facts are undisputed. On August 23, 2000, the trial court granted DHS's petition to find Jasmine a child in need of protection or services. The court later extended the CHIPS order to July 2003.² In August 2002, DHS petitioned the court to terminate Jasmine's parents' parental rights based on abandonment and the continuing CHIPS order. The court terminated Jasmine's parents' parental rights on December 18, 2002.

¶3 The Department of Children and Families (DCF) was appointed as Jasmine's guardian and legal custodian. In 2005, DCF petitioned the court to transfer legal custody to DHS because a permanent adoptive placement was not in progress for Jasmine. The court transferred legal custody of Jasmine to DHS, and DCF retained guardianship.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² This date is not in the record, but is undisputed between the parties.

¶4 On March 24, 2008, Jasmine voluntarily appeared at the Dane County Juvenile Reception Center (JRC) after running away from her placement. JRC then filed a temporary physical custody request with the court, seeking nonsecure custody of Jasmine at a shelter home. The next day, the trial court held a custody hearing for Jasmine. The trial court concluded that it did not have authority to order Jasmine held under the CHIPS or TPR cases. Instead, the court ordered Jasmine taken into temporary nonsecure physical custody at the shelter home under WIS. STAT. § 48.19(1)(c), based on a showing that Jasmine's welfare demanded she be immediately removed from her present custody.

¶5 DHS moved for reconsideration, arguing that DCF, as Jasmine's legal guardian, has the authority to place Jasmine in a temporary shelter, and therefore a new CHIPS petition is not required; that the underlying CHIPS order was still active because Jasmine had not yet been adopted; and that the court should defer to the consistent administrative practice of the agencies in not filing new CHIPS petitions following failed adoptions. After a hearing, the trial court reiterated its position that it did not have authority under the CHIPS or TPR cases to order Jasmine held in the temporary shelter. It instructed DHS to file a new petition if it believed Jasmine needed services beyond the services she was already receiving. The court said that DCF, as Jasmine's guardian, may have the authority to place Jasmine in a temporary shelter, but the court did not. DCF appeals.

Standard of Review

¶6 This case presents issues of statutory construction and application to undisputed facts, which we review de novo. See *Thomas Y. v. St. Croix County*, 175 Wis. 2d 222, 227, 499 N.W.2d 218 (Ct. App. 1993).

Discussion

¶7 DHS argues that the trial court erred because (1) DCF, as Jasmine’s guardian, has the statutory authority to place Jasmine in a shelter home, and thus DHS need not file a second CHIPS petition on Jasmine’s behalf;³ (2) the courts should defer to the consistent administrative practice of DHS in not filing a second CHIPS petition for a child returned to its custody from DCF following a failed adoption; and (3) there are ongoing TPR proceedings that continue the original CHIPS order, and thus DHS need not file a new CHIPS petition. However, DHS does not explain what it asked the trial court to do based on these principles, nor is DHS’s request apparent from the record.⁴ Because we do not know what DHS requested from the trial court, we cannot discern whether the trial court’s response was error.

¶8 All we know from the record is that the court ordered Jasmine taken into custody pursuant to WIS. STAT. § 48.19(1)(c), which states that “[a] child may be taken into custody under ... [a]n order of the judge if made upon a showing

³ If DHS believes that DCF has authority to place Jasmine in a shelter home, and apparently DCF believes this is an appropriate placement, we find it difficult to ascertain the reason for a court’s involvement here.

⁴ The record contains only court minutes of the custody hearing, and we therefore do not have the benefit of a transcript. Our review of the court minutes does not reveal what DHS requested from the court at the hearing, and DHS does not tell us on appeal what it was it requested. Additionally, the hearing was held following JRC’s filing a temporary physical custody request, after Jasmine voluntarily appeared there, and this appeal does not present a conflict between DHS/DCF and JRC. Finally, the record does contain a transcript of the hearing on the motion for reconsideration. There, the court states that it was asked “to place [Jasmine] in the context of a TPR case in the shelter home.” R2-15:9. It appears that the form used by JRC, which contains the admonition “This form shall not be modified. It may be supplemented with additional material,” contemplates a possible custody transfer from a parent to DHS. But DHS has legal custody of Jasmine. To whom would custody be transferred, if that was DHS’s request? *See also infra* note 3.

satisfactory to the judge that the welfare of the child demands that the child be immediately removed from his or her present custody.”⁵ DHS then moved for reconsideration, arguing that it need not file a new CHIPS petition for Jasmine. The trial court denied the motion, stating that its ordering Jasmine taken into custody under WIS. STAT. § 48.19(1)(c) triggered the requirement for a hearing and petition within forty-eight hours under 48.21(1)(a).

¶9 Thus, we do not reach DHS’s argument that the court’s requiring a new petition in this case meant that DHS was required to file a new CHIPS petition for DCF or DHS to act as a child’s guardian in any failed adoption context.⁶ There is nothing in the record to indicate that this case arises from a challenge to DHS or DCF’s authority to place Jasmine. Because we cannot discern from DHS or the record what DHS requested from the trial court, we cannot conclude that the trial court erred in response to that request. We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. See WIS. STAT. RULE 809.23(1)(b)4.

⁵ WISCONSIN STAT. § 48.20(2)(ag) states that “a person taking a child into custody shall make every effort to release the child immediately to the child’s ... guardian or legal custodian.” It is not apparent from the record why Jasmine was not released to DHS or DCF. Neither party argues that she should or could have been so released, nor do they explain why she was not.

⁶ In response to DHS’s argument that DCF has authority to place Jasmine in a shelter, Jasmine argues that the transfer of her legal custody from DCF to DHS two years after the TPR disposition limits DCF’s ability to place her. Jasmine contends that even though DCF remained her guardian, DHS assumed responsibility to provide shelter to Jasmine and DCF lost the right to place her. DHS replies that the sole effect of Jasmine’s argument is to establish that it, rather than DCF, has the authority to place Jasmine in a temporary shelter. We need not reach this dispute. Whether or not DCF or DHS has the authority to place Jasmine in a temporary shelter was not before the trial court, and thus we need not consider it on appeal. See *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.

