

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 1997

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. 97-0684

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**IN RE THE TERMINATION OF PARENTAL
RIGHTS OF PATRICIA B., A PERSON UNDER THE
AGE OF 18,**

**BROWN COUNTY DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,**

PETITIONER-RESPONDENT,

v.

SAMANTHA E.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

HOOVER, J. Samantha E. appeals a judgment terminating her parental rights to Patricia B. She asserts that her trial counsel was ineffective by failing to object to a jury instruction containing the new warnings for

terminating parental rights under § 48.415(2)(c), STATS., when evidence suggested she had only received warnings under the old version of § 48.415(2)(c), STATS., 1991-92. The trial court found at a *Machner* hearing that Samantha had been advised of the grounds for termination under the revised version of the statute.¹ *See Machner v. State*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). This court concludes that this finding of fact is not clearly erroneous. With Samantha properly warned, trial counsel had no basis for objecting to the jury instruction and therefore was not deficient by failing to object. This court therefore affirms the judgment.

In September 1993, Brown County filed a petition alleging that Patricia and her two sisters were in need of protection and services.² In January 1994, the court placed the children in foster care. Patricia was returned to her mother's care for a period in late 1994 to early 1995, but was again removed and placed in foster care until trial.

On September 3 and 4, 1996, the case was tried to a jury, which unanimously concluded that grounds existed to terminate Samantha's parental rights to Patricia. At a dispositional hearing on October 10, 1996, the trial court terminated Samantha's parental rights to Patricia.

¹ Brown County brought a motion to supplement the record to show evidence that Samantha had in fact been properly warned. The court granted the motion at the *Machner* hearing. *See Machner v. State*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). In addition to challenging the effectiveness of her trial counsel, Samantha argues on appeal that the appellate record should not be supplemented by the evidence of proper warnings. This is a chimerical issue. Motion to supplement or no, such evidence was fundamentally relevant to and admissible on the issue of deficient performance and was thus properly considered at the *Machner* hearing.

² This appeal only addresses termination of parental rights to Patricia.

On appeal, Samantha contended that her due process rights were violated when the jury was instructed on grounds for terminating parental rights under the revised § 48.415(2)(c), STATS., when evidence suggested that she was only provided with warnings under § 48.415(2)(c), STATS., 1991-92. Anticipating the County's waiver argument, Samantha argued that her trial counsel was ineffective by failing object to the jury instruction based on the revised statute.

On April 23, 1997, this court concluded that the issue was waived and remanded the case for an evidentiary hearing to determine if trial counsel was ineffective. *See Machner*. At the hearing, trial counsel testified that he believed his client had received the warnings under the new law. The County also presented evidence, and the trial court found, that Samantha had indeed received the new warnings. The trial court concluded that trial counsel was effective and denied Samantha's postconviction motion.

An indigent parent has a statutory right to effective assistance of counsel in termination of parental rights proceedings. *In re M.D.*, 168 Wis.2d 995, 1002, 485 N.W.2d 52, 54 (1992). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first prong considers whether trial counsel's performance was deficient. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct. App. 1991). If counsel's performance is deficient, the second prong considers whether the deficient performance prejudiced the defense. *Id.* The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 245 (1987).

Samantha's assertion that her trial counsel was ineffective fails to pass the first prong of the analysis because her attorney's performance was not deficient. There is no issue whether Samantha received the new warnings. At the *Machner* hearing, the trial court found that on December 10, 1994, Samantha was advised of the new warnings under the revised version of § 48.415(2)(c), STATS. She also received warnings under the new law from her social worker. The court also found that Samantha's attorney believed she had received the new warnings and that counsel recalled testimony at trial suggesting she had received them. Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS. The trial court's findings are sustained by the record and are therefore not clearly erroneous. Additionally, this court notes that Samantha does not directly dispute the trial court's findings.

The jury instruction that guided the jury deliberations contains the same elements for continuing protection or services as the warning Samantha received. *See* WIS J I—CHILDREN 322. Consequently, the trial attorney had nothing to object to in the jury instruction, so his failure to object did not constitute deficient performance.

In conclusion, Samantha's trial counsel was not ineffective for failing to object to the jury instruction because the trial court properly concluded that she had been warned of the same elements the jury considered in finding a continuing need for protection and services.

By the Court.—Judgment affirmed.

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

