COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2342

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CHELSEY B. , A PERSON UNDER THE AGE OF 18:

PIERCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAWN B.,

RESPONDENT-APPELLANT,

BRUCE L.,

RESPONDENT.

APPEAL from an order of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

MYSE, J. Dawn B. appeals an order terminating her parental rights to Chelsey B. Dawn argues that termination in her case had to be based

exclusively on § 48.415(3), STATS. (continuing parental disability); that an erroneous jury instruction caused the real controversy not to be fully tried; and that the trial court erred by not granting a continuance to allow her the opportunity to have a medical examination. This court concludes that the termination of Dawn's parental rights could properly be based on § 48.415(2), STATS. (continuing need of protection or services); that fundamental fairness does not require a new trial; and that the trial court properly exercised its discretion by denying the motion for continuance. The order is therefore affirmed.

The facts underlying this appeal are not disputed. Dawn has been receiving treatment for mental illness since 1985, and twice has been involuntarily committed. In 1993, Dawn gave birth to Chelsey. Approximately six weeks later Chelsey was placed with her maternal grandmother pursuant to a consent decree, and returned to Dawn in early 1994. In late 1994, subsequent to Dawn's second involuntary commitment, Chelsey was again placed with her maternal grandmother, where she remained.

Dawn did not comply with the CHIPs orders, and in October, 1996, a petition to terminate her parental rights was filed. On January 8, 1997, trial was set for February 27 and 28, 1997. On January 29, 1997, the trial court granted the request of Dawn's attorney, Lauri Gaylord, to appoint a guardian ad litem for Dawn. Prior to the trial, Gaylord scheduled an appointment for a psychiatric evaluation of Dawn on February 11, 1997. Dawn missed this appointment, claiming that she did not receive notice of it. On February 18, Gaylord filed a motion for continuance to allow time for another appointment, but this was denied. Dawn's guardian ad litem joined Gaylord's motion for a continuance, and also moved for an appointment of a psychiatrist to examine Dawn. This, too, was rejected by the trial court.

A jury trial was held on the scheduled dates to determine whether the grounds for termination existed. The trial court used WIS. J I—CHILDREN 320[1] as the special verdict form, and Dawn did not then object. The jury found that all the elements required to terminate parental rights under § 48.415(2), STATS., existed. At the subsequent dispositional hearing, the trial court ordered the termination of Dawn's parental rights, and placed Chelsey with DHSS until she could be adopted. Dawn appeals.

Dawn first contends that her rights cannot be terminated under § 48.415(2), STATS. (grounds for involuntary termination: continuing need of protection or services), if the County wishes to rely heavily upon her mental illness to prove those grounds. Dawn argues that the County should have been allowed to rely on her mental illness only if it pursued termination under § 48.415(3), STATS. (grounds for involuntary termination: continuing parental disability termination). Dawn argues that relying on her mental illness to meet § 48.415(2) is particularly unfair in her case, since the County would have been unable to prove all the requirements under § 48.415(3).

This claim is an attack on the trial court's interpretation of the Children's Code, and is reviewed de novo. ***In re T.P.S.***, 168 Wis.2d 259, 263, 483 N.W.2d 591, 593 (Ct. App. 1992). When interpreting a statute, we first look to the statutory language, and, if the statute's meaning is clear, we will not look outside the statute. ***Id***. "A statute is ambiguous only if it is capable of two or more reasonable interpretations." ***Id***. at 264, 483 N.W.2d at 593.

[1] The special verdict question read as follows: "Has Dawn [B.] substantially neglected, willfully refused, or been unable to meet the conditions established for return of Chelsey [B.] to Dawn [B.'s] home?"

There is no language in the statute itself to support Dawn's contention that the County, by choosing to rest termination on the grounds in § 48.415(2) instead of § 48.415(3), STATS., is precluded from using her mental illness to satisfy the requirements. Instead, Dawn theorizes that by explicitly mentioning "mental illness" only in § 48.415(3), the legislature showed its intent to exclude its use from every other ground. Dawn attempts to support this position with reference to legislative history purportedly showing that mental illness was always intended to be a separate ground.

This court is not persuaded. Since the language of the statute does not create any ambiguity, reference to the legislative history is inappropriate. *See* ***id***. The Children's Code, ch. 48, STATS., establishes a comprehensive legislative scheme for dealing with children in need of supervision. *See* ***State ex rel. Harris v. Larson***, 64 Wis.2d 521, 527, 219 N.W.2d 335, 339 (1974). Section 48.415, STATS., lists several grounds for termination, and nowhere suggests that mental illness can be introduced only when the County pursues § 48.415(3), STATS., grounds for termination.

Furthermore, § 48.415(3), STATS., was not meant to be the exclusive means of terminating the parental rights of a mentally ill parent. Nothing in the statutory language suggests this, and nothing in the statutory scheme supports it. Indeed, Dawn's interpretation would lead to absurd results. *See* ***State ex rel. Sielen v. Circuit Court for Milwaukee County***, 176 Wis.2d 101, 109, 499 N.W.2d 657, 660 (1993) (courts should interpret statutes to avoid absurd outcomes). Such an interpretation would not take into account that there are times when mental illness is at issue and § 48.415(2), STATS., applies but subsec. (3) does not. For example, a parent may not be sufficiently mentally ill to require hospitalization, but may lack the ability to raise a child. Under such circumstances, termination

under § 48.415(2) would be appropriate, regardless of the applicability of § 48.415(3). Absurd results would also arise if this court were to limit the County's ability to introduce evidence of mental illness only to those cases involving § 48.415(3). One such example is where a parent's mental illness causes a pattern of physical abuse. In that case, the County should be permitted to introduce evidence of the mental illness to prove the existence of a pattern. Examples such as these support an interpretation based on the unambiguous statutory language, and lead this court to conclude that the County could properly introduce Dawn's mental illness to establish grounds for termination under § 48.415(2).

Dawn next contends that an erroneous jury instruction prevented trial of the real controversy. Although the trial court gave proper jury instructions, and the jury instructions contained the proper standard, Dawn complains of an improper standard in the special verdict form. Dawn failed to object to the instruction at trial, however, and raises this issue for the first time on appeal.

Although this court's power to review an erroneous jury instruction not objected to at trial is limited, it may do so when the alleged error prevents trial of the real controversy. ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). Dawn claims that the real controversy was not tried because the special verdict form used[2] is inconsistent with both the current statutory language and the jury instruction given.[3] This inconsistency allegedly prejudices Dawn because it

[2] WISCONSIN J I—CHILDREN 320 requires the jury to find that "[the parent] has substantially neglected, wilfully refused, or been unable to meet the conditions established for the return of [the child] to the home."

[3] WISCONSIN J I—CHILDREN 322 essentially repeats the language of § 48.415(2)(c), STATS., and requires a showing that "[the parent] has failed to demonstrate substantial progress toward meeting the conditions established for return of [the child] to the home."

permitted the jury to find that her mental illness made her unable to meet the conditions, instead of focusing on whether she had made substantial progress towards meeting the conditions.

While this court is concerned that the special verdict form does differ from the current statutory language, it declines to use its discretionary power in this case because any error is harmless. First, the jury was given the proper instructions notwithstanding the mistaken verdict form. Second, Dawn did not introduce any evidence or advance any arguments that she has made substantial progress. She conceded at trial that "the record is pretty clear that a substantial amount of [the court ordered] requirements have not been met," and her strategy instead focused on the reasons behind her failure. While there may be cases where the differences in the statute and jury instruction will influence the outcome, this is not one of them.

Dawn's final grounds for appeal is that the trial court unfairly denied her a continuance to allow her to be examined by her own doctor, preventing her from introducing this evidence of her mental condition. Dawn argues that this was particularly unfair since the only psychiatrist to testify at trial had not seen her for well over a year before the fact-finding hearing. While Dawn does not contest that she had an opportunity to see a doctor before trial but failed to show, she claims that due process requires she be given a second chance.

The decision to grant a continuance lies within the sound discretion of the trial court, and will be reversed only if the court failed to exercise its discretion or if its decision lacked a reasonable basis. ***Robertson-Ryan & Assocs. v. Pohlhammer***, 112 Wis.2d 583, 587, 334 N.W.2d 246, 249 (1983). Here, Dawn was assigned counsel over two months before the scheduled trial date, permitting

sufficient time to schedule an examination. Dawn's delay in making her appointment until two weeks before the scheduled trial date and her failure to show up affords a reasonable basis for the trial court's decision.

For the forgoing reasons, the order is affirmed.

By the Court.—Order affirmed.

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