COURT OF APPEALS DECISION DATED AND FILED

December 22, 1998

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. 98-1043-FT

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

IN RE THE PATERNITY OF SHAWNA L.O.:

ANGELA M.W.,

PETITIONER-APPELLANT,

V.

TIMOTHY E.D.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Angela M.W. appeals an order regarding the physical placement of her minor child, Shawna L.O. Angela claims that the circuit court erred by failing to appoint a guardian ad litem as required under

§ 767.045(1)(a), STATS.[1] We conclude that, under the facts of this case, a guardian ad litem was mandatory. We therefore reverse the order and remand for the appointment of a guardian ad litem (GAL) and further proceedings consistent with this opinion.

On May 10, 1994, the corporation counsel for Polk County initiated a petition for adjudication of paternity against Timothy E.D. of a minor child expected to be born on September 25, 1994.[2] The child, Shawna L.O., was born on August 19, 1994, to Angela M.W. In the waiver of first appearance statement, Timothy initially denied he was Shawna's father. A default paternity judgment was entered against Timothy on June 5, 1995, for his failure to provide the necessary identification for blood tests. Upon Timothy's request for blood tests, the court set aside the default judgment and ordered blood tests for December 4, 1996. The blood tests established Timothy as the child's father, and adjudication of paternity was filed on February 3, 1997.

On March 25, 1997, Timothy sent a letter to the circuit court requesting visitation rights to Shawna. A motion hearing was held on May 5, 1997, and the court awarded Timothy periods of physical placement with Shawna on alternating weekends. Subsequently, Angela filed a motion for an order establishing child support and ordering Timothy to provide medical insurance for Shawna. Angela further moved the circuit court to modify placement in light of her move to Milwaukee. A contested hearing involving physical placement and

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[1] This is an expedited appeal under RULE 809.17, STATS.

[2] A petition was also filed against Lonnie W.O.; however, blood tests ruled him out as the father of the minor child.

child support was held on December 15, 1997. The circuit court was not requested to and did not appoint a GAL to represent Shawna's best interests at the hearing.

The circuit court awarded Timothy alternate periods of physical placement on the second and fourth weekends of every month commencing January 10, 1998. The court also awarded Timothy brief periods of physical placement on Saturdays and Sundays for the first six months. Beginning in July of 1998, the alternate placement was extended to overnight. The court further awarded alternate placement over the holidays. Angela appealed the order on April 13, 1998, arguing for the first time that the circuit court failed to appoint a GAL pursuant to § 767.045, STATS.[3] Angela filed a notice of motion and motion for relief pending appeal on June 1, 1998. The circuit court denied Angela's motion on July 16, 1998.

In her appeal, Angela maintains that § 767.045, STATS., requires that a GAL be appointed to represent Shawna's best interests. Whether the court should have appointed a guardian ad litem under § 767.045 requires us to engage in statutory interpretation. Construction of a statute or its application to a particular set of facts is a question of law we review de novo. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1987).

> The sole purpose of determining the meaning of a statute is to ascertain the intent of the legislature. In determining

[3] We considered applying the waiver doctrine to Angela's claim because the parties did not afford the trial court the opportunity to consider whether the appointment of a guardian ad litem was required. We conclude, however, that the right to have an advocate for the child's best interests belongs to the child and can therefore not be waived by a parent.

Although Angela premises her claim for relief upon an issue that does not affect her rights, we nonetheless consider the GAL matter. It affects the interests of the child and there is, by the very nature of the issue, no one to otherwise advance the argument on the child's behalf.

> legislative intent, we look to the plain language of the statute. If the statute is clear on its face, our inquiry as to the legislature's intend ends and we must simply apply the statute to the facts of the case.

In re Peter B., 184 Wis.2d 57, 70-71, 516 N.W.2d 746, 752 (Ct. App. 1994). We do not look beyond the statute's plain and unambiguous language. ***L.L.N. v. Clauder***, 203 Wis.2d 570, 593, 552 N.W.2d 879, 889 (Ct. App. 1996).

Section 767.045, STATS., provides:

> (1) Appointment**.** (a) The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
>
> ….
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> 2. The legal custody or physical placement of the child is contested.

Angela contends that § 767.045 mandates that any time the physical placement of a child is contested, the circuit court must appoint a GAL. We do not need to address whether the appointment of a GAL is absolutely mandatory, even when the dispute is admittedly trivial because, under the facts of this case, the court had the responsibility to appoint a GAL. Shawna has not had a relationship with her father, the child has a medical condition that requires special attention that could be aggravated under certain conditions, and the parents live approximately 300 miles apart. These factors have an immense impact on the child's interests. Therefore, the contest involving primary placement was significant, and Shawna's best interests were sufficiently involved that it was error for the court to proceed without appointing a GAL. Accordingly, we remand to the trial court to appoint a GAL who can represent the interests of the child in this physical placement dispute.

By the Court.—Order reversed and cause remanded.

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

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HOOVER, J. *(concurring)*. I concur that § 767.045(1)(a)2, STATS., requires the trial court to sua sponte appoint a guardian ad litem for Shawna. I would hold, however, that a GAL must be appointed whenever legal custody or physical placement are contested. The statute is unambiguous. It is not qualified qualitatively nor quantitatively either on its face or by reference to the definition of "physical placement."[4] The trial court's responsibility is not dependent upon the nature or degree or the apparent significance of the dispute. If the parties ask the trial court to resolve any issue concerning the condition of placement, there is a contest. If there is a contest, the court *shall* appoint a GAL.

The majority is implicitly and understandably concerned that strict application of the statute's language could lead to the absurd result of requiring appointment of a GAL when the parties disagree over an apparently trivial matter. No one wants to place unnecessary and absurd burdens upon family law courts and litigants. Nonetheless, the problem I perceive with the majority's concern, beyond its failure to accept the statute's plain meaning, is that the necessity of appointing a GAL would be determined based upon the dispute as framed from the *parents'* perspective. It is not necessarily the case that one of the two positions being advanced in the physical placement dispute will always be consistent with the best interests of the child and that an inconsistency will always be self evident. What may seem a relatively inconsequential issue as between the parents'

[4] Section 767.001(5), STATS., provides: "'Physical placement' means the *condition* under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." (Emphasis added.)

positions may be significant when either is compared to what is best for the child. I am concerned that if § 767.045(1)(a)2, STATS., is not viewed as mandatory, the trial circuit court may be deprived of the opportunity to apprehend the conflict between each party's respective position and the child's best interests. In any event, I consider the plain language of § 767.045(1)(a)2 to require appointment of a GAL in all contested physical placement matters and would so hold.