COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0785 **Cir. Ct. No. 02TP000024**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BREANNA M. D., A PERSON UNDER THE AGE OF 18:

WINNEBAGO COUNTY HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRIDGET D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Reserve Judge. *Reversed and cause remanded with directions.*

¶1 NETTESHEIM, J.[1] Bridget D. appeals from an order denying her motion for a new trial following the termination of her parental rights.[2] Bridget argues that the trial court failed to comply with WIS. STAT. § 801.58(1), which requires a stipulation of the parties that the assigned judge may preside at the trial when notification of the judge's assignment to the case is received less than twenty-four hours prior to trial. We agree that the trial court failed to comply with the mandatory requirement of the statute. However, we conclude that the question of prejudice has yet to be determined. We remand for a further hearing on the question pursuant to ***State v. Kywanda F.***, 200 Wis. 2d 26, 546 N.W.2d 440 (1996).

Facts and Procedural History

¶2 The controlling facts are not in dispute. Bridget is the mother of Breanna M.D. On September 3, 2002, the Winnebago County Health and Human

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The notice of appeal states that the appeal is taken from an order terminating Bridget D.'s parental rights signed by Judge Thomas J. Gritton. However, Reserve Judge William E. Crane, acting in Judge Gritton's absence, conducted the jury trial and the dispositional hearing resulting in the termination of Bridget's parental rights.

Bridget then filed the instant appeal. At her request, we later remanded this case back to the trial court to allow Bridget to file a postjudgment motion raising the issue before us on this appeal. We further ordered that the appellate briefing would commence fifteen days after the record was returned to this court. We did not require Bridget to file an additional notice of appeal from any order ensuing from the remand proceedings.

Following our remand, Bridget filed her motion, and Judge Crane conducted the hearing on the motion. Judge Crane also signed the order denying Bridget's request for a new trial. Bridget's appeal is limited to the issue litigated at the postjudgment proceeding before Judge Crane. Therefore, although the notice of appeal was filed before the postjudgment proceeding and states that the appeal is taken from Judge Gritton's order, the notice functionally serves to bring Judge Crane's postjudgment order before us.

Services (the Department) filed a petition seeking to terminate Bridget's parental rights to Breanna.[3] Judge Thomas J. Gritton, the regularly assigned circuit judge, presided at the initial appearance. Bridget appeared with counsel, denied the allegations of the petition and requested a jury trial. Judge Gritton scheduled the jury trial for October 28, 2002.

¶3 When Bridget and her counsel arrived on the date of the jury trial, they learned for the first time that Reserve Judge William E. Crane had been assigned to hear the matter. Bridget did not register any objection to Judge Crane presiding at the jury trial. The jury returned a verdict finding grounds to terminate Bridget's parental rights. On November 7, 2002, Judge Crane conducted the dispositional hearing which resulted in the termination of Bridget's parental rights. Again, Bridget did not object to Judge Crane presiding.

¶4 Represented by new counsel, Bridget filed a posttermination motion seeking a new trial on the grounds that Judge Crane was not authorized to conduct the jury trial pursuant to WIS. STAT. § 801.58(1). This statute provides, in relevant part, that if notification of a new judge assigned to the trial of a case is received less than twenty-four hours prior to trial, "the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside." ***Id***. Because the trial court did not obtain the parties' stipulation, Bridget argued that she was entitled to a new trial.

¶5 At the hearing, Bridget testified that she did not know Judge Crane was going to preside at the jury trial until she arrived at the court. She conceded,

[3] The petition also sought to terminate the parental rights of Breanna's father. He is not involved in this appeal.

however, that she did not express any dissatisfaction with Judge Crane or ask her attorney to request a different judge. Bridget also testified that at her initial appearance, she asked her attorney if she had the right to have a different judge hear the matter. She also acknowledged that she had previously been advised of her right to substitution in prior criminal proceedings against her.

¶6 Bridget's trial attorney, David Keck, also testified at the posttermination hearing. Like Bridget, Keck testified that he did not know that Judge Crane would be presiding at the jury trial until he arrived at the courtroom on the morning of trial. He conceded that he was unaware of the "less than 24 hours/stipulation" provision of WIS. STAT. § 801.58(1) and therefore he did not inform Bridget of her right to seek substitution of Judge Crane on that specific basis. However, Keck testified that he had informed Bridget of her right of substitution at the initial hearing when Judge Gritton was assigned to the case. Bridget's only response was that she did not want Judge Barbara Key, another Winnebago county circuit judge, to preside over the matter. Keck also testified that if Bridget had registered any objection to Judge Crane presiding, he would have sought a continuance, which, according to Keck, would have resulted in the assignment of a different judge.

¶7 In a bench ruling, Judge Crane denied Bridget's motion for a new trial. The court reasoned that Bridget had waived her right to substitution under WIS. STAT. § 801.58(1) by failing to object to the judge's assignment to the case at the time of the jury trial and by participating in the ensuing proceedings, including the dispositional hearing. Bridget appeals.

Discussion

WISCONSIN STAT. § 801.58(1)

¶8 WISCONSIN STAT. § 48.29 is the only provision of the Children's Code that addresses the substitution of a judge. However, that statute speaks only to the substitution of the judge at the plea hearing; it does not address the situation here where a new judge is assigned to the matter after the plea hearing. *See* ***id.*** When the Children's Code is silent on a procedural matter, the Rules of Civil Procedure, WIS. STAT. chs. 801 to 847, apply. ***Waukesha County Dep't of Soc. Servs. v. C.E.W.***, 124 Wis. 2d 47, 53, 368 N.W.2d 47 (1985). To the same effect, WIS. STAT. § 801.01(2) provides that the Rules of Civil Procedure apply in all civil actions and special proceedings except where a different procedure is prescribed by statute or rule.

¶9 We therefore turn to WIS. STAT. § 801.58(1), which states:

> Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

¶10 In summary, this statute requires a party to file a written substitution of judge request within certain prescribed time limits depending on the proximity of the trial date to the date the party received notice of the new judicial assignment. If the assignment notice is received ten days or more prior to the trial date, the party must file the written substitution request within ten days of receipt of the notice. If the assignment notice is received less than ten days prior to the trial date, the party must file the written substitution request within twenty-four hours of the trial date. *However, if the assignment notice is received less than twenty-four hours prior to the trial, the party is not under any obligation to file a substitution request*. Instead, the statute provides that the action "*shall* proceed to trial *only* upon stipulation of the parties that the assigned judge may preside at the trial of the action." ***Id***. (emphasis added).

¶11 We hold that this statutory language is clear and unambiguous. A principle of statutory construction holds that "[w]here a form of conduct, the naming of its performance and operation, the persons and things to which it refers, are designated, there is an inference that all omissions should be understood as exclusions." ***Gottlieb v. City of Milwaukee***, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979). In WIS. STAT. § 801.58(1), the legislature has obligated a party to take affirmative steps to seek substitution of judge within prescribed periods of time when the party receives notice of the newly assigned judge twenty-four hours or more in advance of the trial. However, *in the very same subsection*, the legislature abandons that procedure and instead imposes a wholly different procedure when the party receives notice of the newly assigned judge less than twenty-four hours before the trial. In that setting, the matter may proceed to trial "only upon stipulation of the parties." ***Id.*** The legislative intent could not be more clearly stated.

¶12 We find support for our holding in ***Steven V. v. Kelly H.***, 2003 WI App 110, 263 Wis. 2d 241, 663 N.W.2d 817, *review granted,* 2003 WI 9I, 262 Wis. 2d 500, 665 N.W.2d 375 (Wis. June 12, 2003) (No. 02-2860). There, in a termination of parental rights proceeding, the trial court did not advise the mother of her right to substitution at the initial appearance. ***Id.***, ¶29. The court of appeals acknowledged that WIS. STAT. § 48.422(1), which governs the procedure at an initial appearance, does not expressly require the trial court to advise a nonpetitioning party of the right to judicial substitution. ***Steven V.***, 263 Wis. 2d 241, ¶31. Nonetheless, relying on prior supreme court authority, the court concluded that the trial court had such a duty. ***Id.***, ¶¶31-32.

¶13 If, pursuant to ***Steven V.***, the trial court has the affirmative duty to inform of the right to judicial substitution at an initial appearance even though the statute does not expressly impose that duty, then it surely follows that the court has the duty to obtain the parties' stipulation when the statute expressly imposes that duty.

¶14 While Bridget had an affirmative duty to seek substitution in the other scenarios set out in WIS. STAT. § 801.58(1), she had no such duty in the present setting where the new judge was assigned to the case on the very eve of the trial. Instead, in that setting, the legislature has shifted the affirmative duty to the trial court to obtain the parties' stipulation that the newly assigned judge may hear the matter. The trial court's holding that Bridget's failure to object constituted waiver serves to impose an affirmative duty to seek substitution on a party—a duty the legislature consciously abandoned in this scenario. As such, the trial court's ruling also rendered the stipulation provision of the statute meaningless.

¶15 The trial court's waiver ruling was premised on ***Pure Milk Products Co-op. v. National Farmers Organization***, 64 Wis. 2d 241, 219 N.W.2d 564 (1974). There, the supreme court held that a party can waive the right to substitution by participating in the trial or other preliminary proceedings bearing on the merits of the case. ***Id***. at 250. However, the statute at issue in ***Pure Milk*** imposed the affirmative duty to seek substitution on the party. *See* WIS. STAT. § 261.08 (1971). Here, as we have explained, WIS. STAT. § 801.58(1) imposes an affirmative duty upon the trial court to obtain the parties' stipulation. ***Pure Milk*** does not apply in this setting.

The Remedy

¶16 Having concluded that the trial court failed to follow the dictates of WIS. STAT. § 801.58(1), we next discuss the remedy. In ***Kywanda F.***, a delinquency proceeding, the trial court failed to advise the delinquent of the right to judicial substitution pursuant to WIS. STAT. §§ 48.29(1) and 48.30(2). ***Kywanda F.***, 200 Wis. 2d at 30-32. The supreme court first held that the trial court's failure to follow this mandatory directive did not defeat the trial court's subject matter jurisdiction or competency to proceed.[4] ***Id***. at 33-34.

[4] On the matter of competency to proceed, the supreme court observed that prior case law had never held that the failure to advise of the right to judicial substitution had resulted in a loss of competency to proceed. ***State v. Kywanda F.***, 200 Wis. 2d 26, 34, 546 N.W.2d 440 (1996). Instead, the court observed that the loss of competency to proceed was limited to instances where the trial court had failed to abide by the time limits prescribed by WIS. STAT. ch. 48. ***Kywanda F.***, 200 Wis. 2d at 34. In support, the court noted the statutory history indicating that the strict time limits of the juvenile code were designed to protect the due process rights of the parties whereas no such equivalent legislative history existed with regard to the substitution of judge statute. ***Id***. at 35-36. In addition, while recognizing the constitutional right to be tried by an impartial judge, the supreme court rejected the argument that a failure to advise of the right of judicial substitution violated due process. ***Id***.

¶17 Instead, the supreme court held that the appropriate remedy was a prejudice inquiry. ***Id***. at 37-41. Such prejudice is shown "if it is established that the juvenile was not told of the right and did not know of that right." ***Id***. at 37. In making that determination, the supreme court adopted a ***Bangert***-type[5] analysis. The juvenile must first make a prima facie showing that the court violated its mandatory statutory duties and allege that he or she in fact did not know of the information that the court was statutorily required to provide. ***Kywanda F.***, 200 Wis. 2d at 38. If the juvenile makes this showing, the burden then shifts to the State to demonstrate by clear and convincing evidence that the juvenile knew of the statutory right and therefore was not prejudiced. ***Id***.

¶18 Applying the ***Kywanda F.*** analysis to this case, we first observe that there is no dispute that the trial court did not obtain the statutorily mandated stipulation of the parties authorizing the newly assigned judge to preside over the matter. We also observe that Bridget has alleged and testified that she did not know of her right to seek substitution of the judge under this unique and narrow scenario. Therefore, we hold that Bridget has made out the required prima facie case, and the burden has shifted to the State pursuant to ***Kywanda F.***

¶19 However, we are unable to take the analysis any further because the trial court's posttermination ruling was not premised on ***Kywanda F.*** or any ***Bangert*** analysis. Instead, as we have noted, the court ruled that Bridget had waived her right to seek substitution because of her failure to object, a ruling we have overturned in our preceding discussion. The Department argues that "Bridget D. was generally aware of her right to substitution of judge."

[5] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

Presumably, this argument rests on Keck's testimony that he had advised Bridget of her right to substitution at the initial appearance and on Bridget's concession that she had been advised of the right of substitution in prior criminal proceedings. But the right to substitution in this case concerns a newly assigned judge under WIS. STAT. § 801.58(1), not the right to substitution of the judge presiding at the initial appearance or the right to substitute a judge in prior unrelated cases.

¶20 In summary, the trial court did not make a finding that Bridget nonetheless knew of her right to substitution in this particular setting. It is not our function as an appellate court to make findings of fact. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Rather, this determination is appropriately left to the trial court. The supreme court faced this same dilemma in ***Kywanda F.*** and remanded the matter to the trial court for that determination. ***Kywanda F***., 200 Wis. 2d at 41. We do likewise here.

Conclusion

¶21 We summarize our holdings: (1) Bridget did not waive her right to seek substitution of the newly assigned judge at the posttermination proceeding by her failure to object, (2) the trial court failed to follow the mandatory duty imposed by WIS. STAT. § 801.58(1) by failing to obtain the parties' stipulation authorizing the newly assigned judge to hear the trial, and (3) Bridget has made out a prima facie showing that the trial court did not follow the mandatory dictates of § 801.58(1) and that she did not know of her right of substitution at the posttermination hearing.

¶22 As a result, the burden shifted to the Department to show by clear and convincing evidence that Bridget otherwise knew of the statutory right and therefore was not prejudiced.

¶23 We remand for further proceedings on the question of prejudice. We authorize the taking of further evidence on this question if the trial court should deem it necessary and appropriate.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.