**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 2, 2005**

Cornelia G. Clark
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 Nos. 2005AP413**
**2005AP414**
**2005AP415**

**Cir. Ct. Nos. 2004TP64**
**2004TP65**
**2004TP66**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**NO. 2005AP413**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAMES C. P., A PERSON UNDER THE AGE OF 18:**

**DIANE L. C.,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHAEL D. P.,**

**RESPONDENT-APPELLANT.**

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**NO. 2005AP414**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO MEGAN L. P., A PERSON UNDER THE AGE OF 18:**

**DIANE L. C.,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHAEL D. P.,**

**RESPONDENT-APPELLANT.**

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**NO. 2005AP415**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO AMBER M. P., A PERSON UNDER THE AGE OF 18:**

**DIANE L. C.,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHAEL D. P.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Reversed.*

¶1 DYKMAN, J.[1] Michael D.P. appeals from orders terminating his parental rights to his three children, James C.P., Megan L.P. and Amber M.P. He argues that the trial court erred by concluding that he waived his right to counsel provided by WIS. STAT. § 48.23(2). We agree, and therefore reverse.

¶2 We considered this case earlier this year. On February 22, we granted Michael D.P.'s motion for a remand to determine whether he knowingly,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

voluntarily and intelligently waived his right to counsel. We permitted the parties to renew in the trial court the arguments they made here. We retained jurisdiction of the appeals.

¶3 The parties agree that Michael D.P. appeared in this case because he sent letters to the court, made requests of the court and knew that a proceeding to terminate his parental rights was underway. He also filed a petition for appointment of counsel and an affidavit of indigency. The parties agree that the trial court sent Michael D.P. an order to appear at a hearing. They disagree on whether he "appear[ed] before the court," as that phrase is used in WIS. STAT. § 48.23(2).[2]

¶4 The trial court determined on remand that pursuant to WIS. STAT. § 801.06, Michael appeared in this action. It then found that though Michael had appeared, he had not appeared before the court. *See* WIS. STAT. § 48.23(2). Moreover, Michael had not obeyed an order to appear. It concluded that Michael was in default, with the result that he had knowingly, voluntarily and intelligently waived his right to counsel.

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[2] WISCONSIN STAT. § 48.23(2) provides:

> RIGHT OF PARENTS TO COUNSEL. Whenever a child is the subject of a proceeding involving a contested adoption or the involuntary termination of parental rights, any parent under 18 years of age who appears before the court shall be represented by counsel; but no such parent may waive counsel. A minor parent petitioning for the voluntary termination of parental rights shall be represented by a guardian ad litem. If a proceeding involves a contested adoption or the involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made.

¶5 Diane L.C. argues that the trial court's interpretation of WIS. STAT. § 48.23(2) was correct, and that because Michael was in default, he waived his statutory right to counsel. The guardian ad litem also makes this argument. But neither supports this interpretation of § 48.23(2) with an explanation of why "appears before the court" unambiguously means "appears in person before the court." Both merely assume that this is so.

¶6 This case thus involves a question of statutory interpretation. We review questions of statutory interpretation de novo. ***State v. Campbell***, 2002 WI App 20, ¶4, 250 Wis. 2d 238, 642 N.W.2d 230. "The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal, v. Circuit Court***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Whether a statute is ambiguous is a question of law that we determine de novo. ***Thielman v. Leean***, 2003 WI App 33, ¶6, 260 Wis. 2d 253, 659 N.W.2d 73. "If the meaning of the statute is plain, we ordinarily stop the inquiry." ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Kalal***, 271 Wis. 2d 633, ¶47 (citations omitted). "If a statute is ambiguous, the reviewing court turns to the scope, history, context and purpose of the statute." ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, ¶18, 236 Wis. 2d 473, 613 N.W.2d 591; *but see* ***Kalal***, 271 Wis. 2d 633, ¶48 ("[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history.").

¶7 ***Kalal*** tells us that we begin with the language of the statute itself. ***Kalal***, 271 Wis. 2d 633, ¶45. Therefore, we must first determine whether WIS. STAT. § 48.23(2) is ambiguous in the context of this case. We conclude that it is. The phrase "appears before the court" could reasonably mean that a litigant must be personally present during a court proceeding. But that phrase could also reasonably mean that the litigant "appear" in other ways, such as by telephone, teleconference, or by an attorney. WISCONSIN STAT. § 48.23(2) is not a model of clarity. It has been found ambiguous in another context. *See* ***In Interest of M.D.(S)***, 168 Wis. 2d 995, 1002, 485 N.W.2d 52 (1992).

¶8 To assist us in determining the meaning of WIS. STAT. § 48.23(2), we will look at its context. Section 48.23(2) pertains to both adult and minor parents. A minor parent in an involuntary termination of parental rights proceeding who "appears before the court" must be represented by counsel, and may not waive counsel. Section 48.23(2). Were we to adopt Diane L.C.'s and the guardian ad litem's interpretation of § 48.23(2), a minor parent who never was present in person in court would not have "appear[ed] before the court" and therefore would not be entitled to counsel. That is not a reasonable interpretation of a statute which does not permit a minor parent to waive counsel. The supreme court has called a parent's right to the custody and care of his or her children "an extremely important interest that demands protection and fairness." ***M.D.(S)***, 168 Wis. 2d at 1003.

¶9 Moreover, the legislature has been specific in defining when a person must be personally present in court in a termination of parental rights case. Courts may accept voluntary consents to petitions to terminate parental rights, but only if "the parent appears personally at the hearing and gives his or her consent to

the termination of his or her parental rights." WIS. STAT. § 48.41(2)(a). This shows that in termination of parental rights cases, the legislature knew how to clearly require the personal presence of a litigant. "Appears personally," a phrase which is clear and unambiguous, does not appear in WIS. STAT. § 48.23(2).

¶10 We conclude that, while the phrase "appears before the court" initially could have the meaning Diane L.C. and the guardian ad litem propose, once the context surrounding this phrase is considered, the legislature's intent is revealed. "Appears before the court" does not require a litigant to be personally present at a court hearing. We therefore conclude that Michael D.P. appeared before the court.

¶11 This conclusion does not end the matter. WISCONSIN STAT. § 48.23(2) provides that parents who appear before the court in termination of parental rights cases shall be represented by counsel. However, that statute also provides that these parents may waive counsel, "provided the court is satisfied that such waiver is knowingly and voluntarily made." ***Id***. The trial court found that Michael D.P. had knowingly and voluntarily waived his right to counsel by failing to appear personally before the court.

¶12 Because we have concluded that Michael D.P. appeared before the court, it is inescapable that he did not waive his right to counsel for failure to appear before the court. The trial court's finding that he did so is therefore clearly erroneous. Still, the question of the relief to which Michael D.P. is entitled must be determined.

¶13 The term "knowing and voluntary" in the context of waiving the right to an attorney was described in ***State v. Klessig***, 211 Wis. 2d 194, 204, 207,

564 N.W.2d 716 (1997). There the standard of review was described as de novo. ***Id.*** at 204. That standard was used because the matter involved the constitutional right to counsel in a criminal case. ***Id***. Though they are civil cases, termination proceedings are governed by the due process clause of the Fourteenth Amendment to the United States Constitution. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768. In a similar situation, voluntariness was described as a constitutional fact to be reviewed de novo. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51 n.18, 233 Wis. 2d 344, 607 N.W.2d 607. We will review whether Michael D.P. waived his right to an attorney de novo.

¶14 This case is similar to ***Tykila S.*** in that in both cases, the trial court concluded that failing to obey an order for appearance permitted it to sanction the parent who failed to appear by entering a default judgment against the parent. In ***Tykila S.***, the supreme court upheld this sanction. ***Tykila S.***, 246 Wis. 2d 1, ¶26. There, the supreme court concluded that the trial court had erroneously exercised its discretion by entering a default judgment without taking evidence. Still, the court concluded that this error was harmless under WIS. STAT. § 805.18(2) because in another stage of the proceeding, sufficient evidence of abandonment, the ground for the termination, was established.

¶15 But the error in ***Tykila S.*** was at least facially procedural, and she had the assistance of an attorney. Here, the error was the complete denial of an attorney for Michael D.P., though he asked for one on more than one occasion. There is no way to tell what evidence an attorney might have introduced had one been provided to Michael D.P. In a criminal context regarding the Sixth Amendment right to counsel, an analogous case is ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792 (1963), in which a state did not provide counsel except in

capital offenses. Gideon was convicted of a non-capital felony after the trial court denied his request for an attorney. The Supreme Court concluded that the assistance of counsel was a fundamental right, and reversed Gideon's conviction. Later cases have looked at partial denials of the right to counsel differently, analyzing them using a harmless error analysis. *See* ***State v. Mills***, 107 Wis. 2d 368, 370-71, 320 N.W.2d 38 (Ct. App. 1982) (compendium of cases involving right to counsel provided by Sixth Amendment).

¶16 We conclude that the complete denial of a right to counsel in a case implicating the due process clause of the Fourteenth Amendment to the United States Constitution cannot be analyzed under any harmless error analysis. Terminations of parental rights affect some of parents' most fundamental human rights. ***Tykila S.***, 246 Wis. 2d 1, ¶20. Those rights cannot be adequately protected unless a parent who desires an attorney is given one. While a represented parent can be sanctioned for failing to obey a court's order to appear personally by a finding of default, an unrepresented parent has no one to advise him or her as to the realities of appearing or not appearing when ordered to do so by a court. Given the legislative concern with termination of parental rights cases exemplified by WIS. STAT. § 48.23(2) and (3) and WIS. STAT. § 48.41(2) and (3), and the constitutional protection given to parents facing termination proceedings, we conclude that the total denial of counsel to a parent in a termination of parental rights case requires reversal of the order terminating the parent's parental rights. Consistent with the analysis in ***Gideon***, we do not analyze this under a harmless error standard.

*By the Court*.—Orders reversed.

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