COURT OF APPEALS
DECISION
DATED AND RELEASED

May 3, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-0184
96-0185

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

No. 96-0184

In the Interest of Rebecca B.,
A Child Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DORIS B.,

Respondent-Appellant.

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No. 96-0185

In the Interest of Todd B., Jr.,
A Child Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DORIS B.,

Respondent-Appellant.

APPEALS from orders of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Reversed.*

SNYDER, J. Doris B. appeals from orders terminating her parental rights to two children.[1] Doris claims that she did not receive the proper warnings under §§ 48.356 and 48.415, STATS. She also contends that the trial court misused its discretion in admitting certain evidence, that the evidence did not support the jury verdicts and that her trial counsel was ineffective.[2]

Because we conclude that both the warning given to Doris in the extension orders and the verdict forms patterned after that warning were an incorrect statement of the law, we reverse. We affirm the trial court's evidentiary rulings, but because of the reversal do not reach Doris' claims regarding the sufficiency of the evidence or ineffective assistance of counsel.

The underlying action first commenced with a court order dated November 1, 1993, in which Todd B., Jr. (then two and one-half years old) and Rebecca B. (then fourteen months old) were found to be children in need of

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[1] Todd B., Sr., the children's father, was informed of the termination proceedings and chose not to contest the action. Although all of the court proceedings referred to in this opinion concerned both parents, Doris is the sole appellant.

[2] At the time the posttermination appeal was filed, Doris raised an ineffective assistance of counsel claim. This court requested that the trial court conduct a ***Machner*** hearing on that issue. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). The trial court did not find trial counsel ineffective and denied Doris' motions to set aside the termination orders.

protection or services (CHIPS). At that time Doris was properly given both an oral and a written warning that the possible grounds for termination which would apply were a continuing need for protection or services. This comported with the requirements of § 48.415(2), STATS., 1991-92, then in effect.

At a hearing on October 7, 1994, the CHIPS orders were extended and the same written warning was given.[3] However, prior to that hearing, on May 5, 1994, an amendment to § 48.415, STATS., went into effect. As the trial court noted, the warning that Doris was given in the extension orders was not the applicable standard at that time.

Petitions for the termination of Doris' parental rights were filed on March 29, 1995. A jury trial was conducted in October 1995; the jury verdict forms recited the elements that matched the warning Doris had been given, but this did not reflect the current statutory mandates. Based on the standard provided by the trial court, the jury concluded that Todd and Rebecca were in continuing need of protection or services. At a dispositional hearing in November 1995, the court concluded that it was in the best interests of the children to terminate Doris' parental rights. Doris now appeals.

Doris first claims that she did not receive the proper warning at the time the extension orders were entered, and because of this, her parental rights should not have been terminated. We agree.

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[3] Doris did not attend the extension hearing, so no oral warnings were given.

This issue concerns the application of a statute to a set of undisputed facts. Construction of a statute presents a question of law, and this court owes no deference to the trial court's determination. ***State v. Grayson,*** 165 Wis.2d 557, 563, 478 N.W.2d 390, 393 (Ct. App. 1991), *aff'd*, 172 Wis.2d 156, 493 N.W.2d 23 (1992). The construction of the juvenile code and its application to the facts are questions of law. *See* ***Green County Dep't of Human Servs. v. H.N.,*** 162 Wis.2d 635, 645, 469 N.W.2d 845, 848 (1991).

A continuing need for protection or services can be a basis for the involuntary termination of parental rights only if the statutory warning required by § 48.356(2), STATS., is given each time an order places a child outside of the family home pursuant to, inter alia, § 48.365, STATS. (an extension order). ***D.F.R. v. Juneau County, Dep't of Social Servs.,*** 147 Wis.2d 486, 498-99, 433 N.W.2d 609, 613-14 (Ct. App. 1988). The warning requirement is imposed because of the legislature's concern for the due process rights of parents. ***Id.*** at 499, 433 N.W.2d at 614. Because the statute is mandatory, this court cannot substitute alternative ways to satisfy the statute's notice requirements. ***Id.***

At the time of the original CHIPS order, Doris was given the information mandated by § 48.356, STATS., 1991-92. This section requires that "any written order which places a child outside the home ... shall notify the parent or parents of [any grounds for termination of parental rights under § 48.415, STATS., which may be applicable]." *See* ***id.***

At the time of the initial order, Doris was warned that the possible grounds for termination of her parental rights which would apply were a "continuing need for protection and services under s. 48.415(2) Wis. Stats." Section 48.415(2), STATS., 1991-92, then states that in order to show that a child is in continuing need of protection or services, the state must prove, inter alia:

> [T]he parent *has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child* to the home and there is a substantial likelihood that the parent will not meet these conditions in the future. [Emphasis added.]

During the time the original dispositional order was in effect, the legislature enacted an amended version of § 48.415, STATS. *See* 1993 Wis. Act 395, § 25. The bill provided that the amendment would first apply to any CHIPS orders or extension orders entered on or after the effective date of the amendments. *See* ***id.*** §§ 51, 52. The statutory changes took effect on May 5, 1994.

The amendments to § 48.415, STATS., made the following relevant changes to the state's burden in proving a child is in need of protection or services:

> [T]he parent *has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child* to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing. [Emphasis added.]

Section 48.415(2)(c). Doris did not receive this warning although the extension orders were filed five months after the statutory changes took effect.

Because she had only received warnings under the language of § 48.415, STATS., 1991-92, the trial court determined that the jury verdicts should reflect the "substantially neglected, wilfully refused" language, rather than the "substantial progress" language included in the current statute. Trial counsel for Doris did not object to this decision. He stated at the ***Machner*** hearing that he was "convinced that the old standard placed a greater burden on the State to establish ... one of the primary criteria."

In spite of trial counsel's acquiescence, use of this standard constituted plain error. The legislature, in enacting § 48.415, STATS., has prescribed the grounds for the involuntary termination of parental rights. *See* ***D.F.R.***, 147 Wis.2d at 498, 433 N.W.2d at 613. There is a presumption that the legislature intends to change the law when it amends a statute. ***Lang v. Lang,*** 161 Wis.2d 210, 220, 467 N.W.2d 772, 776 (1991). A harmless-error analysis cannot be applied to excuse the failure of the trial court to comply with the imperative command of § 48.356(2), STATS., and its substitution of an outdated standard in this proceeding. *See* ***D.F.R.***, 147 Wis.2d at 499, 433 N.W.2d at 614.

While the State concedes that an outdated standard was used, it argues that because of the precedent of ***State v. Patricia A.P.,*** 195 Wis.2d 855, 537 N.W.2d 47 (Ct. App. 1995), the trial court actually applied the correct standard. The State reasons that "when the standard changes affecting a

parent's rights in 'mid-stream,' so to speak, it is unfair for the State to use anything but the standard contained in the original warning." However, this argument misconstrues our holding in ***Patricia A.P.***

In that case, the mother was properly given the then-current written warning contained in § 48.415(2)(c), STATS., 1991-92. The last warning was included with a dispositional order dated January 19, 1994, prior to the amendment of the statute. On September 2, 1994, after the effective date of the new § 48.415(2)(c), STATS., the State filed a petition to terminate Patricia's parental rights. That petition recited the *modified* grounds for termination taken from the amended § 48.415(2)(c), which represented a basis for termination of which Patricia had never been informed.

We stated that the change in the type of conduct for which termination is risked is a change in the quality of the very nature of the acts leading to termination. ***Patricia A.P.***, 195 Wis.2d at 864, 537 N.W.2d at 50. We then concluded that the application of this new standard deprived Patricia of her parental rights without due process. ***Id.*** at 865, 537 N.W.2d at 51.[4]

Although the State argues that ***Patricia A.P.*** is controlling and requires us to uphold the trial court's use of the old standard, our holding in that case actually supports our decision here. In ***Patricia A.P.***, we concluded

[4] While we noted in ***State v. Patricia A.P.***, 195 Wis.2d 855, 864, 537 N.W.2d 47, 51 (Ct. App. 1995), that it is much easier for the state to establish grounds for termination under the new law and that the new law utilizes a purely objective standard, that statement is dicta and provides no rationale for applying the outdated standard.

that the failure of the trial court to use the same standard as that contained in the warnings Patricia had received deprived her of due process. ***Id.*** at 863-65, 537 N.W.2d at 50-51.

In the present case, the State failed to warn Doris utilizing the legislature's amended standards, and the trial court compounded that error by applying the same outdated standard at trial. Under ***D.F.R.***, 147 Wis.2d at 499, 433 N.W.2d at 614, the warning requirement is imposed "because of the legislature's concern for the due process rights of parents." Under the legislature's prescription, we may not substitute alternative ways to satisfy the notice requirements. ***Id.*** We conclude that failure to apply the proper standard requires reversal on due process grounds, just as it did in ***Patricia A.P.***

Doris also contends that allowing testimony pertaining to events which preceded the October 1994 extension orders was a misuse of discretion. She argues that the following evidence should have been excluded: the reasons for the initial CHIPS petitions, testimony from a counselor whom Doris had seen two years earlier, testimony relating to a home study conducted more than a year before the trial and testimony from Todd's foster mother pertaining to behavioral difficulties she had observed which were most apparent when Todd was receiving regular visits from Doris.

Evidentiary rulings rest within the sound discretion of the trial court. ***State v. Seigel,*** 163 Wis.2d 871, 881, 472 N.W.2d 584, 588 (Ct. App. 1991). This court will sustain a discretionary act if it is made in accordance with

accepted legal standards and in accordance with the facts of record. ***Id.*** at 881-82, 472 N.W.2d at 588.

Doris argues that all evidence which predated the extension orders of October 1994 should have been excluded. She contends that this evidence was so remote in time that it was rendered irrelevant to the issues facing the jury and that its introduction was unfairly prejudicial. She also moved to exclude any evidence of Todd's behavior "in the absence of any opinion testimony of a competent psychological or psychiatric expert establishing a causal connection between conduct of Doris ... and based upon evaluations by such expert of both [Todd] and Doris." We first consider her contentions of remoteness and irrelevancy with regard to evidence which predated the extension orders.

The rule is that relevant evidence is generally admissible. *See* § 904.02, STATS. This rule is tempered by § 904.03, STATS., which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

We do not agree with Doris that the evidence which predated the extension orders was irrelevant to a determination of whether Todd and Rebecca were in continuing need of protection or services. For the jury to fairly evaluate Doris' present ability to care for her children, it is necessary for the jury to be informed of the conditions which precipitated the original CHIPS finding. It is clear from the record that the jury was provided with dates as to when the

counselor met with Doris and when the social worker conducted the home study. The involvement of the State dated back to the original CHIPS proceeding, and testimony which explained the various aspects of that involvement was relevant.

We see no basis for Doris' claim that the proffered testimony was unduly prejudicial. Doris was given an opportunity to cross-examine each witness and to respond to the evidence. The testimony served to explain the extent of the State's involvement in this case, and the testimony included the dates on which the various events took place. The trial court's admission of this evidence was a proper exercise of discretion.[5]

Doris also maintains that all testimony regarding Todd's behavior should have been prohibited and that "the evidence of inappropriate behavior by Todd Jr. was offered and introduced solely to inflame the jury." Doris also claims that Todd's behavior had no relevance to the issue of whether she had met the conditions for the return of her children. We disagree.

The trial court explained that it allowed the disputed testimony because it was relevant to show "the demands that are going to be made upon the mother to care for this child." Furthermore, the testimony of the foster

[5] We note, however, that the standard for evaluating all of the evidence presented in this case is the current standard the legislature has enacted. *See* § 48.415, STATS. All of the evidence presented at trial must be evaluated in terms of whether Doris has shown "substantial progress" toward meeting the conditions for the return of her children. The trial court's suggestion that a "dual standard" would have to be applied because of the amendments to the statute is incorrect.

mother and the social worker which pertained to Todd's behavior was tempered by the testimony of Dr. Mark Simms, a pediatrician who had examined Todd. Simms testified:

It was my opinion initially in November, and again in April that Todd's behavior was the result of stress, tremendous amount of stress. ... I think it's also important for me to say that neither the foster mother nor [the social worker] felt that Todd's mother was doing anything wrong or that he was being mistreated or was subjected to any intentional or unintentional inappropriate care. It's just the stress ... that he was missing his mother intensely and it was very confusing for him. ... So this constant stress of going back and forth between his mother and the foster home was creating a tremendous amount of difficulty, behaviorally and physically, and that he was turning this inwards rather than outwards.

We conclude that the trial court made a rational and reasoned decision to allow the testimony regarding Todd's behavioral problems. The testimony of Simms, as well as direct testimony of a social worker that Doris' treatment of Todd was not at all responsible for Todd's actions, provided the jury with a balanced presentation of relevant evidence.

In conclusion, we reverse the termination orders because of the failure of the State to provide Doris with the proper statutory warnings, which led to the trial court's utilization of an outdated standard that did not comport with the imperative requirements of §§ 48.356 and 48.415, STATS. We affirm the trial court's evidentiary rulings. Doris' claims that the evidence was insufficient

and that her trial counsel was ineffective are deemed moot. *See* ***City of Racine v. J-T Enters. of Am.,*** 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974).

By the Court.—Orders reversed.

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