COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 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. 98-0498
98-0499
98-0500

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

NO. 98-0498

IN RE THE TERMINATION OF PARENTAL RIGHTS OF MICHAEL L.P-L., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PAMELA E.P.,

RESPONDENT-APPELLANT,

MICHAEL D.L.,

RESPONDENT.

NO. 98-0499

IN RE THE TERMINATION OF PARENTAL RIGHTS OF JASMINE E.P-L., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PAMELA E.P.,

RESPONDENT-APPELLANT,

MICHAEL D.L.,

RESPONDENT.

NO. 98-0500

IN RE THE TERMINATION OF PARENTAL RIGHTS OF NAOMI M.P-L., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PAMELA E.P.,

RESPONDENT-APPELLANT,

MICHAEL D.L.,

RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

DEININGER, J.[1] Pamela E.P. appeals orders terminating her parental rights to her three minor children. A jury found that the La Crosse County Department of Human Services had established that Pamela's children were in "[c]ontinuing need of protection or services." *See* § 48.415(2), STATS.[2] Following the jury's verdict, the court entered orders for the termination of parental rights (TPR) with respect to all three children. Pamela claims that the orders violate her constitutional right to due process because she was denied appointed counsel at the plea hearing in previous court proceedings to declare the children to be in need of protection or services. Additionally, she claims that the term "substantial progress" in § 48.415(2)(c), is unconstitutionally vague. We

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

[2] Section 48.415(2), STATS., provides that "[c]ontinuing need of protection or services" constitutes grounds for the termination of parental rights. The specific showings required by the statute are:

> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> (b) 1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.
>
> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the 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 under s. 48.424.

conclude that Pamela's first claim is not supported by the appellate record, and that Pamela has not met her burden on the second claim of establishing the unconstitutionality of the statute in question. Accordingly, we affirm the three orders terminating her parental rights.

BACKGROUND

In October 1995, the Department filed a petition with the circuit court alleging that Pamela's children were in need of protection or services (CHIPS). At the plea hearing on the CHIPS petition, Pamela informed the court that she did not contest the fact that the children were in need of protection or services. The "court minutes" of the plea hearing also reflect that Pamela requested the court to appoint counsel for her; that the court determined that the allegations in the CHIPS petitions were proven because "mother doesn't contest; father has defaulted"; and that the court set the matter for a dispositional hearing. Thereafter, the court appointed an attorney to represent Pamela at the dispositional hearing at county expense. On November 29, 1995, the court found Pamela's three minor children to be in need of protection or services, and ordered them placed in a foster home.

The CHIPS out-of-home placement was continued on November 25, 1996, with "no objection" from Pamela or her counsel, both of whom were present at the extension hearing. On July 29, 1997, the La Crosse County Department of Human Services petitioned the court to terminate Pamela's parental rights to her three minor children, alleging that she is an unfit parent and citing the children's continuing need of protection or services as grounds for the TPR. *See* § 48.415(2), STATS., quoted in n.2, above. The allegations of the petition were tried to a jury.

On the morning of the first day of the fact-finding hearing, Pamela raised a due process objection to the TPR proceedings grounded on the denial of her alleged right to counsel at the initial plea hearing in the prior CHIPS proceedings. The court overruled her objection. The jury found for the Department on all contested issues. Following a dispositional hearing on November 29, 1997, the trial court ordered Pamela's parental rights to the three children terminated. She appeals the three termination orders.[3]

ANALYSIS

At the time of the October 31, 1995 plea hearing in the CHIPS proceedings which preceded the TPR petition, § 48.23(3), STATS., as amended by 1995 Wis. Act 27, provided that "[t]he court may not appoint counsel for any party other than the child in a proceeding under s. 48.13 [CHIPS]." The supreme court subsequently ruled this provision unconstitutional in ***Joni B. v. State***, 202 Wis.2d 1, 549 N.W.2d 411 (1996), because it violated Wisconsin's separation of powers doctrine and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. ***Id.*** at 6-7, 549 N.W.2d at 413.

In reaching its conclusions on the challenge to the statute, the supreme court noted that "parents do not have a constitutionally protected right to counsel in all child protective hearings." ***Id.*** at 12, 549 N.W.2d at 415; *see also* ***Lassiter v. Department of Soc. Serv.***, 452 U.S. 18 (1981). The court concluded, however, that "fundamental fairness requires that a circuit judge be given the discretion to make the determination of what due process requires on a case-by-

[3] The orders also terminate the parental rights of the children's father, but the father has not appealed the termination orders.

case basis." ***Joni B.,*** 202 Wis.2d at 18, 549 N.W.2d at 417. Specifically, the court instructed circuit courts to "only appoint counsel after concluding that either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment." ***Id.*** at 18, 549 N.W.2d at 417-18. Finally, the court suggested that when a circuit court either grants or denies a request for counsel, "it should memorialize its findings and rationale on the record to facilitate appellate review." ***Id.*** at 18, 549 N.W.2d at 418.

The only items in the appellate record from the CHIPS cases which preceded the TPR petition are the dispositional orders that were entered on November 29, 1995, the extension orders from November 1996, and the "courtroom minutes" of the CHIPS proceedings. The record contains no transcript of the October 31, 1995 plea hearing at which Pamela claims she was unconstitutionally denied her right to appointed counsel.

We are thus unable to review whether due process required that Pamela be appointed counsel at the initial CHIPS plea hearing. It appears from the clerk's minutes that Pamela requested counsel, but those minutes also state that Pamela informed the court that she did not wish to contest the factual allegations of the petition. We do not know what specific findings and conclusions the court may have made at the plea hearing with respect to the need or advisability of having counsel appointed to represent Pamela that day. We do know that the court accepted Pamela's decision not to contest the factual allegations, and that thereafter, the court appointed counsel to represent her at the dispositional hearing.

It is the appellant's responsibility to insure that the record contains all items necessary to his or her appeal. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). We do not consider assertions of fact outside the record.

See ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981). Without a transcript, we must assume that the trial court made appropriate findings and conclusions, and that its action in appointing counsel for Pamela for the dispositional hearing but not the plea hearing was supported by the facts and considerations before it. *See* ***Oxmans' Erwin Meat Co. v. Blacketer,*** 86 Wis.2d 683, 689, 273 N.W.2d 285, 287-88 (1979). Accordingly, we reject Pamela's constitutional attack on the termination orders grounded on the court's failure to appoint counsel for her at the initial CHIPS plea hearing.[4]

Moreover, we note that Pamela was represented by counsel at all proceedings in the CHIPS cases subsequent to the plea hearing. The minutes of those subsequent proceedings do not indicate that her counsel challenged the CHIPS court's jurisdiction, or that he raised any other claims of error stemming from Pamela's lack of representation at the October 31, 1995 plea hearing. Thus, even if the present record were sufficient to establish that a constitutional error occurred at the initial plea hearing, we might well conclude, as the Department

[4] Pamela also claims that she was improperly denied counsel at a temporary physical custody hearing which preceded the CHIPS petition. The minutes of that proceeding reflect that she requested legal counsel, but that the court proceeded with the custody hearing and extended the emergency placement of the children in foster care until the time of the plea hearing on October 31, 1995. Again, however, there is no transcript of the October 23, 1995 temporary physical custody hearing in the record. Even if there were, however, we would not find a constitutional defect in the termination proceedings stemming from a denial of counsel at the temporary physical custody hearing.

The temporary physical custody order entered under § 48.21, STATS., unlike the subsequent CHIPS dispositional order, did not provide a ground for filing the TPR petition. Furthermore, there is clear statutory authority for a court to proceed with temporary custody hearings, given the applicable statutory time constraints, even if parents are unrepresented. *See* § 48.21(3)(e), ("If the parent … or the child is not represented by counsel at the hearing and the child is continued in custody as a result of the hearing, the parent … or child may request through counsel subsequently appointed or retained or through a guardian ad litem that the order to hold the child in custody be reheard.").

asks us to do, that by failing to raise the alleged error during the eighteen months her children were in out-of-home placements prior to the TPR petition, Pamela has forfeited her opportunity to do so now.

We turn now to Pamela's second claim, that being that the term "substantial progress" in § 48.415(2)(c), STATS., is unconstitutionally vague. The Department urges us to decline review of this claim because Pamela has raised it for the first time on appeal. We agree with Pamela, however, that a constitutional challenge alleging that a statute is unconstitutional on its face "is an issue of subject matter jurisdiction which cannot be waived." ***State ex rel. Skinkis v. Treffert***, 90 Wis.2d 528, 538-39, 280 N.W.2d 316, 321 (Ct. App. 1979). Furthermore, we note that both parties have had the opportunity to brief the issue and have done so, and that there are no factual issues that need resolution. *See* ***L.K. v. B.B.,*** 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983).

Pamela cites no evidence in the record, nor does she assert in her brief, that she was misled by the statutory wording into believing that any specific actions she may have taken during the period when her children were placed outside of her home qualified as "substantial progress" in meeting the conditions for return of her children. Thus, Pamela's challenge to the statute rests solely on her general attack alleging vagueness in the meaning of the word "substantial." Although we agree with Pamela that we should consider her challenge to the statute on which the termination of her parental rights was grounded, we conclude that she has not met her burden to establish that the statute is unconstitutional "beyond a reasonable doubt." *See* ***Richland Sch. Dist. v. DILHR,*** 174 Wis.2d 878, 905, 498 N.W.2d 826, 836 (1993).

In reviewing a previous vagueness challenge to grounds for the termination of parental rights, we stated that an unconstitutionally vague statute carries three dangers: "the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right." ***R.D.K. v. Sheboygan County Soc. Servs. Dep't,*** 105 Wis.2d 91, 99-100, 312 N.W.2d 840, 845 (Ct. App. 1981). We conclude that § 48.415(2)(c), STATS., exhibits none of these flaws.

The statute provides that once a child has been placed outside the parental home under a CHIPS order, the inquiry relevant to a TPR is whether "the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home." Section 48.415(2)(c), STATS. Since there is no statutory definition for the term "substantial progress," we must presume the legislature intended the words to comport with their common meaning, which may be established by consulting dictionary definitions. ***State v. Ehlenfeldt***, 94 Wis.2d 347, 356, 288 N.W.2d 786, 790 (1980). As Pamela herself argues in her brief, "substantial" can mean "real," "important," or "considerable in amount."

We conclude that the use of the term "substantial," under any of the meanings Pamela cites, adequately conveys to Pamela and other parents that progress in meeting the conditions set forth in a CHIPS dispositional order must be significant, and certainly more than minimal or superficial, in order to avoid a potential TPR. Thus, we conclude that the statute gives a parent "fair warning" of

the conduct he or she needs to exhibit in order to avoid a potential termination of parental rights.[5]

While it is true that the contours of the word "substantial" cannot be stated with "mathematical precision," this does not mean that the statute impermissibly delegates discretion to the trial court or to a jury. *See* ***Ehlenfeldt***, 94 Wis.2d at 355, 288 N.W.2d at 789. Pamela is critical of WIS J I—CHILDREN 323 (formerly 322), because it does not precisely define "substantial progress," but simply enumerates certain factors for the jury to consider.[6] She did not, however, challenge the giving of this instruction at the instructions conference, and we thus cannot consider any challenge to the instruction on this appeal. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). We conclude, moreover, that the term "substantial progress," although it "clearly leaves some

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[5] In this regard, we note that § 48.415(2)(a), STATS., makes specific reference to the requirement under § 48.356(2), STATS., that a CHIPS dispositional order which places children outside the parental home must notify parents of "any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child to be returned to the home." *See* §§ 48.356(1) and (2). The CHIPS court must also "orally inform" a parent who appears in court of these matters. Section 48.356(1). Both the original CHIPS dispositional order from November 1995 and the extension order in 1996 indicate that these requirements were met here.

[6] WIS J I—CHILDREN 323 provides, in relevant part, as follows:

> In determining whether (parent) failed to demonstrate substantial progress towards meeting the conditions for return, or whether there is a substantial likelihood that (parent) will not meet the conditions for return within the twelve-month period following the conclusion of this hearing, you may consider the following: the length of time (child) has been in placement outside the home; the number of times (child) has been removed from the home; the parent's performance in meeting the conditions for return of the child; the parent's cooperation with the social service agency; parental conduct during periods in which (child) had contact with (parent); and all other evidence presented during this hearing which assists you in making these determinations.

discretion," sufficiently focuses the attention of a court or jury on specific performance criteria because of its context within a determination of whether concrete, enumerated conditions set forth in a court order have been addressed. The term does not therefore represent an impermissible delegation of discretion. *See* ***R.D.K.,*** 105 Wis.2d at 100, 312 N.W.2d at 845.

Finally, we do not understand Pamela to claim that the use of the term "substantial progress" somehow inhibits the exercise of her constitutional rights. We are unaware of a constitutional right to make minimal or superficial progress, as opposed to substantial progress, in meeting the conditions for the return of one's children.

In short, Pamela has not met her burden to show that § 48.415(2)(c), STATS., is unconstitutionally vague. While she attacks the meaning of a term used in the statute, she has not convinced us that a misunderstanding of the statute contributed to the termination of her parental rights, or is likely to do so for other parents under similar circumstances. Since "[a] certain amount of vagueness and indefiniteness is inherent in all language," ***Ehlenfeldt,*** 94 Wis.2d at 355, 288 N.W.2d at 789, Pamela has not convinced us that the language chosen by the legislature in this case falls short of the "'fair degree of definiteness'" that is required to sustain it. *See* ***id.,*** (quoted source omitted).

CONCLUSION

The record before us fails to support Pamela's claim that she was unconstitutionally denied counsel at the initial plea hearing in the CHIPS cases which preceded the present TPR proceedings. We also conclude that Pamela has not met her burden to demonstrate that the language of the statute setting forth the

grounds on which her parental rights were terminated is unconstitutionally vague. Accordingly, we affirm the three orders terminating Pamela's parental rights to her children.

By the Court.—Orders affirmed.

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