

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2007

David R. Schanker
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 No. 2007AP324

Cir. Ct. No. 2005TP311

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
PHILLIP E., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PATTI P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS P. DONEGAN, Judge. *Reversed and cause remanded.*

¶1 CURLEY, P.J.¹ Patti P. appeals the order terminating her parental rights to Phillip E. She argues that the order terminating her parental rights should be overturned because she was not afforded the right to counsel as mandated in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

WIS. STAT. § 48.23(2) (2003-04),² and as interpreted in the holding of *State v. Shirley E.*, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623.³ Because Patti P. never knowingly or voluntarily waived her right to counsel, the trial court erred when it permitted her attorney to be excused from the dispositional hearing. Consequently, this court must reverse the order terminating Patti P.'s parental rights to Phillip E. and remand this matter to the trial court.

I. BACKGROUND.

¶2 Patti P. gave birth to Phillip E. on November 23, 2002. At the time of his birth, Patti P. was not married. Because Phillip was born cocaine-positive, he was placed in the care of his grandmother. Eventually, Phillip was the subject of a child in need of protective services (CHIPS) petition because his grandmother was not able to give him adequate care and the environment in which he was living was unsafe. After the trial court found him to be a child in need of protection or services, the order placing the child outside of the parental home was extended once. On July 28, 2005, however, the State filed a termination of parental rights petition seeking to terminate both Patti P.'s parental rights to Phillip, as well as Phillip's father's parental rights.⁴ At the initial plea hearing, Patti P. was present and was advised that she must appear at every future

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ Patti P. also appears to be raising an ineffective assistance of counsel claim for the first time in this appeal. Because the issue of whether she was represented by an attorney during the proceeding is dispositive, this court declines to address the ineffective assistance of counsel claim. Because of our decision in this first issue, it is not necessary for us to address the remaining arguments. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

⁴ The father is not involved in this appeal.

proceeding or run the risk of having a default judgment entered against her. Thereafter, various proceedings were conducted. After her original attorney successfully moved to withdraw, new counsel was provided to her. During part of the time these proceedings were pending, Patti P. was incarcerated. At the final pretrial hearing, Patti P. failed to appear. Mixed reports explaining her absence surfaced. Patti P. alerted her counsel and the court that she needed to appear in traffic court; however, the trial court contacted the court and discovered that no one by that name had ever appeared that day. In fact, the trial court discovered that no traffic cases were heard in that court on that day. The court also learned from Patti P.'s parole agent that there was an outstanding warrant for her arrest. Given the history of the case and the strong possibility that Patti P. had misled the court as to why she was absent, the trial court found her absence "egregious."

¶3 At the hearing, despite Patti P.'s absence, her attorney participated. The trial court found that grounds for a termination of parental rights had been established under WIS. STAT. § 48.415, and proceeded to make a finding that Patti P. was unfit. The trial court then decided to wait until the resolution of Phillip's father's termination of parental rights jury trial before proceeding to a dispositional hearing. After the jury found that grounds existed to terminate the father's parental rights, a dispositional hearing was scheduled and then rescheduled due to a calendaring error.

¶4 At the adjourned date of September 25, 2006, all parties were in attendance except Patti P. and her attorney. However, her attorney appeared by telephone. Her attorney told the court that a letter had been sent to Patti P. advising her of the date and her obligation to attend the hearing if she wanted to pursue the case. Patti P.'s attorney also told the court that he had not heard from her. The assistant district attorney informed the court that there was an

outstanding warrant for Patti P.'s arrest. The trial court then made the following statements to Patti P.'s attorney on the record:

THE COURT: If you feel that you have nothing to present to the Court by way of cross-examination or other appearance, I would relieve you of [your] duty.

[PATTI P.'S ATTORNEY]: I don't have any basis to make any objection, as I put on the record already, I have no instructions of any kind from Ms. P[].

THE COURT: Based on that, I will determine that you are released from any obligation to appear on her behalf today since she has not given you any directions as to her wishes and she is not present in court, so you are free to go.

[PATTI P.'S ATTORNEY]: Thank you.

THE COURT: All right. The mother continues in default, counsel is relieved from any obligation to appear.

The trial court went on to find that termination of the parental rights of both parents was in Phillip's best interest.

¶5 Several weeks later, Patti P. wrote to the Children's Court clerk advising him that she would be appealing the trial court's ruling. This letter commenced the appeal process and an appellate lawyer was provided to Patti P. Appellate counsel spoke with Patti P. only once, and when she failed to make a scheduled appointment with him, her attorney sought to withdraw from the case. This court refused to allow him to withdraw and instead, he was directed to file a no-merit report. *See* WIS. STAT. § 809.32. Appellate counsel did file a no-merit report, but it was rejected because it failed to discuss the issue of Patti P.'s right to counsel at the dispositional hearing. New counsel was provided to Patti P. This appeal follows.

II. ANALYSIS.

¶6 The dispositive issue in this appeal is whether Patti P. was denied her statutory right to counsel in these proceedings. Patti P. asserts that because she never waived her right to counsel and she was unrepresented by counsel at the dispositional hearing, her right to counsel has been violated. The State and the guardian ad litem acknowledge that *Shirley E.* addresses the right to counsel in a termination of parental rights case, but they attempt to distinguish the facts of that case from those here. They also claim that requiring a lawyer to continue to represent an absent party is contrary to the Wisconsin Supreme Court Rules governing professional conduct and is a waste of judicial resources. This court disagrees on both counts.

¶7 This court need not explain the nature of a termination of parental rights proceeding, nor its importance to both the parties as well as to society, as that information has been set forth in both the initial Court of Appeals *Shirley E.* case and the Supreme Court case affirming this court.

¶8 The procedure for the termination of a parent's parental rights is set forth in the Children's Code. With respect to attorney representation, WIS. STAT. § 48.23(2), in relevant part, directs that:

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.

The statute uses language that makes this requirement mandatory. "In statutory construction, the use of the word 'shall' is usually construed as mandatory, while the word 'may' is generally construed as permissive." *State v. McKenzie*, 139

Wis. 2d 171, 176-77, 407 N.W.2d 274 (Ct. App. 1987) (citations omitted). The statute also directs that the only exception to the requirement that a party be represented by an attorney in a termination of parental rights case is if “the court is satisfied such waiver is knowingly and voluntarily made.” Sec. 48.23(2). Because Patti P. appeared in this matter, she was entitled to counsel. She never knowingly and voluntarily waived her right to counsel, as the State concedes.

¶9 The Supreme Court recently interpreted this statutory language. In *Shirley E.*, the court addressed the issue in a slightly different context. There, Shirley E., a parent in a termination of parental rights case, appeared by telephone but failed to appear in person. *Id.*, 298 Wis. 2d 1, ¶12. She was instructed by the trial court to appear in person at the next hearing. *Id.* When she did not appear personally, the trial court found her in default for failing to comply with its order that she attend the hearing. *Id.*, ¶13. Several hearings later, when Shirley E. still had not appeared, Shirley’s E.’s attorney advised the trial court that even though Shirley E. was in default, she wished to continue to participate in the proceedings. *Id.*, ¶16. The trial court stated that she was “relieved of any further duties in this case.” *Id.* Later, despite the trial court’s direction, the attorney appeared at the dispositional hearing in front of another judge and indicated her intention of participating. *Id.*, ¶17. The trial court reiterated that she had no further duties in the case and dismissed her from the courtroom. *Id.*

¶10 On appeal, Shirley E. contended that her statutory right to counsel was violated when her attorney was dismissed from the case. This court reversed and the supreme court granted the petition to review. In its decision, the supreme court stated that the “circuit court has a duty ‘to assure there was representation in court unless there was a knowledgeable and voluntary waiver.’” *Id.*, ¶39 (citation omitted). Further, the court explained:

The legislature intended to be expansive in its according of legal rights to parents. The absence of an explicit and unambiguous requirement in § 48.23 that a parent appear in person to maintain a right to counsel means that a parent's right to counsel is not contingent upon the parent's personal attendance at the proceeding.

Id., ¶43 (footnote omitted).

¶11 In addressing the State's argument that Shirley E. waived her right to an attorney by failing to appear, the supreme court noted that such a finding would be contrary to the statutory wording of WIS. STAT. § 48.23(2), and pronounced that "it is 'the duty of the court to determine by careful questioning that the waiver of counsel[] ... is knowledgeable and voluntary.'" *Shirley E.*, 298 Wis. 2d a, ¶57 (alterations in *Shirley E.*; citation omitted). The supreme court further determined that:

Depriving a parent of the statutory right to counsel in a termination of parental rights proceeding deprives the parent of a basic protection without which, according to our legislature, a termination of a parental rights proceeding cannot reliably serve its function. The fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent. Accordingly, the denial of the statutory right to counsel in the present case constitutes structural error.

We thus hold that it was prejudicial error per se for the circuit court to dismiss Shirley E.'s attorney from the proceedings and to prevent counsel from participating in the termination of parental rights proceeding.

Id., ¶¶63-64.

¶12 While it is true that here Patti P.'s attorney sought to be relieved of his duties at the dispositional hearing, whereas in *Shirley E.* the attorney attempted to remain in the case after a default was entered against her client but was prevented from doing so, the holding in the case is not dependent on how a parent

in a termination of parental rights case came to be unrepresented. What the case holds is that the statute mandates that a parent who once appears in the proceeding is entitled to representation throughout the proceeding and the only way such representation can be waived is by the trial court's questioning the parent to determine whether the waiver of counsel is "knowledgeable and voluntary." *Id.*, ¶57 (internal quotation marks and citation omitted). As noted, no such inquiry occurred here.

¶13 The State also submits that it wastes judicial resources to require a lawyer to continue to represent a party who fails to appear, and it "knows of no statute or case law that would authorize a circuit court to compel an attorney to proceed when a [parent] is completely out of contact with the attorney." WISCONSIN STAT. § 48.23(2) is just such a statute, and *Shirley E.* is the case that requires attorneys to continue their representation as best they can when their client fails to appear or keep in touch. Certainly the representation may not be as effective to an absent parent as when a parent is appearing and cooperating, but short of an intelligent waiver by the parent, the parent is entitled to representation throughout the entire proceedings.

¶14 Finally, both the State and the guardian *ad litem* submit that the trial court's actions in allowing Patti P.'s attorney to be excused from the dispositional hearing was appropriate because the lawyer would not have been able to fulfill his ethical obligations had he participated. The State argues in its brief that:

A lawyer cannot adequately prepare or present a case with the thoroughness and preparation necessary if their client is not available. *See* SCR 20:1.1. A lawyer cannot abide by a client's decisions concerning the objectives of representation, or consult with the client as to the means by which they are to be pursued, if that client is not available. *See* SCR 20:1.2. A lawyer cannot keep a client reasonably informed about the status of the [termination of parental

rights (“TPR”)] or comply with requests for information from the State, if that client is not available. *See* SCR 20:1.4. A lawyer cannot know whether or not there is a basis for contesting the TPR that is not frivolous, if that client is not available. *See* SCR 20:3.1. A lawyer cannot expedite litigation consistent with the interests of the client, when the client’s wish to not participate, evidenced by their non-appearance, is not followed. *See* SCR 20:3.2. By not allowing a defense attorney to withdraw from representation of a non-appearing respondent, the court is in conflict with the Supreme Court Rules governing the profession.

¶15 This court first notes that Patti P.’s attorney did not move to withdraw, he merely asked to be excused from attending the hearing. Further, this court observes that it is presumed that the legislature knew the existing law when creating WIS. STAT. § 48.23(2). The legislature is presumed to know the meaning of the words it selects, and we presume that the legislature chooses its terms carefully and with precision to express its meaning. *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996). We further “presume that the legislature acts with full knowledge of existing case law when it enacts a statute.” *State v. Grady*, 2006 WI App 188, ¶9, 296 Wis. 2d 295, 722 N.W.2d 760, *review granted*, 2007 WI 16, 298 Wis. 2d 94, 727 N.W.2d 34. So, too, this court will presume that in deciding *Shirley E.* the supreme court was well aware of its rules governing lawyers when it determined that lawyers must continue with their representation in a termination of parental rights case even if their client has given them little guidance and is absent. This court also observes that the presence of an attorney representing an absent party plays an important role in seeing that all the protections written into the legislation terminating a parent’s rights are adhered to.

¶16 For the reasons stated, this court must reverse the order terminating Patti P.’s parental rights and remand to the trial court. Just as the delay of the

proceedings caused by the appeal and the remand put the life of Torrance on hold, it is regrettable that because of this decision, Phillip's future will not yet be finalized. Nevertheless, as the supreme court opined: "At stake here are fundamental rights. Termination proceedings deprive parents of a significant liberty interest in their children." *Id.*, 298 Wis. 2d 1, ¶59 (footnote omitted). This court directs the trial court to expedite this matter upon its return.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4 (2005-06).

