

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2004

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 No. 03-1799

Cir. Ct. No. 01JV000037

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF RYAN R.W., A PERSON
UNDER THE AGE OF 18:**

MICHAEL F.W.,

PETITIONER-RESPONDENT,

v.

BETTY A.W.,

RESPONDENT-APPELLANT,

RYAN R.W.,

RESPONDENT-CO-APPELLANT.

APPEAL from orders of the circuit court for Walworth County:
 JOHN R. RACE and MICHAEL S. GIBBS, Judges.¹ *Reversed.*

¶1 SNYDER, J.² Ryan R.W., born November 4, 1988, and his mother, Betty A.W., appeal from circuit court orders subjecting Ryan to the prosecution and determination of a petition alleging that he is a juvenile in need of protection or services (JIPS) under WIS. STAT. § 938.13. Ryan and Betty contend, *inter alia*,³ that the JIPS order was obtained as the result of an unauthorized private prosecution of the JIPS petition by Ryan's father, Michael F.W., and that the JIPS order is null and void. We agree.⁴

BACKGROUND

¶2 A complete review of the procedural background concerning the filing and prosecution of the WIS. STAT. § 938.13(4) JIPS petition is necessary.

¹ Judge John R. Race entered an order authorizing the filing of a WIS. STAT. § 938.13(4) petition and then recused himself as required by WIS. STAT. § 938.10. The case was transferred to Judge Michael S. Gibbs, who entered the final JIPS order and disposition.

² 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.

³ Ryan also contends that the petition alleged facts insufficient to support his being a juvenile in need of protection or services under WIS. STAT. § 938.13(4) and that the WIS. STAT. ch. 938 court should have deferred the matter to the family court which had issued a divorce judgment covering the issues presented by the JIPS petition. Betty contends that the evidence presented at the factual hearing was insufficient to support Ryan being a juvenile in need of protection or services, including that Ryan was uncontrollable, that the trial court erred in its disposition of the JIPS matter, and that it erred in excluding certain testimony at the factual hearing.

⁴ Because we determine that the JIPS petition is null and void for the reasons stated in this opinion, we need not address the other issues raised on appeal. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

On February 16, 2001, Michael filed a JIPS petition under § 938.13(4) alleging that Ryan was uncontrollable.⁵ The petition presented the following grounds:

The parents have recently divorced, with joint legal custody of Ryan. Primary placement is with [Ryan's] mother, Betty A.[W.]. His father, Michael F.[W.], has alternate periods of placement under the terms of the divorce decree. Since June of 1999, Michael F.[W.] has not seen Ryan despite innumerable attempts to do so because Ryan refuses to participate in placement. The divorce decree recites procedures for cooperation between the parents to enforce Michael F.[W.'s] placement. A copy of an excerpt of the Marital Settlement Agreement is attached. Despite cooperation between the parents and a lengthy series of sessions with mental health counselors, Ryan articulates no justifiable reason to not see his father. Despite all efforts of both parents to enforce Michael F.[W.'s] placement, Ryan remains uncontrollable [sic], uncooperative and refuses to see his father.

¶3 On March 5, 2001, the juvenile court commissioner conducted a JIPS initial appearance. The Walworth county corporation counsel appeared and told the juvenile court commissioner that juvenile court intake "saw fit not to make a [court] referral" of the JIPS petition, and that the corporation counsel would not file the JIPS petition. During the hearing, Betty's counsel told the juvenile court commissioner that the petition alleging that Ryan would not cooperate with his father was akin to subjecting a child to JIPS jurisdiction because he did not want to take piano lessons or brush his teeth. Michael's

⁵ WISCONSIN STAT. § 938.13 reads in relevant part:

The court has exclusive original jurisdiction over a juvenile alleged to be in need of protection or services which can be ordered by the court, and:

(4) Whose parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to control the juvenile.

counsel responded, “With all due respect, [Ryan] is harming somebody. He is harming my client.” The juvenile court commissioner held the JIPS proceeding open to allow Michael to request that the filing of the JIPS petition be authorized by the circuit court under WIS. STAT. § 938.25(3).

¶4 WISCONSIN STAT. § 938.25(3) reads in relevant part:

(3) If the district attorney, corporation counsel or other appropriate official under s. 938.09 refuses to file a petition, any person may request the judge to order that the petition be filed and a hearing shall be held on the request.... The matter may not be heard by the judge who orders the filing of a petition.

¶5 On May 24, 2001, a hearing occurred before Judge John R. Race concerning Michael’s request that the JIPS petition be filed. On June 25, 2001, Judge Race issued written findings that the Walworth County Department of Human Services and the corporation counsel “have declined to proceed in prosecution of an action under Chapter 938 Wisconsin Statutes,” that the “failure of the Walworth County Corporation Counsel to file this action is not fatal to the proceeding,” and “that the parent has the independent right to file and prosecute a petition under [§§] 938.13(4) and 938.25 Wisconsin Statutes.” Judge Race then entered the following order:

1. The petition of Michael F.[W.] dated and filed February 16, 2001, and alleging that the minor, Ryan [W.], is uncontrollable pursuant to Wisconsin Statute Section 938.13(4), is hereby ordered to be filed in the Circuit Court for Walworth County.

2. The petitioner, with private counsel and at his expense, is authorized to proceed to prosecute the petition of February 16, 2001.

3. The Corporation Counsel of Walworth County is relieved of any obligation to prosecute the petition of Michael F.[W.] as filed.

4. This Court, pursuant to statutes, [recuses] itself from further participation in this action, and directs that assignment to a new Judge be commenced.

5. The petition of Michael F.[W.] having been previously filed with this Court on February 16, 2001, shall for all statutory notice, service and prosecution purposes, be deemed filed effective upon entry of this order.

¶6 The JIPS petition was transferred to Judge Michael S. Gibbs. After a six-day trial, Judge Gibbs granted the JIPS petition, finding Ryan uncontrollable and entering a WIS. STAT. ch. 938 disposition.

ISSUE

¶7 In its June 25, 2001 decision, the court found that “[Michael F.W.] has the independent right to file *and prosecute* a petition under [WIS. STAT. §§] 938.13(4) and 938.25 Wisconsin Statutes.” (Emphasis added.) We conclude that the controlling appellate issue is who can “prosecute” a § 938.13(4) JIPS petition.

¶8 Ryan and Betty contend that under WIS. STAT. § 938.09(5) only the corporation counsel can prosecute. Michael argues that § 938.09(5) is ambiguous when read in context with WIS. STAT. § 938.25(3), which allows a private person to request that a WIS. STAT. § 938.13(4) JIPS petition be filed when the corporation counsel refused to file the petition. It follows, according to Michael, that when the corporation counsel refuses to file a JIPS petition, a private prosecution of the petition is lawful, warranted and necessary.

STANDARD OF REVIEW

¶9 Whether a private party has a right to participate in a criminal prosecution involves a question of statutory interpretation that we review without

deference to the circuit court. *Jessica J. L. v. State*, 223 Wis. 2d 622, 628, 589 N.W.2d 660 (Ct. App. 1998). The purpose of statutory interpretation is to discern the intent of the legislature. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997).

¶10 If the statutory language is clear and unambiguous, and sets forth the legislative intent, we apply that to the case at hand and do not look beyond the language to ascertain the meaning. *Id.* A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons. *Id.* If a statute is ambiguous, we look to the scope, history, context, subject matter, and object of the statute in order to ascertain legislative intent. *Id.* Whether a statute is ambiguous is a question of law. *Awve v. Physicians Ins. Co. of Wisconsin, Inc.*, 181 Wis. 2d 815, 822, 512 N.W.2d 216 (Ct. App. 1994).

ANALYSIS

¶11 Ryan and Betty contend that WIS. STAT. § 938.09(5) requires that only a district attorney or corporation counsel prosecute WIS. STAT. § 938.13(4) JIPS petitions. Ryan cites to WIS. STAT. § 978.05 as relevant to a § 938.13 prosecution analysis. We agree and begin our analysis with that provision. Section 978.05 establishes the duties of the Wisconsin district attorney, and reads in relevant part:

978.05 Duties of the district attorney. The district attorney shall:

....

(6) CIVIL ACTIONS OR SPECIAL PROCEEDINGS.
 (a) Institute, commence or appear in all civil actions or special proceedings under and perform the duties set forth for the district attorney under ss. ... 938.09 ... perform any duties in connection with court proceedings in a court assigned to exercise jurisdiction under chs. ... 938 as the

judge may request and perform all appropriate duties and appear if the district attorney is designated in specific statutes[.]

¶12 In essence, WIS. STAT. § 978.05(6) requires that the district attorney “shall ... appear ... and perform the duties set forth for the district attorney under ss. ... 938.09” WISCONSIN STAT. § 938.09 specifically addresses the duties of the district attorney in WIS. STAT. § 938.13 proceedings as follows:

The interests of the public shall be represented in proceedings under this chapter as follows:

....

(5) By the district attorney or, if designated by the county board of supervisors, by the corporation counsel, in any matter arising under s. 938.13.⁶

¶13 The district attorney’s duty to prosecute WIS. STAT. § 938.13 matters pursuant to WIS. STAT. § 978.05(6) has not been previously addressed. However, because the subsec. (6) duty is statutorily co-equal to the district attorney’s subsec. (1) duty to prosecute criminal actions, we will look to subsec. (1) precedent for guidance. Section 978.05(1) reads as follows:

The district attorney shall:

(1) CRIMINAL ACTIONS. Except as otherwise provided by law, prosecute all criminal actions before any court within his or her prosecutorial unit.

¶14 The question of whether a private party can prosecute criminal actions in lieu of the statutory district attorney duty has been previously addressed. In *Biemel v. State*, 71 Wis. 444, 37 N.W. 244 (1888), our supreme court addressed

⁶ The designation and authority of the corporation counsel by the Walworth county board of supervisors to represent the interests of the public in lieu of the district attorney in WIS. STAT. § 938.13 matters is not contested by Michael.

whether “private persons may employ counsel, whether from good or bad motives, and send them into our courts to prosecute persons accused of ... crimes, and whether the courts may allow such paid attorneys to prosecute the accused against his consent.” *Id.* at 446. The *Biemel* court responded:

We think public policy, and the fair, just, and impartial administration of the criminal law of the state, make it the duty of the courts to exclude the paid attorneys of private persons from appearing as prosecutors. That public policy is against permitting them to prosecute, is, we think, clearly indicated by the several provisions of our laws upon the subject of criminal prosecutions.

Id. Further, the *Biemel* court stated:

We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases. The laws have clearly provided that the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial.

Id. at 450.

[T]he duty of the prosecuting attorney [is] to proceed with all fairness in presenting the cause of the state ... and in prosecuting the whole case

Id. at 451.

¶15 The *Biemel* rationale is reflected in *Jessica J. L.*, 223 Wis. 2d at 630, a more recent holding, where we interpreted WIS. STAT. § 978.05(1) to

authorize only a district attorney, or a special prosecutor appointed under WIS. STAT. § 978.045,⁷ to prosecute a criminal violation on behalf of the State in circuit court. In addition, we held that neither a guardian ad litem nor private counsel for a victim in a criminal action can participate in the criminal prosecution of the defendant. *Jessica J. L.*, 233 Wis. 2d at 630. According to our supreme court, the reason for this is that “[i]t is against public policy and the impartial administration of criminal law for a court to allow attorneys for private persons to appear as prosecutors.” *State v. Scherr*, 9 Wis. 2d 418, 426, 101 N.W.2d 77 (1960).

¶16 We are mindful that *Biemel* specifically addresses criminal prosecutions, and that it does so through a court decision issued over a century ago. However, we are satisfied that the *Biemel* rationale is as relevant to prosecutions today as it was then, and that the rationale applies equally to all of the district attorney prosecution duties established under WIS. STAT. § 978.05. Accordingly, we equate the § 978.05(1) criminal prosecution duty of the district attorney to the subsec. (6) juvenile court duty to prosecute WIS. STAT. § 938.13 petitions. Having done so, we now turn to prosecution responsibility under WIS. STAT. § 938.09.

¶17 WISCONSIN STAT. § 938.09(5) requires that the district attorney represent the public “in any matter arising under s. 938.13,” unless the county board transfers such duty from the district attorney to the corporation counsel. In effect, the district attorney’s WIS. STAT. § 978.05(6) duty to prosecute WIS. STAT. § 938.13(4) petitions may be delegated to the corporation counsel, under § 938.09,

⁷ A special prosecutor is an attorney appointed to perform “for the trial of the accused person, the duties of the district attorney.” See WIS. STAT. § 978.045(1r).

in the same manner as the district attorney's § 978.05(1) duty to prosecute criminal matters may be delegated to special prosecutors pursuant to WIS. STAT. § 978.045. We conclude, extending the teachings of *Biemel* and *Jessica J.L.*, that the duty to prosecute § 938.13(4) petitions is unambiguously restricted to the district attorney, unless delegated to the corporation counsel under § 938.09(5), and that the private prosecution of a JIPS petition results in a null and void procedure. We now turn to the basis upon which Michael disagrees with this conclusion.

¶18 Michael argues that because WIS. STAT. § 938.25(3) authorizes any person to request the filing of a WIS. STAT. § 938.13(4) petition when the local corporation counsel refuses, the juvenile court logically has the authority to release the corporation counsel from WIS. STAT. § 938.09 responsibility and to authorize a private party to prosecute the JIPS petition. We cannot agree.

¶19 The juvenile court has exclusive original subject matter jurisdiction to consider and determine JIPS petitions. *See* WIS. STAT. § 938.13. Further, the court had authority to order the filing of the JIPS petition in response to Michael's WIS. STAT. § 938.25(3) request. However, the legislature may enact statutes that limit a court's power to exercise subject matter jurisdiction and that measure a court's competency rather than its jurisdiction. *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 336-37, 555 N.W.2d 640 (Ct. App. 1996). Thus, a court may have subject matter jurisdiction and yet not be competent to entertain a particular matter. *Id.* Failure to comply with such statutory mandates may result in a loss of competency to proceed in a particular case. *State v. Bollig*, 222 Wis. 2d 558, 565, 587 N.W.2d 908 (Ct. App. 1998). A court's competency to act is a question of law which we review de novo. *Id.* at 563. Whether a defect in statutory compliance is central to

the statutory scheme for prosecution of a § 938.13(4) petition is also a question of law that we review independently. *Bollig*, 222 Wis. 2d at 563.

¶20 WISCONSIN STAT. § 938.25(3) addresses only a private person's ability to "request the judge to order that the petition be filed." Section 938.25(3), unlike WIS. STAT. § 938.09, is silent as to the duty or authority to prosecute a WIS. STAT. ch. 938 action. We are not persuaded that § 938.25(3) can be read to authorize the juvenile court to ignore the unambiguous language of § 938.09(5) that designates to the district attorney, or to the delegated corporation counsel, the duty to prosecute the JIPS petition.

¶21 In sum, we are satisfied that WIS. STAT. §§ 978.05(6) and 938.09(5) unambiguously address the authority to prosecute WIS. STAT. § 938.13 petitions. Only the Walworth county district attorney, or the county corporation counsel if properly delegated, can prosecute a JIPS petition filed under WIS. STAT. § 938.25(3). Because the juvenile court released the corporation counsel from the duty of prosecution and transferred that duty to Michael, a private party directly interested in the result of the prosecution ("With all due respect, [Ryan] is harming somebody. He is harming my client."), we hold that the juvenile court erred in granting Michael the authority to prosecute. Because the error resulted in an unauthorized prosecution, the juvenile court suffered a loss of competency to exercise its continued jurisdiction over the § 938.13(4) JIPS petition.

REMEDY

¶22 Ryan and Betty demand that the JIPS petition be vacated and dismissed. Here, the juvenile court had jurisdiction to consider and to determine the WIS. STAT. § 938.13(4) JIPS petition initially filed by Michael. The original

petition was dated February 16, 2001, and ordered filed by the juvenile court on June 25, 2001. Ryan was twelve and is now fifteen years of age.

¶23 The juvenile court's determination of whether a juvenile is in need of protection or services that can be ordered by the court should be made based upon the facts as they existed at the time the petition was filed. *See State v. Gregory L.S.*, 253 Wis. 2d 563, 579, 643 N.W.2d 890 (Ct. App. 2002). If Ryan is a juvenile in need of protection or services at this time, and such protection or services can be provided by the WIS. STAT. ch. 938 court, a new JIPS petition should be filed based upon current facts and circumstances. We are satisfied that a remand of this matter for further proceedings relating back to the 2001 allegations is not necessary or warranted. We therefore vacate the existing JIPS orders and dismiss the JIPS petition.

By the Court.—Orders reversed.

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

