

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 22, 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. 95-3582
95-3583

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

95-3582

IN THE INTEREST OF KETURAH P.,
A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY,

Petitioner-Respondent,

v.

MARK P.,

Respondent-Appellant,

KATHY P.,

Respondent.

95-3583

IN THE INTEREST OF KIA P.,
A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY,

Petitioner-Respondent,

v.

MARK P.,

Respondent-Appellant,

KATHY P.,

Respondent.

APPEALS from orders of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

DYKMAN, J. These are single-judge appeals decided pursuant to § 752.31(2)(e), STATS.¹ Mark P. appeals from orders terminating his parental rights to his minor daughters, Keturah and Kia. The decision to terminate was made after a trial court found that grounds existed for termination based upon child abuse under § 48.415(5)(a), STATS.² Mark raises the following issues on appeal: (1) whether sexually abusing several children on one occasion

¹ These appeals have been expedited. RULE 809.107(6)(e), STATS. We consolidated these appeals by order dated January 5, 1996.

² Section 48.415(5)(a), STATS., provides:

Child abuse may be established by a showing that the parent has exhibited a pattern of abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and a showing of either of the following:

- (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

constitutes a pattern of abusive behavior; and (2) whether his due process rights were violated when the petitions to terminate his parental rights were based upon the same evidence supporting the original petitions which alleged that the children were in need of protection and services (CHIPS). We conclude that: (1) several different acts of sexual abuse directed against four children constitutes a pattern of abusive behavior; and (2) Mark's due process rights were not violated because a county may terminate parental rights at any time when the evidence supports a finding that grounds exist for termination based upon child abuse. Accordingly, we affirm.

BACKGROUND

In April 1992, La Crosse County filed two CHIPS petitions alleging that Keturah and Kia had been sexually abused by their father, Mark P. In July 1992, Mark was convicted of one count of sexual assault of a child, contrary to § 948.02(2), STATS., and one count of sexual assault, contrary to § 940.225(3), STATS., after he pleaded guilty to sexually abusing his two step-sons who were living with Keturah and Kia. That same month, the trial court ordered the girls placed into protective custody. The court extended these orders in July 1993 and again in July 1994.

In July 1995, La Crosse County filed two petitions for the termination of Mark's parental rights to Keturah and Kia. The petitions alleged that the girls were in continuing need of protection or services and that Mark had sexually abused them. The petitions also stated that Mark had admitted to abusing his two step-sons and Keturah and Kia.

Much of the testimony at the fact-finding hearing centered on whether Mark sexually abused the children and when and how often this occurred. Mary Bilskemper, a supervisor at La Crosse County Human Services who conducted a sexual abuse investigation, testified that Keturah and her two half-brothers alleged that Mark abused all four children.

Michael Weissenberger, an investigator for the La Crosse County Sheriff's Department, testified that Mark admitted that he sexually abused his

two step-sons. In particular, Weissenberger testified that Mark admitted that he touched the boys' penises and that he made them touch his penis and put their mouths on or near his penis. Mark's step-sons also indicated to Weissenberger that Mark had sexual contact with Keturah.

Gene Kolaczkowski, a clinical therapist at Lutheran Hospital, testified that during play therapy, Kia indicated that Mark had sexual contact with her. He also testified that Mark's step-sons indicated through play therapy that Mark sexually abused Kia. Kolaczkowski concluded from his observations of the children that Kia was sexually abused by Mark. He also testified that one step-son indicated that Mark sexually abused the girls on different days than the boys.

Mark stipulated that he sexually touched Keturah and his two step-sons and he acknowledged that he pleaded guilty to sexually assaulting the two boys. But he claimed that he abused the three children on one day during a fifteen to twenty minute period. He denied that he ever sexually abused Kia and suggested that she could have been sexually abused by another person living in the home.

Based upon this evidence, the trial court found that there was overwhelming clear and convincing evidence that Mark abused all four children and that Mark exhibited a pattern of abusive behavior with respect to all four children. The court rejected Mark's argument that if the events to which he admitted happened on "one occasion" that it was not a pattern of abuse. It reasoned that had Mark committed one act to one child on one day, that would not be a pattern of abusive behavior. But, in this case, the court found that Mark had abused four children, denied the abuse, minimized it, and blamed the children's mother for his actions. The court concluded that such behavior constituted a pattern of abusive behavior and that grounds for termination of his parental rights existed.

At a dispositional hearing, the trial court concluded that because it found grounds for termination based upon child abuse, it found that Mark was an unfit parent. It also found that termination was in the girls' best interests and ordered that Mark's parental rights be terminated. In so doing, the court

commented that Mark's relationship with the children was not a safe one because even if the court accepted Mark's assertion that he abused the children on one day only,³ that was enough for it to find that he was a danger to the children and to sever his relationship with them. Mark appeals.

PATTERN OF ABUSE

To determine whether Mark's actions constitute a pattern of abusive behavior, we must construe § 48.415(5), STATS., and apply it to facts. Construction of a statute and its application to a particular set of facts are questions of law which we decide independently, without deference to the trial court's determination. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989). Our primary purpose when interpreting a statute is to give effect to the legislature's intent. *Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc.*, 195 Wis.2d 821, 827, 536 N.W.2d 722, 724 (Ct. App. 1995). We first look at the language of the statute and if that language is clear and unambiguous, we construe the language in accordance with its ordinary meaning. *Id.* at 828, 536 N.W.2d at 724.

Mark argues that the evidence demonstrates that he sexually abused the children on one occasion and that one occasion cannot constitute a pattern of abusive behavior for the purpose of determining whether grounds exist for terminating his parental rights under § 48.415(5), STATS. That statute provides that child abuse may be established by a showing that the parent has exhibited a pattern of abusive behavior which is a substantial threat to the health of the child who is the subject of the petition. He argues that the plain meaning of the word "pattern" requires that the abusive behavior occurs on more than one occasion and that it involves more than one act.

We agree with Mark that a pattern of abusive behavior would not permit termination if the abusive behavior is one isolated incident directed at one child. The plain meaning of the word "pattern" refers to an action which occurs more than once. Thus, to satisfy the "pattern" requirement of this statute, there must be at least two acts of abusive behavior. But, notwithstanding

³ The trial court stated that it believed that the abuse occurred on more than one day.

Mark's assertions to the contrary, the abuse in this case involved more than one act. As the trial court noted and Mark admitted, he abused three different children on one day at least. For the purpose of § 48.415(5), STATS., we conclude that such behavior, *i.e.*, three acts of abuse directed at three children, constitutes a pattern of abusive behavior. That the abusive acts might have occurred on the same day and even within the same hour does not condense them into one act. Moreover, the court heard evidence, which it found credible, that Mark abused the boys on a day different from when he abused the girls. Such behavior demonstrates a pattern of abusive behavior and therefore, satisfies the requirements of § 48.415(5).

DUE PROCESS

Mark also argues that his due process rights were violated because the facts supporting the petitions for terminating his parental rights were the same as those which supported the CHIPS petitions. He contends that because the County could have decided to terminate as early as 1992 but instead decided to initiate CHIPS proceedings, the County may not now petition to terminate his parental rights without additional facts to support the termination petitions. He asserts that to permit the County to file termination petitions with no new allegations other than those which were alleged in the original CHIPS petitions is fundamentally unfair. Mark argues that he has a right to go through a CHIPS procedure and that the procedural history of this case nullifies his CHIPS proceedings. We disagree.

When the County obtained protective orders for the girls finding them in need of protection and services in 1992, 1993 and 1994, it had enough evidence then to proceed on termination petitions based upon child abuse. That the County chose to wait before it commenced termination proceedings is within its discretion and is not fundamentally unfair. While ch. 48, STATS., establishes procedures with which the County must comply before it places a child under supervision, it does not prevent the County from commencing termination proceedings when the evidence is sufficient to do so. *Cf. State v. Annala*, 168 Wis.2d 453, 472, 484 N.W.2d 138, 146 (1992) (prosecutor afforded great discretion whether to initiate prosecution in a particular case). While the County is bound by a dispositional order, the existence of one does not preclude the commencement of a termination proceeding. Whatever reasons the County

may have had for not initially proceeding with termination are irrelevant when the evidence supports a statutory ground upon which termination may proceed. Accordingly, we affirm.

By the Court. – Orders affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.