

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 10, 1997

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.

**No. 97-0132**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN THE INTEREST OF KELLY M.H.,  
A PERSON UNDER THE AGE OF 18,**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**KELLY M.H.**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Pierce County:  
ROBERT W. WING, Judge. *Affirmed.*

LaROCQUE, J. Kelly M.H., age sixteen (d/o/b 9-17-81), appeals a CHIPS (child in need of protection and services) order placing her in foster care. She argues that the trial court improperly admitted evidence of her mother's

alleged neglect that post-dated the filing of the CHIPS petition. This court affirms the order.

## **BACKGROUND**

About a week before the scheduled fact-finding jury trial, Kelly filed a motion to exclude any evidence that after the CHIPS petition was filed, Kelly's mother, Gena, had moved to Kentucky to live with Leo G., Gena's boyfriend and the source of much of the neglect allegations against Gena. Kelly claimed that the evidence was either irrelevant or, if relevant, outweighed by unfair prejudicial effect.

The lengthy probable cause statement in the State's CHIPS petition included among its allegations a statement that Kelly and her two minor sisters were improperly supervised and living out of the home for days at a time. The probable cause statement consisted in large measure of the investigating county social worker, Amy Johnson's report, attached to the petition and apparently written in April 1996. At trial, Kelly and her mother denied the accuracy of many statements attributed to them in the report.

According to Johnson, Kelly and her two minor sisters advised Johnson as follows: Leo and Gena began dating about a month and a half before the investigation, and soon began living together with Gena and her three minor daughters. Some of the children expressed a fear of Leo, described his excessive drinking, and his obscene and demeaning remarks addressed to them. Kelly told Johnson that Leo and Gena "get very drunk on the weekends, and that's when she likes to stay at her friend's house." Kelly described an incident where Leo "punched her in the head" and another where he dragged her across the living room and threw her down, leaving fingerprint bruises on her arm. On at least one

or two occasions, he physically assaulted Kelly or her mother. On one occasion, Leo required Kelly to ride with him in his truck even though he was “very intoxicated,” and that “he’s always driving drunk.” Kelly observed “knots on their mom’s head as a result of Leo’s beating.” According to Johnson's report, Kelly said that she and her sister were in trouble for talking with the social worker. Johnson also described an attempt to interview Gena at the parties' trailer home, which resulted in a confrontation with Leo and Gena, each of whom used obscene and vulgar language, some of it directed at Johnson personally. The report strongly implied that Gena did not appreciate the connection between the child neglect and Leo’s chronic misconduct toward the children.

Based upon these allegations and many others, Kelly was alleged to be a child in need of protection and services pursuant to § 48.13(10), STATS., that is, “[w]hose parent ... neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter as to seriously endanger the physical health of the child.”

The circuit court denied Kelly's motion to exclude post-petition evidence that Gena had moved to Kentucky to live with Leo and his relatives.

## DISCUSSION

One of Kelly’s arguments is that certain provisions of the children’s code contemplate the exclusion of post-petition misconduct in a CHIPS case. Interpretation of a statute is a question of law and is reviewed on appeal without deference to the trial court. *Grosskopf Oil, Inc. v. Winter*, 156 Wis.2d 575, 581, 457 N.W.2d 514, 517 (Ct. App. 1990). The questions whether particular evidence is relevant and, if it is, whether it should be admitted, are addressed to the trial court’s discretion. *State v. City of La Crosse*, 120 Wis.2d 263, 268, 354 N.W.2d

738, 740 (Ct. App. 1984). This court concludes that the children's code does not ban post-petition evidence and that the trial court did not erroneously exercise its discretion by admitting post-petition evidence under the circumstances presented in this case.

Kelly first refers to § 48.255(1)(e), STATS., entitled "Petition; form and content." This statute requires a CHIPS petition to include "credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and to provide reasonable notice of the conduct or circumstances to be considered by the court ...."

The requirements of § 48.255(1)(e), STATS., serve two purposes: they give the court sufficient information to demonstrate CHIPS jurisdiction and they provide fair notice to the parties of the State's proposed trial evidence. Addressing the latter purpose first, fair notice, the inclusion of post-petition evidence may, but need not, create a problem. Where the parties named in the petition have inadequate knowledge of the nature of the accusations of neglect, it would violate the letter and the spirit of the children's code. In the present circumstances, however, it is apparent that there was no surprise or lack of notice. Defense counsel acknowledged at the pretrial motion hearing that the very purpose of the hearing was to exclude the post-petition conduct relating to Gena's move out of state. This court concludes that the notice function of the statute is not violated by the use of post-petition evidence so long as adequate and reasonable notice is given in advance of trial.

The second statutory purpose for the probable cause statement in the petition is merely to demonstrate that the allegations are sufficient to invoke the court's jurisdiction. This statutory purpose is not impeded by the later

introduction at the fact-finding hearing of evidence of post-petition conduct so long as the evidence is consistent with the question the jury is asked to answer relating to neglect. In other words, if the jury is asked to determine whether the neglect exists at the time of trial, the evidence of post-petition evidence may be relevant to that determination.

Kelly also relies upon the provisions of § 48.31(1), STATS., which defines a fact-finding hearing as “a hearing to determine if the allegations of a petition ... are proved by clear and convincing evidence.” This statutory language merely indicates the nature of the hearing as a fact-finding inquiry and establishes the appropriate middle burden of proof . The statute is not a rule of evidence and does not direct the court to ban post-petition evidence.

In furtherance of her argument, however, Kelly notes that the pattern jury instructions, WIS J I—CHILDREN 180, advises the jury that it should consider the evidence in relation to a particular date, either the date the petition was filed or the date the children were removed. The instruction itself informs the jury:

In answering the question in the special verdict, you must consider the facts and circumstances as they existed on \_\_\_\_\_, which was [the date on which the petition was filed] [the date on which the child was removed from the home by the Department of Social Services]. Your answer must reflect your findings as of that date.

This instruction, if given, could support Kelly’s contention that only conduct up to the date of the petition or removal from the home, which for all practical purposes in this case is one and the same date, is relevant. As the comment by the instructions committee demonstrates, however, whether to limit the inquiry to the

date of the petition or removal is not subject to a universal rule in all CHIPS proceedings. The comment to WIS J I CHILDREN 180 recognizes that:

This instruction is intended for use only when the jury requires some guidance on the question of the appropriate date as to which a verdict question is to be answered. As an alternative to giving this instruction, the applicable date may simply be included in the verdict question.

The issue of the date or time period upon which the jury must focus is most likely to arise with respect to the many jurisdictional grounds which are worded in the present tense. For example, Wis. Stat. § 48.13(8) provides for CHIPS jurisdiction over a child “who is receiving inadequate care during the period of time a parent is incarcerated.” Department intervention will often have resulted in the provision of adequate care at the time of the hearing, perhaps even by the time the petition is filed, but it hardly seems logical that this should defeat jurisdiction. The issue is somewhat less clear when the parent or other family members remedy the problems between the filing of the petition and the date of the hearing. ... As another example, Wis. Stat. § 48.13(4) provides for CHIPS jurisdiction where a parent signs the petition and states that he or she “is unable to care for the child.” If the inability clearly existed at the time of the filing but has completely disappeared by the time of the hearing, should there be jurisdiction?

There is no statutory or case law guidance on this question of timing, and when the issue does arise, it must be resolved by the court in the context of the particular jurisdictional ground at issue. As a general rule, it is the Committee’s opinion that the intent and purpose of the Children’s Code are best served by addressing the jurisdictional issue as of the date of removal of the child or the filing of the petition. In particular, the best interests of the child are not served by permitting the child to waffle in and out of the jurisdictional status. Changes or improvements subsequent to court intervention can and should be considered by the court in determining the appropriate dispositional order.

The comment demonstrates the problem that can arise if the evidence given the jury includes post-petition/post-removal conduct. The decision

to admit or deny such evidence is best left to the sound discretion of the trial court. The comment describes the real possibility that where post-petition evidence is admitted, it may lead to a fact-finding decision that no CHIPS jurisdiction exists at time of trial. Thus, a neglectful parent who has corrected the problem, but perhaps only temporarily, will remain outside the services available through the court. On the other hand, many neglect situations involve a course of continuing conduct and not an isolated event that cannot be reduced to an artificial frame of reference ending with the filing of a petition.

In the present situation, the potential for evidence that would cause the jury to find that neglect had been remedied was not an issue. Rather, the State sought to prove that the primary source of neglect was unbroken up to the time of trial. Of course, because the State opened the door to Gena's post-petition behavior, she was entitled to, and was given, the opportunity to discredit or explain her post-petition conduct. The fact that she may or may not have failed to convince of her contention is not the point. In ruling on the motion to exclude the evidence, the trial court plainly advised Kelly's counsel that she could introduce relevant exculpatory evidence and that is just what she did.

A word of caution is called for. In a given case, the open door to post-petition conduct may, as the comment to the jury instruction demonstrates, provide an unwise result unfair to the children and the public. Here, however, the thrust of the trial was the truth or falsity of Gena's conduct in relation to Leo's treatment of the children. This court concludes that neither the statutes previously described nor the jury instruction and comment imposes a rigid bar to the admission of post-petition evidence where it is deemed relevant by the court.

Next, Kelly argues that even if the post-petition evidence was relevant, the trial court failed to weigh the evidence as required by § 904.03, STATS. This court disagrees for several reasons.

First, the trial court implicitly weighed the relevance versus the unfair prejudice when it denied the motion. The court characterized the neglect alleged as Gena's inability or unwillingness to acknowledge the detrimental effect of Leo's presence. Neglect may be the parental refusal to provide for the physical health of the child. Whether Gena's ongoing relationship with Leo was such a "refusal" rendered the scope and nature of her relationship relevant.

Contrary to Kelly's argument, the introduction of this continuous relationship was not "other wrongs" evidence limited by § 904.04(2), STATS. As noted earlier, a claim of child neglect is often an inquiry into a continuing course of conduct not easily regimented into a precise and tidy segment of time. It may arise and subside for a time. It may constitute a single dramatic event or a long-standing compelling act or omission. The very fact that Gena's association with Leo was not a temporary aberration gave the allegation of neglect context and meaning.

Kelly's argument suggests that Gena's move to Kentucky is different in both time and nature; it occurred after the children were no longer in the family home, and the jury could wrongly consider this separate act of parental disregard a demonstration of impermissible "bad character" evidence. Kelly's argument demonstrates that, in CHIPS cases, the line between "character evidence" and direct evidence of neglect is not always a bright one. While Gena's decision to live with Leo after removal of the children is different in time and circumstance from her decision to allow Leo to live in her home with her children, that is only one of the factors for the trial court to consider in ruling on admissibility. The evidence is admissible not because it infers that Gena acted in conformity with her prior misconduct, it is admissible because her behavior was a seamless, continuous refusal to recognize Leo's harmful influence. The children's absence is only a competing factor that is offset by the requirement that the State prove Gena's refusal to act to protect her daughter was deliberate.



Apart from the issue whether the evidence was character evidence is whether the relevance of Gena's continuing relationship with Leo was outweighed by unfair prejudice. This court has examined the trial transcript. That record demonstrates that the trial focused not upon Gena's move, but upon the truth or falsity of the social worker's report of pretrial statements from Kelly and Gena. The questions dealt at great length upon Leo's behavior toward Gena and the children and upon Gena's behavior while the children were in the home.

Further, the court expressly allowed Gena unrestricted leeway to explain why she moved to Kentucky. She told the jury that Leo's family had advised her of employment opportunities in Kentucky, that she needed the funds to hire an attorney to defend her in the CHIPS case, and that she was denied any meaningful or intimate contact with the children while they were in foster care.

Kelly's unequivocal denial of many of the damning statements about Leo and Gena attributed to her by the social worker who investigated the matter relegated Gena's move to Kentucky to an insignificant role. In conclusion, the evidence demonstrates that the trial court's implicit weighing of relevance and any unfair prejudice of the post-petition evidence negates any claim of error.

*By the Court.*—Order affirmed.

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

