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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0417**

In the Matter of the Civil Commitment of:
Derek Edward Leach.

**Filed August 12, 2008
Reversed
Willis, Judge**

Clay County District Court
File No. 14-PR-07-3020

Gregory J. Joseph, 200 South Fifth Street, Suite 106, Moorhead, MN 56560 (for appellant Derek Edward Leach)

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Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges the district court's decision to commit him as a developmentally disabled person. Because we conclude that the evidence was insufficient to support the district court's conclusion that the statutory grounds for civil commitment have been met, we reverse.

FACTS

Appellant Derek Edward Leach has been the subject of criminal-sexual-conduct charges on two separate occasions, once in 1996 and again in 2007. The 1996 charges resulted from allegations by a nine-year-old boy that Leach had sexually molested him. When a rule 20 evaluation showed that Leach was incompetent to stand trial, the district court suspended the criminal proceedings. Although it is not altogether clear from the record, it appears that a civil-commitment action was commenced, which led to Leach being classified as “mentally retarded,”¹ and that he was placed for treatment at the Fergus Falls Regional Treatment Center for a period of time and then released to his parents’ home.

The 2007 criminal-sexual-conduct charges were based on an incident that allegedly occurred sometime between January 1, 2000, and December 31, 2002. The charges were filed after a 14-year-old boy told a school counselor in the summer of 2007 that Leach had sexually molested the boy when he was seven or eight years old. The district court ordered a rule 20 evaluation, which showed that Leach was “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” Accordingly, the district court suspended the criminal proceedings, and an action to civilly commit Leach as a developmentally disabled person was instituted. The district court appointed John C. Pucel, Ph.D., a licensed psychologist,

¹ The Minnesota Commitment and Treatment Act, Minn. Stat. §§ 253B.001 - .23 (2006), formerly used the term “mentally retarded.” *See* Minn. Stat. § 253B.02, subd. 14 (2004). As a result of a legislative amendment in 2005, that term has been replaced by “developmentally disabled.” *See* 2005 Minn. Laws ch. 56, § 1, at 337-38.

to assess Leach and submit a written report regarding Leach's condition and give an opinion regarding whether there was a "need" for commitment.

At the conclusion of the civil-commitment hearing on December 20, 2007, the district court found that Leach meets the statutory criteria for civil commitment as a "developmentally disabled person." The district court ordered that Leach be committed for an initial period of six months² and that a review hearing be held at the end of that period. Leach appeals.

DECISION

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Enberg v. Bonde*, 331 N.W.2d 731, 736 (Minn. 1983) (quotation omitted). Therefore, a state cannot constitutionally confine "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 576, 95 S. Ct. 2486, 2494 (1975).

² The district court originally ordered an initial-commitment period of one year. When Leach filed this appeal, he claimed that the order violated Minn. Stat. § 253B.09, subd. 5 (2006), which provides that the initial commitment "shall not exceed six months." On March 10, 2008, the district court sua sponte issued an amended order, reducing the duration of the initial commitment to six months. In April, however, this court ruled that the district court lacked jurisdiction to issue the March 10 order because of the pendency of this appeal. But because it is undisputed that a one-year initial commitment violates the statute and, in light of the district court's willingness to amend the initial-commitment period, this court dismissed as moot the part of this appeal regarding the duration of the initial commitment and remanded that issue to the district court for reconsideration. On April 26, the district court issued a second order reducing the duration of the initial commitment to six months.

When reviewing a decision to civilly commit a person, this court determines whether the district court complied with the Minnesota Commitment and Treatment Act (MCTA) and whether the commitment is justified by findings based on evidence presented at the commitment hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). The record is viewed in the light most favorable to the district court's decision, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the district court to judge the credibility of witnesses. *Id.* But whether the evidence is sufficient to support the district court's conclusion that the statutory grounds for civil commitment have been met is a question of law reviewed de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997); *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

Leach argues that the evidence fails to support the district court's conclusion that the statutory grounds for his civil commitment as a developmentally disabled person have been satisfied. To warrant such a commitment, a district court must find by clear and convincing evidence that a person is "developmentally disabled" for purposes of the MCTA, which defines a developmentally disabled person as one

- (a) who has been diagnosed as having significantly subaverage intellectual functioning existing concurrently with demonstrated deficits in adaptive behavior and who manifests these conditions prior to the person's 22nd birthday; and
- (b) whose recent conduct is a result of a developmental disability and poses a substantial likelihood of physical harm to self or others in that there has been (i) a recent attempt or threat to physically harm self or others, or

(ii) a failure and inability to obtain necessary food, clothing, shelter, safety, or medical care.

Minn. Stat. §§ 253B.02, subd. 14, .09, subd. 1 (2006).

It is undisputed that Leach has been “diagnosed with sub-average intellectual functioning with deficits in behavior prior to his 22nd birthday.” And because there was no evidence that Leach has failed or is unable to obtain necessary food, clothing, shelter, safety, or medical care, the parties agree that the issue is whether there was sufficient evidence showing that Leach’s “recent conduct” poses a “substantial likelihood of physical harm” to himself or others, in that there has been “a recent attempt or threat to physically harm” himself or others. *See* Minn. Stat. § 253B.02, subd. 14. Leach claims that the evidence is insufficient because the alleged conduct that his commitment is based on—the allegations of sexual molestation sometime between 2000 and 2002—occurred five to seven years ago and thus is not a “recent attempt or threat” to physically harm others. This raises a question of statutory interpretation, which we review *de novo*. *See Hince v. O’Keefe*, 632 N.W.2d 577, 582 (Minn. 2001).

The object of all statutory interpretation is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (2006). This court must give the terms of a statute their plain and ordinary meaning and take into account the structure of the statute and the context of the disputed language. *See In re Robledo*, 611 N.W.2d 67, 69 (Minn. App. 2000). When the language of a statute is ambiguous, the intent of the legislature controls. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Ambiguity exists only when the language of the statute is susceptible of more than one reasonable interpretation.

Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000). “[A]ny ambiguities in the laws dealing with the deprivation of a person’s liberty in the civil commitment context ought to be construed against the state and in favor of the person who is being deprived of his or her liberty.” *In re Colbert*, 464 N.W.2d 505, 507 (Minn. 1991).

Resolution of the issue here depends on the proper construction of the word “recent” in section 253B.02, subdivision 14. Because the MCTA does not define “recent,” we look to its plain and ordinary meaning. *See* Minn. Stat. § 645.08(1) (2006); *see also In re Kottke*, 433 N.W.2d 881, 884 (Minn. 1988) (relying on common understanding to construe the term “serious physical harm” when the legislature provided no definition of that term in the MCTA). *The American Heritage Dictionary* defines “recent” as “[o]f, belonging to, or occurring at a time immediately before the present.” *The American Heritage Dictionary* 1508 (3d ed. 1992). “Recent” is also defined as “1. Lately done or made; that has lately happened or taken place 3.a. Belonging to a (past) period of time comparatively near to the present. . . . 4.a. Of a point or period of time: Not much earlier than the present; not long past.” XIII *The Oxford English Dictionary* 319 (2d ed. 1989). We conclude that these definitions show that the term “recent” in section 253B.02, subdivision 14, is ambiguous—that is, it is reasonably susceptible of more than one interpretation. As the state conceded during oral argument, the term has different meanings depending on the context in which it is used. And such ambiguities in the MCTA are to be construed in favor of the person who is being civilly committed. *Colbert*, 464 N.W.2d at 507.

To resolve an ambiguity in statutory language, we may consider the legislative history of the statute, including records of legislative hearings and changes in statutory language. *Thorson v. Billy Graham Evangelistic Ass’n*, 687 N.W.2d 652, 656 (Minn. App. 2004) (citing Minn. Stat. § 645.16(7)), *review denied* (Minn. Dec. 22, 2004). Before adoption of the MCTA, the statutes that governed civil commitments did not include a requirement of recent conduct in the definition of a developmentally disabled person. *See* Minn. Stat. §§ 253A.02, subd. 5, .07, subd. 17 (1980); *see also* Eric S. Janus & Richard M. Wolfson, *The Minnesota Commitment Act of 1982: Summary and Analysis*, 6 Hamline L. Rev. 41, 49 (1983) (“[T]he old definition included only attempts to do *serious* harm, and was not limited to *recent* attempts.”). Although the change in statutory language shows that the legislature clearly intended to impose a recency requirement for civil commitments of developmentally disabled persons, nothing in the available legislative history sheds light on what the legislature meant by “recent.”

We note that one legal commentator has suggested that in considering whether conduct is recent for purposes of the MCTA, “one should refer to the purpose of the recency requirement.” Eric S. Janus, *Civil Commitment in Minnesota* 31 (2d ed. 1991).

Professor Janus explains:

The reason for requiring proof of [recent conduct] is to ground the prediction of future harm. Thus, the recency of [the conduct] should be judged by evaluating its value in predicting future harm. This may be an issue on which expert opinion is decisive. In general . . . the more remote the last incident of harmful [conduct], the less predictive of future harm it will be. This follows from the fact that there has been an intervening harm-free period during which the past [conduct] has not been predictive of harm.

Id. We believe that this is a well-reasoned approach.

Here, there was expert testimony regarding whether Leach's conduct was sufficiently recent for the purpose of predicting future harm. The only testimony at the civil-commitment hearing was that of Dr. Pucel, who testified that there was no "recent conduct" by Leach suggesting that he poses a substantial likelihood of harm to himself or others. Although Dr. Pucel recognized that the allegations of sexual molestation in 2000 and 2002, if true, "clearly constitute harm to others," Dr. Pucel ultimately opined that the alleged conduct was not a "recent attempt or threat" showing that Leach currently poses a substantial likelihood of harm to himself or others. He concluded, therefore, that the evidence failed to establish that Leach meets the statutory definition of a developmentally disabled person because "there was no available evidence of [Leach] engaging in similar sexual acts or acts of physical aggression toward[] others in recent years" and "[h]e has been able to maintain adequate personal functioning, with support, during these subsequent years."

Despite Dr. Pucel's testimony, the district court concluded that "[t]here is clear and convincing evidence" that Leach meets the definition of a developmentally disabled person. The district court explained that in "interpreting the word recent," it must consider "the specific developmentally disabled condition of [Leach]" and "the specific serious wrongful acts that [he] had allegedly . . . engaged in in the past." The district court noted that Leach's condition, "which underlies his conduct and creates the serious risk of harm to others . . . is a condition that is largely static in nature and . . . [has] not

been subject to any significant change.” The district court concluded, therefore, that “the legislature intended the word recent for individuals who have mental disabilities of the type that [Leach] has, namely, static mental disabilities . . . to be expansive in nature.” But the district court’s focus on Leach’s condition ignores the mandate of the statute, which expressly requires that a showing of a substantial likelihood of harm be based on a person’s conduct, not his condition.³ *See* Minn. Stat. § 253B.02, subd. 14(b).

In light of Dr. Pucel’s testimony, we agree with Leach that the evidence fails to show that he exhibited “recent conduct . . . [that] poses a substantial likelihood of physical harm to self or others in that there has been . . . a recent attempt or threat to physically harm self or others.” Minn. Stat. § 253B.02, subd. 14(b). The district court erred, therefore, by concluding that the evidence was sufficient to satisfy the statutory grounds for Leach’s civil commitment as a developmentally disabled person. Because we reverse for that reason, we need not address Leach’s argument that the district court failed to adequately address less-restrictive alternatives to civil commitment.

Reversed.

³ The legislature took into account the fact that a developmentally disabled person’s condition “is not usually susceptible of great or rapid improvement” by providing that continuing commitments, which occur after the initial commitment, are indeterminate rather than determinate. *See In re Harhut*, 385 N.W.2d 305, 311 (Minn. 1986).