

**COURT OF APPEALS
DECISION
DATED AND FILED**

APRIL 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3634

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF TY L.,
A PERSON UNDER THE AGE OF 18:**

WAUKESHA COUNTY,

PETITIONER-RESPONDENT,

v.

TY L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

ANDERSON, J. Ty L. asserts he was denied due process when the juvenile court held that his appearance at his § 48.13, STATS., extension hearing could be accomplished by telephone rather than by his physical presence. We affirm because we conclude that Ty's right to meaningfully participate in the hearing did not require his physical presence in the juvenile court.

Ty is a juvenile with diagnoses of mental retardation and cerebral palsy who was subject to a child in need of protection or services (CHIPS) dispositional order dated June 24, 1996, placing him in an out-of-home placement at the Oconomowoc Developmental Training Center (ODTC). Waukesha County filed a timely petition to extend the dispositional order that was scheduled for a hearing in the afternoon on June 27, 1997. On the morning of the hearing, the juvenile court received a facsimile from Ty's treating psychiatrist at ODTC strongly recommending that Ty not be present at the hearing "because of the serious danger it places him at regarding safety of self and others."

Upon receipt of the recommendation, the juvenile court conducted a status conference with the assistant corporation counsel and the guardian ad litem (GAL) present in chambers, and adversary counsel for Ty appearing by telephone. Adversary counsel relayed his client's desire for a hearing and the opportunity to tell the juvenile court that he wanted to return home. The GAL confirmed that Ty had expressed the same sentiments to him. However, the GAL told the court that he did not believe it was in Ty's best interest that he be physically present at the hearing. The assistant corporation counsel suggested that either the hearing be conducted at ODTC or that Ty appear by telephone.

The juvenile court decided against having Ty transported to the hearing by the Waukesha County Sheriff's Department because his explosive behavior would require restraints and this would not be in his best interest. Based on the psychiatrist's report, the court expressed concerns about how Ty might react to the court's decision if he were physically present at the hearing. The court stated that it had two alternatives, either conduct the hearing at ODTC or have Ty appear by telephone. Adversary counsel for Ty objected to an appearance by telephone, stating, "I don't know—honestly I don't know how much he'll get out

of actually being in court except I think he has a right to be there and I think the right to hear testimony” The court settled on having Ty appear by telephone.

At the beginning of the scheduled hearing, the juvenile court was advised that arrangements had been made to have Ty appear by telephone. The GAL waived Ty’s appearance at the hearing. Adversary counsel stated that he would not waive Ty’s appearance under § 48.365(3), STATS., and he argued that the GAL could not waive Ty’s appearance over the objection of adversary counsel.¹

Adversary counsel also argued that he believed that Ty had a right to be in the hearing room to observe and listen to the testimony and to consult with counsel. Equally important to counsel was his need to ask Ty questions during the course of the hearing. Although counsel conceded that the court could have Ty listen to the proceedings by telephone, he asserted that it would be totally inappropriate to require him to consult with Ty by telephone and that he reserved the right to consult with Ty in person.

The juvenile court found that § 48.365(3), STATS., permitted either the GAL or adversary counsel to waive Ty’s physical presence at the extension hearing. The court made a series of findings, including that under the circumstances, transport by the sheriff’s department would be inappropriate; that a hearing at ODTC would not be possible because of time constraints; that Ty was functioning at the level of a four- or five-year-old child; that Ty’s presence would be of no direct benefit to the proceedings; and, that the proceedings could cause an increase in Ty’s aggressive behavior at ODTC. Based upon these findings, the

¹ Section 48.365(3), STATS., provides: “The appearance of any child may be waived by consent of the child, counsel or guardian ad litem.”

court held that Ty's appearance at the hearing would be by telephone and adversary counsel would have the opportunity to consult by telephone.

On appeal, Ty contends that he was denied the due process right to meaningfully participate in the extension hearing. First, he attacks the GAL's waiver of his appearance at the extension hearing. He argues that when a child has both a GAL and adversary counsel, the GAL cannot unilaterally waive the child's rights. He concludes that the juvenile court erred in accepting the GAL's waiver of his presence at the hearing. Ty's second contention is that the assistant corporation counsel and adversary counsel were in agreement that the hearing be conducted at ODTA and the court erred in not conducting the hearing on site.

The juvenile court's conclusion that Ty could meaningfully participate in the extension hearing by telephone is a constitutional fact. "We review constitutional facts independently as conclusions of law." *Rhonda R.D. v. Franklin R.D.*, 191 Wis.2d 680, 700, 530 N.W.2d 34, 42 (Ct. App. 1995). We do not set aside the historical facts found by the trial court, however, unless they are clearly erroneous. *See* § 805.17(2), STATS.

We begin by agreeing with Ty that the GAL did not have the authority to waive his physical presence at the hearing. In a case where the GAL waived contest of a petition for the termination of parental rights over the expressed desire of a parent with adversary counsel to contest the petition, we held that the GAL must accede to adversary counsel when there is a conflict.

Furthermore, the involvement of a GAL in these situations does not diminish the adversary counsel's duty to provide his client with zealous, competent and independent representation. Under certain circumstances, parents and children involved with juvenile proceedings have the right to counsel. Said counsel is bound by the most recent amendment to the Wisconsin Supreme Court Rules of Professional Conduct. Counsel must preserve the client's

confidences and secrets, exercise independent professional judgment on behalf of the client, and provide the client with competent representation.... Adversary counsel should have been, and must be, allowed to zealously advocate the expressed wishes of a CHIPS parent. We hold that the purpose of the Children's Code would be defeated if adversary counsel were required to defer to a GAL's plan for waiving the fact-finding hearing stage of a CHIPS proceeding.

E.H. v. Milwaukee County, 151 Wis.2d 725, 737-38, 445 N.W.2d 729, 734 (Ct. App. 1989) (footnotes omitted).

Our agreement with Ty is not a reason to reverse the order of the juvenile court. The juvenile court did not use the GAL's waiver of Ty's appearance to proceed without Ty. Rather, the court accepted the GAL's waiver as a waiver of Ty's physical presence in the juvenile court and made arrangements for Ty to participate in the hearing by telephone. Ty challenges this solution, describing it as an "unacceptable alternative."

The conduct of the trial is largely within the discretion of the judge. *See Brons v. Bischoff*, 89 Wis.2d 80, 90, 277 N.W.2d 854, 858 (1979); § 906.11(1), STATS. The goal of the judge is to achieve the basic objective of our trial system—the ascertainment of the truth—based on those factors, legal and factual, best calculated to effect a decision which comports with reality. *See State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 576, 150 N.W.2d 387, 397 (1967). To achieve this goal in deciding how each phase of a trial should be conducted, the judge must balance the rights of all of the parties along with the principles of judicial administration and judicial efficiency.

To assist the judge, Wisconsin has officially recognized the utility of using technology in the trial process. *See Schmidt v. Schmidt*, 212 Wis.2d 405, 412, 569 N.W.2d 74, 77 (Ct. App. 1997). Trial courts are expected to heavily rely

on these advances to keep cases progressing to resolution. *See id.* In CHIPS cases, the use of technology to obtain testimony is specifically authorized:

At hearing under this section, s. 48.357, 48.363 or 48.365, on the request of any party, unless good cause to the contrary is shown, the court may admit testimony on the record by telephone or live audio-visual means, if available, under s. 807.13 (2). The request and the showing of good cause may be made by telephone.

Section 48.335(4), STATS.

The use of technology has been broadened beyond this statutory authorization. Wisconsin's appellate courts have authorized a party's participation in proceedings by telephone. In *Rhonda R.D.*, we approved of a prisoner's participation by telephone in a contested termination of parental rights case. *See Rhonda R.D.*, 191 Wis.2d at 701-03, 530 N.W.2d at 42-43. We recognized that the physical presence of a participant is not always necessary or required by due process. *See id.*

The principles of *Rhonda R.D.* can be applied to this case. Although it is a basic proposition of due process that a juvenile be given the opportunity to be heard at a meaningful time and in a meaningful manner, meaningful participation does not always require the juvenile's physical presence. *See id.* at 701, 530 N.W.2d at 42. Where the absence of the juvenile would not frustrate the conduct of a fair and just hearing, the juvenile's absence is not an infringement of due process. *See State v. David J.K.*, 190 Wis.2d 726, 736, 528 N.W.2d 434, 438 (Ct. App. 1994).

The use of technology, as a tool to conduct trials, is at the discretion of the trial judge. This would include whether Ty's physical presence at the hearing was necessary. We are satisfied that the juvenile court engaged in a

Careful reasoning process balancing the pros and cons of Ty's physical presence. The record supports the court's sound discretionary decision that Ty could meaningfully participate by telephone.

Ty carries diagnoses of mental retardation and cerebral palsy. He cognitively functions at about a four- to five-year-old level. His language comprehension skills are at the five- to seven-year-old range. Ty functions best in a structured environment and requires positive feedback, praise and reinforcement. He requires frequent repetition and auditory and visual cues.

On the morning of the hearing from ODTC, the report the juvenile court received included comments that when under stress, Ty suffers from an intermittent explosive disorder.

This child sticks to a belief, which may be unreasonable, and believes it unconditionally. If the process does not happen then, he becomes extremely explosive, and in a very unprovoked and instantaneous manner, quicker than the eye can follow, bites peers or staff on the arm or face, etc.

Ty's treating psychiatrist believed that if he were not returned home as a result of the extension hearing, there would likely be an increase in Ty's unprovoked, unpredictable and explosive aggressions requiring ODTC to use restraints to control him. The GAL had also made the juvenile court aware that after the last extension hearing returning Ty to ODTC, he had been a major problem for his mother.

The court also considered adversary counsel's refusal to participate in a hearing where Ty would appear by telephone because such an arrangement would make it inconvenient for him to consult with Ty. Adversary counsel made

it clear that he would not consult with Ty by telephone because of the difficulties he had in when he discussed this case with Ty face-to-face.

We recognize that special problems are created for counsel representing individuals who carry Ty's multiple diagnoses; however, these problems cannot be allowed to trump the trial judge's control of the proceedings. Adversary counsel could have gone to ODTG and, along with Ty, participated in the hearing by telephone. Such an arrangement would have given Ty and his counsel instant access to each other and permitted meaningful participation in the hearing while reducing the risk of an explosive outburst from Ty.

We conclude that the juvenile court appropriately balanced its obligation to conduct a fair and just hearing, Ty's due process right to meaningfully participate in the extension hearing, adversary counsel's need to consult with Ty, and the principles of judicial efficiency and judicial administration. The court's decision to have Ty participate by telephone was the sound exercise of judicial discretion.

By the Court.—Order affirmed.

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

