COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2834 **Cir. Ct. No. 2003TP671**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EDWARD T., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EDWARD T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Edward T. appeals from an order terminating his parental rights to his son, also named Edward T. At issue is whether the circuit court lost competency to proceed when it held the fact-finding hearing beyond the forty-five-day limit of WIS. STAT. § 48.422(2) (2003-04). We conclude that the delay in conducting the fact-finding hearing was excused by good cause. Therefore, we affirm. Because we decide this case based on good cause, we do not consider whether the delay could also be affirmed based on the guardian ad litem's consent to the delay.[2]

BACKGROUND

¶2 On September 24, 2003, the State filed a petition to terminate the parental rights of Edward T. and Georgette H., parents of Edward, and the parental rights of Andre B. and Georgette H., parents of Elijah T.[3] Numerous court hearings were held over the following months, during which time the two fathers contested the petition. A default judgment was entered against Georgette on April 27, 2004, because she failed to appear.

¶3 On October 12, 2004, the parties appeared before the circuit court. This particular hearing was conducted by the Hon. David Borowski, who was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The Wisconsin Supreme Court has yet to decide this issue. In ***State v. Robert K.***, 2005 WI 152, ___ Wis. 2d ___, 706 N.W.2d 257, the court decided a similar case based on a good cause analysis and declined to address "whether a guardian ad litem's acquiescence in the circuit court's setting the fact-finding hearing beyond the 45-day period fulfills the consent requirement of Wis. Stat. § 48.315(1)(b)." ***Robert K.***, 706 N.W.2d 257, ¶58.

[3] Although the rights of Georgette H. and Andre B. are referenced for purposes of providing background, their rights are not at issue in this appeal and will not be addressed.

filling in for the Hon. Carl Ashley. Georgette moved to vacate the default judgment and the motion was granted. The case was then scheduled for a fact-finding hearing before a jury on January 24, 2005. Because the issue in this case centers on what occurred at that hearing, the hearing will be discussed in greater detail later in this opinion.

¶4 Ultimately, the fact-finding hearing was again rescheduled for reasons not relevant to this appeal. The jury found grounds to terminate Edward's parental rights. The circuit court subsequently found that termination was in the child's best interest. This appeal followed.

DISCUSSION

¶5 At issue is whether the circuit court lost competency to proceed when it scheduled the fact-finding hearing for a date more than forty-five days after the continued hearing on the petition. *See* WIS. STAT. § 48.422(2).[4] A hearing may be held outside the forty-five-day limit if a continuance is granted.[5] *See* WIS. STAT. § 48.315(2), which provides:

> A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or

[4] WISCONSIN STAT. § 48.422(2) provides:

> If the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately.

[5] The Wisconsin Supreme Court recently held that the word "continuance" in WIS. STAT. § 48.315(2) "is sufficiently broad to encompass situations in which the fact-finding hearing is originally scheduled beyond the statutory 45-day time period." ***Robert K.***, 706 N.W.2d 257, ¶28.

> consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

Id.

¶6 Although the Wisconsin Supreme Court has strongly encouraged circuit courts to state on the record reasons for continuing a fact-finding hearing beyond forty-five days, emphasizing that a "circuit court's failure to comply with the statutory time periods may result in loss of competency to proceed[,]" the court has also noted that circuit courts need not engage in an "'incantation of statutory phrases'" to properly invoke WIS. STAT. § 48.315(2). ***State v. Robert K.***, 2005 WI 152, ¶¶33, 57, ___ Wis. 2d ___, 706 N.W.2d 257 (citation omitted). In the absence of an explicit statement of reasons in the record, good cause and the necessity of the length of the delay can be inferred if we find ample support in the record. ***Id.***, ¶¶33, 34.

¶7 The issue of whether the circuit court complied with the time limits and properly granted a continuance under WIS. STAT. § 48.315(2) presents a question of law we review independently. ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752. When evaluating whether good cause existed, we consider four main factors: "(1) good faith of the moving party; (2) prejudice to the opposing party; (3) prompt remedial action by the dilatory party; and (4) the best interest of the child." ***Robert K.***, 706 N.W.2d 257, ¶35.

¶8 On appeal, Edward for the first time challenges the continuance granted on October 12, 2004.[6] At that hearing, the circuit court first considered

[6] Unlike other areas of the law, a competency challenge based on the circuit court's failure to act within the statutory time periods listed within WIS. STAT. ch. 48 cannot be waived, even if an objection is not raised in the circuit court. ***Sheboygan County Dep't of Soc. Servs. v. Matthew S.***, 2005 WI 84, ¶30, 282 Wis. 2d 150, 698 N.W.2d 631. Thus, it is imperative that all (continued)

Georgette's motion to vacate the default judgment. The circuit court granted the motion and then proceeded to discuss scheduling:

> [COURT]: So, for all of those reasons, I'm vacating the default judgment, which was entered by Branch 33, and we will pick a trial date and work back from there in terms of rescheduling the matter.
>
> [CLERK]: Jury trial date, January 24th, of '05, scheduling for five days, working backwards.
>
> [COURT]: We'll put in the docket sheet that [Edward's counsel] is not available most of the second morning, on the 25th.
>
> [CLERK]: January 14th, 9:00 a.m., final pretrial, Branch 33, status court date.
>
> [GUARDIAN AD LITEM]: Do we need a status date?
>
> [STATE]: I [t]hink we know where everybody's going to be.
>
> [COURT]: All right. Anything else from anybody?
>
> [STATE]: No. I'm doing an order to produce for each of the parties for January 14th at 9:00 a.m. Oh, that's a Friday.
>
> [CLERK:] How about January 13th at 9:00?
>
> [COUNSEL FOR GEORGETTE]: That's fine.

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parties in termination of parental rights case be vigilant about making sure that if a fact-finding hearing is being scheduled outside the time limits, the circuit court has the information needed to find good cause to continue the hearing, including the parties' positions on whether the hearing should be continued, and makes the necessary findings on the record. This will avoid challenges to the circuit court's competency raised for the first time on appeal, months after the fact-finding and dispositional hearings, that can lead to reversals that require cases to be refiled months or years after the initial petition, wreaking havoc on the life of the child. *See* ***Robert K.***, 706 N.W.2d 257, ¶56 ("When a circuit court states on the record its basis for finding good cause, the parties and reviewing courts are assured that the circuit court has considered the legislative directive for prompt disposition of [termination of parental rights] cases. With such a record, fewer appeals are likely to ensue based on whether good cause existed under Wis. Stat. § 48.315(2). While we recognize such a procedure might place a slight burden on the circuit court, this burden is outweighed by the substantial benefit to the parties, the public, and the legal system.").

> [GUARDIAN AD LITEM]: Fine.
>
> [COURT]: Perm plan, TPR adoption. The Court is finding reasonable efforts. The Court will sign the permanency plan review hearing order. Thank you.

That concluded the hearing.

¶9 As is clear from the record, the circuit court did not explicitly indicate that it was granting a continuance; however, the fact-finding hearing was scheduled for a date beyond the forty-five-day limit. The circuit court did not mention "good cause" or offer any reasons why, when it was only October, the fact-finding hearing date was set for January. However, it is apparent that the scheduling issue was discussed prior to the colloquy set forth above because the circuit court was already aware of a specific date when Edward's counsel had limited availability.

¶10 Edward acknowledges that even if the matter was not discussed on the record, this court can still affirm if it can infer from the record "ample evidence" to support a finding of good cause. *See* ***id.***, ¶¶33, 34. However, he contends this court cannot find good cause existed because "there is a dearth of evidence upon which to conclude the Court and parties acted in good faith in scheduling the trial outside of the 45 day time limit." In response, the State and guardian ad litem argue there is sufficient evidence to support a finding of good faith. Several reasons are suggested that support the decision to schedule the trial for January 2005.

¶11 The State notes that congestion of a court's calendar is presumed to constitute good cause to toll the time limits in termination of parental rights cases. *See* ***J.R. v. State***, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989). The State contends that such congestion existed here, and points to the fact that the

court's clerk offered January 24, 2005, as the first available trial date. The State argues: "It can be reasonably inferred from the record that congestion of the court's calendar prevented the clerk from offering an earlier date."

¶12 The guardian ad litem adds that it is clear from the transcript that the parties had discussed dates before going on the record, because the circuit court, on its own initiative, made a point of stating that the docket sheet should reflect that Edward's trial counsel would not be available the second morning of trial. The guardian ad litem adds: "The Court clearly knew that everyone was agreeable to the date of January 24, 2005, despite the fact that Edward T.'s counsel would not be available" for the second day of the trial, which meant that the circuit court "would have to excuse the jury on the second day of the trial to accommodate Edward T's counsel['s] other scheduling conflict." In making this argument, the guardian ad litem asks this court to infer that when the parties discussed dates, they must have acknowledged that court congestion required a date outside forty-five days.

¶13 Edward contends that it is improper for this court to infer scheduling conflicts. Edward also notes that the guardian ad litem made no motion to supplement the record with any evidentiary offer about off-the-record discussions. Edward urges this court not to speculate about court congestion. We do not consider it speculation to note that congestion and attorney conflicts are the only plausible reason for the guardian ad litem to concur in the continuance because it is in the best interest of children to have parental rights resolved as quickly as possible.

¶14 The State offers two additional reasons why the continuance was in good faith: the circuit court had just vacated the default judgment against

Georgette, and neither she, Edward nor Andre had been deposed. Thus, discovery was ongoing and would require additional time to complete. In his reply brief, Edward did not address whether these reasons would justify the continuance, nor does he dispute the factual assertion that no depositions had been taken.

¶15 Just like the court in ***Robert K.***, this court

> must now decide whether the facts of record in the present case constitute good cause justifying the setting of the fact-finding hearing beyond the 45-day time period established in Wis. Stat. § 48.422(2) and whether, in accordance with § 48.315(2), the continuance was only for so long as was necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

Id., 706 N.W.2d 257, ¶31 (footnote omitted). We begin by considering the four factors relevant to determining whether good cause exists. At the outset, we note that Edward does not identify which of the four he concedes or contests, except to argue generally that "[i]n the absence of *any* evidence that scheduling conflicts amongst the attorneys or the court prevented setting an earlier date, or of other factors preventing an earlier date, the appellate court cannot presume that the delay in a continuance [sic] was due to court calendar congestion or scheduling conflicts."

¶16 First, we consider whether the moving party showed good faith. While the record reveals no formal motion to set the trial date beyond forty-five days, making it impossible to say which party would be considered the movant,

we are satisfied that there is no evidence that *any* party lacked good faith in suggesting or agreeing to the January trial date.[7]

¶17 Second, we consider whether the opposing party was prejudiced. There is no indication that anyone opposed the date. However, assuming that Edward would, or should, have opposed it, he offers no reasons why he was prejudiced by the delay.

¶18 The third consideration is whether there was prompt remedial action by the dilatory party. Edward does not identify a dilatory party, except to complain that the reasons for the continuance were not stated on the record.

¶19 Finally, we must consider the best interest of the child. Aside from the general policy that weighs in favor of prompt resolution of cases, Edward offers no reasons why the best interest of the child was not served by setting the trial for January. In contrast, the State offers two reasons that we believe justified continuing the case to January: the vacation of the default judgment against Georgette, and the need to schedule her deposition, as well as the depositions of the two fathers involved in the case. A full and fair fact-finding hearing is clearly in a child's best interest. Where, as here, Georgette was being allowed to reenter the case after it had been pending for thirteen months and she had been defaulted for six months, it was in everyone's interest that her counsel have adequate time to prepare in order to ensure a full and fair fact-finding hearing. It was likewise imperative that all parties have the ability to complete reasonable discovery. Here, the depositions of critical witnesses—the parents—were missing. There is no

[7] Faced with a similar lack of evidence of bad faith, the Wisconsin Supreme Court came to the same conclusion for the same reasons in ***Robert K.*** *See* ***id.***, 706 N.W.2d 257, ¶36.

evidence suggesting that any party had been uncooperative in discovery or less than diligent in pursuing it. The continuance allowed the parties reasonable time to properly prepare for trial.

¶20 Weighing the requisite factors, we are convinced that there was good cause justifying the continuance. Even if, as Edward argues, there was insufficient evidence that court congestion required the delay, we conclude the facts that Georgette was brought back into the case six months after she was defaulted and discovery had yet to be completed constitute good cause for a continuance.

¶21 Our review is not at an end, however. If there is good cause for a continuance, this court must still consider whether the continuance was "only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases." WIS. STAT. § 48.315(2). Although there was no on-the-record discussion concerning whether any earlier dates were available (and such discussions would have been very helpful), we conclude that the facts are sufficient to support the inference that this requirement was satisfied.

¶22 The record indicates that all parties and their lawyers agreed to the trial dates. There is also no indication that anyone subsequently objected. There is no indication that either Edward or his son was prejudiced by the delay. We believe the reasoning in ***Robert K.*** applies equally here:

> In the instant case, the complexity and size of Robert K.'s family made it necessary to have multiple lawyers and guardians ad litem present. By scheduling the fact-finding hearing for a date beyond the 45-day time period, the circuit court ensured the appearance of and representation for all parties in this case. The facts of the instant case show that, given the circuit court's six-week trial cycle and the scheduling problems of the many attorneys, the delay was no longer than was necessary.

Id., ¶53. Similar to ***Robert K.***, this case involves multiple parents: one mother and two fathers, all with their own counsel. Trial was estimated to require five days. Depositions had yet to be taken. These facts explain why a trial could not have been immediately scheduled, even if the court had a completely open calendar. Because the circuit court ultimately selected trial dates that included a morning when, the circuit court knew, one attorney was unavailable, the most reasonable inference is that the parties selected the best dates available to the court and acceptable to the parties. This too supports a conclusion that the continuance was for only so long as was necessary. We are satisfied under the unique facts of this case that the continuance was proper under WIS. STAT. § 48.315(2).

¶23 For these reasons, we conclude the circuit court did not lose competency to proceed. Accordingly, we affirm.

By the Court.—Order affirmed.

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