

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3560-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF ASHLEY D., A PERSON UNDER
THE AGE OF 17:**

LAFAYETTE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

RENEE J.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Renee J.M. appeals an order which denied her motion to dismiss proceedings to extend a dispositional order relating to her daughter, Ashley. The original dispositional order, entered September 28, 1999, declared Ashley to be a child in need of protection or services (CHIPS), transferred the child's custody to the Lafayette County Department of Human Services, and placed her with her maternal grandparents. When the department sought to extend the order in September 2000, Renee moved to dismiss on the grounds that a proper request for extension under WIS. STAT. § 48.365 had not been filed with the court prior to the expiration of the dispositional order. The trial court found that "a request was made" for the extension and denied the motion to dismiss. We affirm.

BACKGROUND

¶2 The original CHIPS dispositional order was to expire on September 23, 2000. On September 6, 2000, the court entered an "Order Granting Temporary Extension" which included the following findings:

1. The request has been made to extend the dispositional order.
2. The dispositional order has not expired or been terminated.
3. The court is unable to conduct a hearing on the request prior to the expiration or termination of present order.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The order extended the dispositional order until October 23rd and set a hearing on the “petition for extension” for October 13th. A copy of the original dispositional order was attached to the September 6th Order Granting Temporary Extension. On the same date, a Notice of Hearing was entered in the court file for the October 13th hearing, specifying it was for “Extension of Disp. Order.”

¶3 Renee filed a “Motion to Dismiss” on October 10th, alleging that the department’s request for an extension was “contrary to WIS. STAT. § 48.365(6).” At the October 13th hearing, Renee and her counsel stipulated to an extension of the CHIPS dispositional order until December 13, 2000. The purpose of the extension was to allow the department to pursue a “Petition for Appointment of Relative as Guardian,” which had been filed on October 2nd, requesting that Ashley’s grandparents be appointed her guardian. A hearing on the guardianship petition was set for October 31st, and Renee’s motion to dismiss was “held in abeyance” until that time. The CHIPS extension order entered on October 13th was expressly agreed by the parties to be an “actual” extension, not a temporary one under WIS. STAT. § 48.365(6), and it included a notice of appeal rights and warnings regarding grounds for termination of parental rights.

¶4 Prior to the October 31st hearing, Renee amended her motion to dismiss and moved, in the alternative, for a change of venue to Grant County, where Ashley was residing with her grandparents, and where both Renee and Ashley’s father were also now residing. At the hearing, Renee’s counsel informed the court that the basis of the motion to dismiss was that no written request or petition for extension of the original dispositional order had been filed with the court prior to the original expiration date of September 23, 2000. The only indications in the court file that the department was requesting an extension were the Order Granting Temporary Extension and the Notice of Hearing, described

above. Counsel for the department acknowledged that he usually submits a one-page form petition for extension along with the other documents when notifying the court of the department's request for an extension of a CHIPS dispositional order, and that he apparently neglected to do so on this occasion.

¶5 The court concluded that there had been no jurisdictional error, and that it was competent to hear the extension proceedings. It acknowledged that no document entitled "petition" or "request" for extension had been filed, but found that a sufficient "request" for an extension had been timely made:

In this particular case, the court, in the temporary extension, made the determination that there had been a motion to extend the dispositional order. The notice for hearing says it was an extension of dispositional order.

Everybody's on notice that this goes out to, then, that that's what this proceeding is about. And that, I think, is what is intended. The court, by the presentation of these documents, was informed that the corporation counsel's office was requesting an extension.

The court entered an order on December 5th denying Renee's motion to dismiss, and she appeals.²

² The December 5th order also transferred venue of the CHIPS action to Grant County, where, at a December 12th hearing, the dispositional order was extended through September 23, 2001, by agreement of the parties. Renee stipulated to the order "subject to all the jurisdictional objections formerly stated." The present appeal is actually of the December 12th order, which finalized the extension proceedings, but it brings before us all interlocutory orders adverse to the appellant. WIS. STAT. RULE 809.10(4). The department does not argue that Renee waived the opportunity to appeal the denial of her motion to dismiss by stipulating to the entry of the Order to Extend Dispositional Order. See *County of Racine v. Smith*, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (Ct. App. 1984). Accordingly, we do not address the issue.

ANALYSIS

¶6 In denying Renee’s motion, the trial court decided both a legal and a factual question. First, it concluded that WIS. STAT. § 48.365 does not require that a formal, written request or petition for extension be filed before a court may consider extending a CHIPS dispositional order. It then found that the department had, in fact, made a “request” to extend the dispositional order relating to Ashley. We review the former question de novo, and the latter for clear error. *State v. Sweat*, 208 Wis. 2d 409, 414-15, 561 N.W.2d 695 (1997); WIS. STAT. § 805.17(2).

¶7 WISCONSIN STAT. § 48.365(1m) provides as follows:

The parent, child, guardian, legal custodian, expectant mother, unborn child by the unborn child’s guardian ad litem, any person or agency bound by the dispositional order, the district attorney or corporation counsel in the county in which the dispositional order was entered or the court on its own motion, *may request* an extension of an order under s. 48.355 including an order under s. 48.355 that was entered before the child was born. *The request shall be submitted to the court* which entered the order. No order under s. 48.355 may be extended except as provided in this section.

(Emphasis added.) The statute, on its face, requires neither that a “petition” be filed, nor that a “request” be in a specific form or contain specific information. *Compare* WIS. STAT. § 48.255(1) (specifying the form and content of a “petition” to initiate a CHIPS action). As was noted during argument in the trial court, the statute provides that a parent or legal custodian, who may be unrepresented, “may request” that a CHIPS disposition be extended, and further, that the court may initiate extension proceedings on its own motion.

¶8 We conclude that, under the plain language of WIS. STAT. § 48.365(1m), no petition or specific form of request is necessary to initiate

proceedings to extend a CHIPS dispositional order. *See Jungbluth v. Hometown, Inc.*, 201 Wis.2d 320, 327, 548 N.W.2d 519 (1996) (noting that if the plain language of a statute clearly sets forth the legislative intent, we apply the statute accordingly to the facts and circumstances before us). All the statute requires is that the court that entered the dispositional order be made aware that one of the authorized persons is requesting an extension. Once a request for extension is communicated to the court, the court must notify the parties and conduct a hearing on the request, § 48.365(2), and the statute sets out other requirements for extension proceedings. *See* § 48.365(2)-(5). Renee does not contend that any other provisions of the extension statute were not complied with.³

¶9 We next consider whether the trial court erred in finding that a request for an extension was timely submitted by an authorized party. The court found that “by the presentation of these documents [the proposed order for temporary extension and notice of hearing]” the corporation counsel “was requesting an extension.” Renee complains that “no evidence was presented as to who made the ‘request,’” but she points to no place in the record where she requested an evidentiary hearing on the matter or even raised an issue regarding who had requested that extension proceedings be initiated. Rather, Renee’s

³ Renee argues that the court lacked authority to order both the “actual” extension of the order, as well as the temporary, thirty-day extension under WIS. STAT. § 48.365(6) which preceded it. Her arguments, however, are grounded on the same premise—the need for a formal, written request, as a prerequisite for either. Section 48.365(6) provides that “[i]f a request to extend a dispositional order is made prior to the termination of the order, but the court is unable to conduct a hearing on the request prior to the termination date, the court may extend the order for a period of not more than 30 days.” There is no dispute that if a proper request for extension was made, it was timely, given that the Order Granting Temporary Extension and the Notice of Hearing were entered and sent to the parties on September 6, 2000, some two weeks prior to the expiration of the original dispositional order. Renee does not challenge the need for the temporary extension in order to conduct the hearing, and the hearing itself was conducted on October 13th, within the thirty-day temporary extension.

argument in the trial court was simply that a certain document had not been filed, and that its absence was fatal to the extension proceedings.⁴ See *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (“We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.”).

¶10 We conclude the trial court’s finding that a request for an extension of the CHIPS dispositional order had been submitted to the court was not clearly erroneous. In short, it was reasonable for the court to draw the inference that the corporation counsel, by drafting and submitting the temporary extension order and notice of hearing, was making a request that Ashley’s dispositional order be extended. The former document included a “finding” that a “request has been made to extend the dispositional order,” and the latter specified that the scheduled hearing was for “Extension of Disp. Order.” Renee has offered no other reasonable inference that might be drawn from the corporation counsel’s submission of these documents, and we can think of none.

¶11 Renee relies on two precedents to support her claim that the lack of a written request for extension deprives the court of either jurisdiction or competence to extend a CHIPS dispositional order. The first is *S.D.R. v. State*, 109 Wis. 2d 567, 326 N.W.2d 762 (1982), but we conclude the case is of little assistance on the present facts. The supreme court concluded in *S.D.R.* that the thirty-day, temporary extension provision under WIS. STAT. § 48.365(6) does not violate the due process rights of a juvenile who has been adjudicated delinquent.

⁴ Renee’s counsel told the trial court: “There is no such petition in the file, nor is there a request in the file. That’s my whole argument.”

Id. at 572. Renee, however, relies on the court’s discussion, later in the opinion, of appropriate trial court practices regarding the extension of dispositional orders:

In conclusion, we reiterate that sec. 48.365(6), Stats., applies only if the request for extension is filed *before* the expiration of the dispositional order *and* the court is unable to conduct the required hearing prior to the order’s expiration. We hold that *the petition for extension should set forth some reason for requesting the extension*. While a petition for extension filed one day before the expiration date is timely, we recommend that parties seeking to extend a juvenile disposition file such petitions, when possible, at a time which enables the court to conduct the plenary hearing prior to the termination of the order. We also urge trial courts to hold the plenary hearing as near as possible to the expiration of the dispositional order. However, under no circumstances may the dispositional order be temporarily extended for more than 30 days. The court must hear and decide the extension request within 30 days of the termination of the order.

Id. at 577 (third emphasis added).

¶12 We conclude that the supreme court’s direction that “petition[s] for extension *should* set forth some reason” (emphasis added) does not mean that, in the absence of a petition stating a reason for extension, the court lacks jurisdiction or competence to order an extension. The filing of a written request or petition, stating reasons for an extension, certainly constitutes a preferred practice, as both the department and the trial court acknowledge. As we have discussed, however, it is *not* a requirement under the statute. WISCONSIN STAT. § 48.365 ensures that parties are apprised of the reasons for an extension request by requiring a hearing on the request, and by requiring the agency supervising the child to file a written report, which includes, if appropriate, “an explanation of why returning the child

to his or her home is not safe or feasible.” Section 48.365(2g)(b)2.⁵ We do not believe *S.D.R.* may be read to impose a jurisdictional requirement, or a limitation on the court’s competency to proceed, that is not expressed in § 48.365.

¶13 Renee also cites *Green County DHS v. H.N.*, 162 Wis. 2d 635, 469 N.W.2d 845 (1991), where the supreme court held that a court “loses its competence to exercise jurisdiction when a hearing is not held within the maximum 30-day extension period allowable under WIS. STAT. § 48.365(6).” *Id.* at 641. Here, there is no dispute that the extension request was heard, and granted, within the thirty days following the original order’s expiration date. Renee claims, however, that *H.N.* is significant in that it “recognizes that § 48.365(1m) requires that a request is necessary to temporarily extend a dispositional order.” We agree, but as we have discussed, the trial court did not err in finding that a timely request was submitted to the court. The court imposed no requirements for a “request” in *H.N.* above and beyond the words of the statute.

¶14 Finally, Renee also argues that *H.N.* makes clear that she did not waive the “loss of competence” issue by agreeing to continue the hearing on her motion to dismiss, or by stipulating to the “actual” extension of the dispositional order through December 13th. Our disposition of this appeal, however, is not

⁵ In this case, there can be no question that Renee was well apprised of the reasons the department sought to extend the dispositional order. The record reflects that on September 21, 2000, some three weeks before the October 13th extension hearing, Renee and her counsel attended a “permanency planning review hearing” and received an “amended administrative review report” which the department had prepared. The report outlines the services provided, progress toward meeting the conditions for Ashley’s return, and the department’s plan to initiate a guardianship by Ashley’s grandparents. Most significantly, however, at the October 13th hearing, when stating Renee’s agreement with a sixty-day extension of the dispositional order, her counsel informed the court, “[Renee] knows what’s—what they are requesting and what they are asking for and she knows what their position is at this time, so no, we don’t have any objection.”

premised on a waiver, actual or implied, of the issue Renee has raised. See footnote 3. Rather, we conclude that her claim of error lacks merit—the absence of a formal, written request for extension did not preclude the court from considering the department’s request for extension of Ashley’s dispositional order.

CONCLUSION

¶15 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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

