

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 01-0755-FT
01-0756-FT
STATE OF WISCONSIN**

**IN COURT OF APPEALS
DISTRICT IV**

NO. 01-0755-FT

**IN THE INTEREST OF JESSICA R.L.,
A PERSON UNDER THE AGE OF 17:**

GREEN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAVID L. AND MITZI L.,

RESPONDENTS-APPELLANTS.

NO. 01-0756-FT

**IN THE INTEREST OF DEANNA M.L.,
A PERSON UNDER THE AGE OF 17:**

GREEN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAVID L. AND MITZI L.,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ David L. and Mitzi L. challenge the validity of an order issued by the circuit court on November 14, 2000, extending the County's supervision of their daughters, Jessica L. and DeAnna L., and extending Jessica's out-of-home placement with her grandmother. Because the delay in holding a fact-finding hearing on the County's motion to extend the dispositional order was the result of a circumstance described in WIS. STAT. § 48.315(1), we conclude the court had competence to decide whether supervision and out-of-home placement should continue. Accordingly, we affirm the November 14 order.

BACKGROUND

¶2 On November 5, 1998, Jessica, who was born on February 11, 1987, and DeAnna, who was born on May 31, 1990, were taken into custody by the Green County Department of Human Services due to allegations that their parents, Mitzi and David, were unable to provide adequate supervision and care for them. They were temporarily placed in the home of their paternal grandmother, Mary Jane H. Subsequently, the County filed a petition for a determination of status,

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

alleging that Jessica and DeAnna were in need of protection and services due to a failure of care caused by parental drug and alcohol abuse.

¶3 After a fact-finding hearing on the petition on January 6, 1999, the circuit court found that Jessica and DeAnna were children in need of protection and services. Psychological evaluations were completed for both parents, and the County filed its dispositional report and permanency plan prior to the dispositional hearing. On March 17, 1999, the circuit court entered a one-year CHIPS dispositional order, placing both children in the home of their paternal grandmother and setting numerous requirements for the parents to meet before the children could be returned to them.

¶4 On February 25, 2000, the County filed a petition to extend the dispositional order. David and Mitzi then filed a petition to change the girls' placement and an objection to extending the dispositional order, alleging that the paternal step-grandfather who was residing in the home with the grandmother and the children had sexually abused other children years earlier. On March 17, 2000, the court extended the children's out-of-home placement to April 5, 2000, set a fact-finding hearing for that date and granted Jessica's motion to appoint adversary counsel for her.

¶5 On April 5, 2000, David, Mitzi, Jessica, Mary Jane, representatives from the Green County Department of Human Services, the lawyers for all, the guardian ad litem for the children and various witnesses appeared in court for the scheduled fact-finding hearing to determine whether the court should extend the dispositional order. However, no testimony was taken and no exhibits were

offered into evidence.² Instead, David, Mitzi, their attorney, Mary Jane, counsel for Green County, adversary counsel for Jessica and the guardian ad litem arrived at an agreement to modify the dispositional order, which, if approved by the court, would control the placement of the children for approximately three months. The stipulation continued Jessica's placement with her grandmother; required the grandmother's husband, John H., to move immediately from the house where Jessica and the grandmother live; and permitted DeAnna's return to her parents at the end of the 2000 school year. The court scheduled a full evidentiary hearing on placement to begin on July 7.

¶6 At the commencement of the proceedings on July 7, Mitzi and David moved to dismiss the petition to extend the dispositional order. They asserted the court had lost competence to exercise jurisdiction because the original dispositional order expired no more than thirty days after March 17, 2000, according to the provisions of WIS. STAT. § 48.365(6). The court denied the motion to dismiss and took testimony on July 7, 24, 26, 27 and 28. The court next entered an order on November 14, 2000, *nunc pro tunc* to July 28, continuing supervision for both children for one year, with Jessica's placement with Mary Jane, her paternal grandmother, and DeAnna's with her parents.

¶7 David and Mitzi appeal to challenge the competence of the court to extend the dispositional order that arose from the July hearings. They assert that

² Various reports had been filed with the circuit court prior to April 5, *e.g.*, the affidavit of Desiree Garcia in regard to John H.'s sexual abuse of her, John H.'s admission of abuse, statements of clinicians at the Mental Health Center relative to the progress David and Mitzi had made in coping with their addictions, and Green County's extension of dispositional report/permanency plan review. However, none of these documents were offered as exhibits on April 5.

the court appearances of the parties and counsel on April 5 were insufficient to satisfy the requirements of a “hearing” under WIS. STAT. § 48.365(2) and (2m), which hearing is a necessary precursor to extending the dispositional order. They contend that an ongoing dispositional order is necessary for the court to retain competence to hear the County’s petition to extend supervision.

DISCUSSION

Standard of Review.

¶8 Whether a hearing sufficient to satisfy the requirements of WIS. STAT. § 48.365(2) and (2m) was held on April 5, 2000, is a question of statutory interpretation, which we review *de novo*. *Green County Dep’t of Human Servs. v. H.N.*, 162 Wis. 2d 635, 645, 469 N.W.2d 845, 848 (1991). Additionally, whether a court has competence to exercise its subject matter jurisdiction in a particular case is also a question of law which we review without deference to the decision of the circuit court. *State v. Bollig*, 222 Wis. 2d 558, 563, 587 N.W.2d 908, 910 (Ct. App. 1998).

Sufficiency of April 5 Proceeding.

¶9 Because the County moved to extend the initial one-year dispositional order, our inquiry is driven by WIS. STAT. § 48.365, extension of orders, which states in relevant part:

(1m) ... No order under s. 48.355³ may be extended except as provided in this section.

³ WISCONSIN STAT. § 48.355 addresses dispositional orders.

(2) No order may be extended without a hearing. The court shall notify the child, the child's parent, guardian and legal custodian, all the parties present at the original hearing, ... the child's court-appointed special advocate, the district attorney or corporation counsel in the county in which the dispositional order was entered ... of the time and place of the hearing.

(2g)(a) At the hearing the person or agency primarily responsible for providing services to the child ... shall file with the court a written report stating to what extent the dispositional order has been meeting the objectives of the plan

(2m)(a) Any party may present evidence relevant to the issue of extension. The judge shall make findings of fact and conclusions of law based on the evidence. Subject to s. 48.355(2d), the findings of fact shall include a finding as to whether reasonable efforts were made by the agency primarily responsible for providing services to the child or expectant mother to make it possible for the child to return safely to his or her home An order shall be issued under s. 48.355.

...

(6) If 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, not including any period of delay resulting from any of the circumstances specified in s. 48.315(1).

¶10 All parties agree that a hearing is required in order to extend a dispositional order, but they disagree on whether the proceeding held on April 5 was a hearing within the contemplation of WIS. STAT. § 48.365. They also dispute whether the order of April 5 was an extension of the previous dispositional order or a decision on the merits of what was then in the best interests of the children.

¶11 In its most basic form, a hearing is an appearance before a court held for the purpose of deciding issues brought to the court for resolution. BLACK'S LAW DICTIONARY 725 (7th ed. 1999). It may be an evidentiary hearing, an

adjudicatory hearing, a dispositional hearing, a pretrial hearing or it may simply address scheduling issues. *See, e.g.*, WIS. STAT. §§ 48.355, 48.30, 807.04, 802.10(5). The petitions pending before the court on April 5 were the County's petition of February 25, to extend the dispositional order, and David and Mitzi's petition to change placement. Motions to extend dispositional orders are addressed in § 48.365. Motions for a change in placement are addressed in § 48.357. Because the court's order of April 5 extended the placement of Jessica, we must attempt to discern the intent of the legislature in requiring a hearing before a dispositional order is extended.⁴ *Truttschel v. Martin*, 208 Wis. 2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language chosen. *Id.* "If the language employed is clear and unambiguous, that is conclusive of legislative intent. Our inquiry ends, and we must apply the plain meaning of the statutes to the facts of this case." *Cemetery Servs., Inc. v. Department of Regulation & Licensing*, 221 Wis. 2d 817, 825, 586 N.W.2d 191, 195 (Ct. App. 1998), *review denied*, 225 Wis. 2d 488, 594 N.W.2d 283 (1999). Only if a statutory provision is ambiguous do we resort to rules of statutory construction, such as legislative history, to determine legislative intent. *See J.A.L. v. State*, 162 Wis. 2d 940, 962, 471 N.W.2d 493, 502 (1991). Additionally, a statute is not rendered ambiguous merely because the parties disagree as to its meaning. *See State v. Orlík*, 226 Wis. 2d 527, 534, 595 N.W.2d 468, 472 (Ct. App. 1999).

¶12 Here, as the Wisconsin Supreme Court has pointed out, the legislature revised ch. 48 to assure that dispositional orders did not extend for

⁴ We do not address the requirements for a change in placement because none of the interested parties object to the court's ordering that DeAnna return to her parents.

more than one year at a time without a “formal hearing.” *See H.N.*, 162 Wis. 2d at 646, 469 N.W.2d at 849. An exception to that rule is found in WIS. STAT. § 48.365(6), which permits a thirty-day extension if a petition to extend is filed before the dispositional order expires and the court is unable to hold a hearing on that request prior to the expiration of the order sought to be extended. *H.N.*, 162 Wis. 2d at 646-47, 469 N.W.2d at 849. In revising ch. 48, the legislature was concerned that children subject to court supervision not become lost in the system with dispositional orders extended without the circuit court’s review of the factual and legal necessity for such orders. *Id.* at 646-49, 469 N.W.2d at 849-51. A hearing permits the court to evaluate the parents’ and the child’s progress and to determine whether continued court supervision is necessary. *See R.E.H. v. State*, 101 Wis. 2d 647, 652-53, 305 N.W.2d 162, 165-66 (Ct. App. 1981).

¶13 WISCONSIN STAT. § 48.365(2), which addresses notice and to whom it is to be given, must be read in conjunction with subsec. (2m), which requires the circuit court to make findings of fact and conclusions of law based on the evidence. Here, the notice concerns of subsec. (2) for the April 5 proceeding were well heeded, as all interested parties and their attorneys and witnesses were present in court. However, the determination of what evidence subsec. (2m) requires the court to make its findings of fact and conclusions of law on is our major focus.

¶14 As we construe WIS. STAT. § 48.365(2m), we are mindful that the legislature was trying to assure that there was a factual and a legal basis for continued court supervision. It attempted to accomplish this goal by requiring a circuit court to have a hearing and make findings of fact and conclusions of law before a dispositional order could be extended. Because any findings of fact of a circuit court are clearly erroneous if there is no support for them in the record,

Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 643-44, 340 N.W.2d 575, 577 (Ct. App. 1983), we conclude that evidence of the need to extend a dispositional order must be produced at the hearing that is required prior to extension. That evidence can be in the form of oral testimony, a written report made under oath, *see* § 48.365(am)(ag), or based on the stipulated admission of documents on which the court can reasonably rely in making the findings of fact and conclusions of law required by statute. However, even with a stipulation as to disposition, there must be evidence of record upon which a court can reasonably rely.

¶15 Here, the circuit court made neither findings of fact nor conclusions of law based on evidence presented at the April 5 hearing. The record before us contains no witness testimony nor does it contain any exhibits or other type of documentary evidence that the court received on April 5 and on which it could have reasonably relied in making the April 5, 2000 order.⁵ That the parties came up with some type of agreement which the court converted into a modified dispositional order does not comport with the mandate of the legislature to make findings of fact and conclusions of law based on evidence presented in court, nor does it follow the guidance given by the supreme court in ***H.N.*** in regard to the necessity of holding a hearing in compliance with WIS. STAT. § 48.365 before extending a dispositional order.⁶

⁵ The transcript of the April 5 hearing is less than eleven pages long, beginning at 3:45 p.m. and concluding at 3:58 p.m., wherein the assistant district attorney for Green County set out an “interim agreement” for the placement of the children for the three months to follow the hearing.

⁶ If the court had begun to take testimony and the need for additional hearing time had become apparent, the presentation of evidence on the requested extension could have been continued, but that is not what occurred here. Simply stated, no hearing within the contemplation of WIS. STAT. § 48.365(2m) occurred.

¶16 Our decision should not be read to prohibit stipulations to extensions of dispositional orders. However, when such stipulations are made, evidence upon which the circuit court can reasonably rely to accept the stipulation and to make the requisite findings and conclusions must be received on the record. Because no evidence was adduced to support the extension of the dispositional order from April 5 to July 7 and because the court did not make the findings and conclusions required by statute, the court's order did not comply with the requirements the legislature has established.

¶17 However, it is not the April 5 order to which David and Mitzi object, but rather, the November 14, 2000 order, *nunc pro tunc* to July 28. That order resulted from the adjudication of the County's petition to extend the dispositional order, for which petition David and Mitzi contend the court lacked competency to proceed. They contend that the March 17, 1999 order could have expired no later than April 16, 2000, according to the provisions of WIS. STAT. § 48.365(6) and the supreme court's decision in ***H.N.***.

Competency.

¶18 Competency is the ability of a court to exercise its subject matter jurisdiction in regard to particular issues in specific cases. *State v. Dawn M.*, 189 Wis. 2d 480, 485, 526 N.W.2d 275, 277 (Ct. App. 1994). As we have explained, a circuit court "is not competent to act until a ... CHIPS petition is filed to initiate a juvenile proceeding." ***Id.***

¶19 In 1991, the supreme court held that when a dispositional order has been in effect for a maximum of thirteen months, it expires causing the circuit court to lose its competency to exercise jurisdiction to adjudicate a petition to extend a dispositional order. ***H.N.***, 162 Wis. 2d at 641, 654, 469 N.W.2d at 847,

852. In **H.N.**, the supreme court was asked to construe § 48.315 to permit an extension of a dispositional order beyond the thirty days afforded by § 48.365(6), if the delay resulted from an event described in § 48.315. The supreme court refused to do so, holding that, “A plain reading of the statutes, moreover, supports the view that sec. 48.315, Stats., is not applicable to sec. 48.365” **H.N.**, 162 Wis. 2d at 649, 469 N.W.2d at 850.

¶20 Subsequent to the release of **H.N.**, the legislature amended WIS. STAT. § 48.365(6). 1993 Wis. Act 98, § 62. It added the following phrase to subsec. (6): “not including any period of delay resulting from any of the circumstances specified in s. 48.315(1).” Consistent with the plain meaning of the statute, the Legislative Reference Bureau’s analysis explains that the then current law permitted dispositional orders to be extended for no more than thirty days beyond a one-year term and that the then pending amendment of § 48.365(6) “excludes, in computing that 30-day period, any period of delay that may be excluded in computing time limits under the children’s code.” LRB Analysis 93-4860/3. Therefore, the question we are faced with in this appeal is whether the March 17, 1999 dispositional order, as extended on March 17, 2000, was still in effect when the fact-finding hearing was held in July because of a delay caused by a circumstance set out in § 48.315(1). If it was, the circuit court had competency to adjudicate the County’s petition to extend supervision; if not, then it lost competency and its order of November 14, 2000, *nunc pro tunc* to July 28, is of no effect.

¶21 WISCONSIN STAT. § 48.315, delays, continuances and extensions, states in relevant part:

- (1) The following time periods shall be excluded in computing time requirements within this chapter:

...

(b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel or of the unborn child by the unborn child's guardian ad litem.

Here, a delay in adjudicating the County's request to extend the dispositional order of March 17, 1999 occurred with the consent of the attorney for Jessica and the guardian ad litem for both children. Therefore, the delay in the fact-finding hearing was due to a circumstance within the scope of WIS. STAT. § 48.315(1)(b). **H.N.** does not control the question of the circuit court's competency because the supreme court interpreted a different version of WIS. STAT. § 48.365(6). Instead, the question of competence with which we are presented is determined by the 1993 amendment to § 48.365(6). Because the delay between April 5 and the conclusion of the fact-finding process is not counted in the thirty-day extension permitted by § 48.365(6), the court had competence to adjudicate the County's petition to extend supervision. Accordingly, we affirm the order of November 14, 2000.⁷

⁷ David and Mitzi also request attorney fees for the time spent in the July hearings. However, they have offered no authority for this court to deviate from the American Rule in regard to attorney fees. Generally, we do not address issues that are not adequately developed by the parties in their briefs, and we decline to do so in regard to their attorney fees request. *See Truttschel v. Martin*, 208 Wis. 2d 361, 369, 560 N.W.2d 315, 319-20 (Ct. App. 1997).

The guardian ad litem also moves this court to strike certain sections of David and Mitzi's reply brief, asserting that it relates facts that are not of record. We deny the motion because the cited provisions of the reply brief are not relevant to the statutory construction which controls the outcome of this appeal.

CONCLUSION

¶22 Because the delay in holding a fact-finding hearing on the County's motion to extend the dispositional order was the result of a circumstance described in WIS. STAT. § 48.315(1), we conclude the court had competence to decide whether supervision and out-of-home placement should continue. Therefore, we affirm its order.

By the Court.—Order affirmed.

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

