COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2001

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 01-1086
01-1087

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

NO. 01-1086

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KENYOTA A.,

RESPONDENT-APPELLANT.

NO. 01-1087

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KENYOTA A.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 CANE C.J.[1] Kenyota A. appeals from orders terminating his parental rights to his two children.[2] Kenyota argues the trial court lost competency to proceed because the initial hearing was not completed within thirty days of the petition's filing, contrary to WIS. STAT. § 48.422(1); and the fact finding hearing was not held within forty-five days of the initial hearing, contrary to WIS. STAT. § 48.422(2). This court concludes that under WIS. STAT. § 48.315, both hearings were properly continued and the time limits were sufficiently tolled. Therefore, the court did not lose competency and the orders are affirmed.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The court also terminated the parental rights of Sooner M., the children's mother. She, however, is not a party in this appeal.

BACKGROUND

¶2 The pertinent facts are uncontested. On August 15, 2000, Brown County filed a petition for termination of parental rights against Kenyota and Sooner M., the children's mother. The initial appearance was held on September 12 before the Honorable Richard J. Dietz.

¶3 Kenyota's attorney appeared, but Kenyota was not present because he had been incarcerated at the Shawano County jail since September 10. Kenyota's attorney told the court that he had not yet spoken with his client about the case and that he did not learn until September 11 that Kenyota was incarcerated. For that reason, he was unable to arrange to have Kenyota transported to court, but did arrange for Kenyota to be available by telephone for the appearance.

¶4 Kenyota's attorney also told the court that it was his understanding that Sooner planned to seek a continuance of the initial appearance so that she could obtain counsel, which could negate the need to contact Kenyota by telephone. Sooner, who appeared pro se, told the court she would like to continue the initial appearance to seek counsel. The court agreed to Sooner's request, specifically noting that the continuance also would give Kenyota's attorney an opportunity to confer with Kenyota. The matter was scheduled for a continued initial hearing on September 18.

¶5 On September 15, Kenyota filed a motion for substitution of judge. The matter was adjourned for reassignment. A reassignment order was filed on September 22 and the matter was rescheduled for October 10 before the Honorable Donald R. Zuidmulder.

¶6 On October 10, the parties appeared before the Honorable Richard G. Greenwood, Reserve Judge, for the continued initial hearing. Kenyota, appearing in person and with counsel, told the court that he was contesting both the petition and whether he is the children's father. Ultimately, the court concluded that based on prior paternity judgments and the testimony, Kenyota was the children's father. The court also scheduled another hearing for October 20 to hear the County's motion to suspend visitation during the termination action and to set a trial date.

¶7 Prior to the October 20 hearing, the parties discussed possible trial dates with Judge Zuidmulder's clerk for what one attorney described as "thirty minutes at least comparing calendars up through December." At the hearing, the trial court and the parties again discussed possible trial dates. Although the court said it was available November 13, attorneys for the County and both parents were all unavailable. The same attorneys were, however, available December 18-20.

¶8 The trial court scheduled the hearing for December 18-20 after finding good cause to hold the fact finding hearing outside the forty-five-day time limit established by WIS. STAT. § 48.422(2). The cases proceeded to a jury trial on December 18. The jury found that grounds existed to terminate Kenyota's parental rights. A dispositional hearing was held in January 2001, at which time the court found that it was in the children's best interests to terminate Kenyota's parental rights. This appeal followed.

LEGAL STANDARDS

¶9 WISCONSIN STAT. § 48.422 establishes mandatory time limits for holding hearings in termination of parental rights (TPR) cases. *See* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. A trial court's failure to comply with the mandatory time limits deprives it of competency to proceed. *See* ***T.H. v. La Crosse County***, 147 Wis. 2d 22, 35-38, 433 N.W.2d 16 (Ct. App. 1988), *aff'd per curiam by an equally divided court*, 150 Wis. 2d 432, 441 N.W.2d 233 (1989). The Children's Code, WIS. STAT. ch. 48, "contains no provision for the waiver of time limits, and the only provisions for delays, continuances and extensions are set forth in § 48.315, STATS." ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 640, 549 N.W.2d 489 (Ct. App. 1996). That statute provides in relevant part:

> **(1)** The following time periods shall be excluded in computing time requirements within this chapter:
>
> (a) Any period of delay resulting from other legal actions concerning the child or the unborn child and the unborn child's expectant mother, including an examination under s. 48.295 or a hearing related to the mental condition of the child, the child's parent, guardian or legal custodian or the expectant mother, prehearing motions, waiver motions and hearings on other matters.
>
> ….
>
> (c) Any period of delay caused by the disqualification of a judge.
>
> ….
>
> **(2)** 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 consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

¶10 Whether the circuit court complied with the time limits and granted a continuance pursuant to WIS. STAT. § 48.315(2), under the undisputed facts of this case, presents a legal question of statutory interpretation. ***April O.***, 2000 WI App 70 at ¶6. We review questions of law independently. ***Id.***

DISCUSSION

I. Initial hearing

¶11 The initial hearing in TPR cases must be held within thirty days after the petition is filed. WIS. STAT. § 48.422(1). Here, the initial hearing was held within thirty days, but was continued beyond the thirty-day time limit. Kenyota argues the hearing was improperly continued on two bases: (1) The court did not explicitly make a finding that good cause justified the continuance; and (2) the continued initial hearing was not held until twenty-eight days after the "original failed attempt at holding the hearing."[3] This court rejects both of these arguments.

A. Good cause to continue initial hearing

¶12 Kenyota is correct that the trial court did not explicitly find good cause to continue the initial hearing. Kenyota, citing ***April O.***, argues that "[t]he failure to make the finding of good cause on the record before granting the continuance is critical." In ***April O.***, the trial court never granted a continuance in any proceeding before the time limits expired "and therefore did not do so in open court and in a 'timely manner.'" *See* ***id.*** at ¶10 (quoting WIS. STAT. § 48.315(2)). This court concludes that ***April O.*** is distinguishable.

[3] This court disagrees with Kenyota's characterization of the first hearing. At the very least, the hearing provided the court with an opportunity to inform Sooner of her legal rights, such as to contest the petition, have a jury trial and have an attorney appointed to represent her.

¶13 Although the trial court did not make specific findings, the circumstances are self-evident from the record that good cause existed to reschedule the initial hearing after the thirty days. Sooner requested a continuance so that she could retain counsel. Pursuant to WIS. STAT. § 48.422(5), the court had no discretion to deny her request.[4] Accordingly, the court stated: "All right. Well, [Sooner] has requested the right to be represented by counsel. I'll schedule this matter for … a balance of initial appearance."[5]

¶14 The trial court also implicitly acknowledged another reason for continuing the hearing: Kenyota, who was not present in the courtroom, had not yet had an opportunity to meet with his attorney. The court told Kenyota's attorney that the continued hearing "will give you an opportunity as well to confer with your client."

¶15 Additionally, a trial court considering whether good cause exists to continue a TPR hearing is required to take "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." *See* WIS. STAT. § 48.315(2). Here, Kenyota's counsel not only consented to the continuance, but suggested that the trial court continue the matter and thanked the court for the additional time that would allow him to communicate with his client.

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[4] WISCONSIN STAT. § 48.422(5) provides: "Any nonpetitioning party, including the child, shall be granted a continuance of the hearing for the purpose of consulting with an attorney on the request for a jury trial or concerning a request for the substitution of a judge."

[5] If Kenyota had been prepared to go forward and was concerned about the delay caused by Sooner's need to consult counsel, he could have moved to sever his cases. Because he supported the continuance, he did not do so. Moreover, he does not argue that his counsel was ineffective for failing to move to sever the cases at the initial hearing or at subsequent hearings.

¶16 Finally, pursuant to WIS. STAT. § 48.315(2), a court is to continue a matter "only for so long as is necessary." The court scheduled the continued hearing for September 18, six days later. Kenyota does not challenge the implicit finding that a six-day delay was necessary under the circumstances. Based on these facts, this court concludes that the requirements of § 48.315(2) were satisfied and that the initial hearing was properly continued.

B. Tolling of the time limits during judicial substitution

¶17 Kenyota also challenges the length of delay between September 22, when a new judge was assigned per Kenyota's request, and the October 10 hearing date. He argues, "The record is silent as to why it was necessary to continue the hearing for an additional 19 days after the new judge was assigned" (emphasis removed). Accordingly, Kenyota contends, the trial court lost competency to proceed.

¶18 Pursuant to WIS. STAT. § 48.315(1)(c), any period of delay caused by the disqualification of a judge is excluded from the time limits imposed in WIS. STAT. ch. 48. This court has held that the delay caused by disqualification includes the time required to assign a new judge and those periods of time necessary to send out any statutorily-required notices, notify the parties of the newly-scheduled hearing date and arrange for calendar time on the court's calendar. *See* ***In re Joshua M.W.***, 179 Wis. 2d 335, 343, 507 N.W.2d 141 (Ct. App. 1993). ***Joshua M.W.*** also implied that a delay by the newly-assigned judge that did not exceed thirty days (applicable to TPR cases) was reasonable. *See* ***id.*** at 344.

¶19 Here, the delay between the judicial reassignment and the continued initial hearing was nineteen days. Consistent with ***Joshua M.W.***, a nineteen-day

delay is not unreasonable. *See* ***id.*** Moreover, Kenyota can hardly be heard to complain that there is no record justifying the nineteen-day delay when he did not raise any objection, orally or in writing, at the trial court. This court concludes that WIS. STAT. § 48.315(1)(c) effectively tolled the time limits, so that the delay caused by the judicial substitution did not deprive the court of competency to proceed.

II. Fact finding hearing

¶20 The fact finding hearing in TPR cases must be held within forty-five days of the initial hearing, unless all parties agree to commence with the hearing on the merits immediately. WIS. STAT. § 48.422(2). It is undisputed that the fact finding hearing was not held within forty-five days. Kenyota challenges the trial court's decision to schedule the hearing beyond forty-five days, arguing that (1) there was not a showing of good cause and (2) the hearing was continued for longer than necessary. This court rejects both of these arguments.

A. Good cause

¶21 The trial court explicitly found that good cause existed to schedule the trial for December 18, the only date available to the court and counsel for the parents and the County. After discussing possible dates, the court stated, "[I]t's clear on this record that it's impossible for me to or the lawyers to simply get to this matter before this date, so I'm going to find good cause exists to exceed the [time limits]."

¶22 Kenyota argues that although court congestion has been found to constitute good cause, *see* ***J.R. v. State***, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989), "[n]o case has recognized attorney convenience as good cause."

Here, the court explicitly found that it was impossible for the court or the lawyers to set an earlier court date. This conclusion, Kenyota argues, is inconsistent with the court's earlier statement that it was available on November 13.

¶23 Because Kenyota supported the continuance, he did not object to the court's conclusion or ask the court to explain more fully how court congestion had caused the need to delay the hearing. Absent any evidence in the record to the contrary, this court accepts the trial court's assessment of its calendar at face value. This assessment and the fact that all parties consented to the December 18 date support the trial court's determination that good cause existed to continue the hearing.

B. Only so long as necessary

¶24 Next, Kenyota argues that the trial court erroneously postponed the hearing date for longer than necessary. He contends:

> [T]he record … reflects no finding that it was necessary to continue the matter all the way until December 18, 2000. [Sooner's attorney] gave no specifics of his schedule, and Judge Zuidmulder demanded none. The other attorneys were not even asked whether there was some date between November 13, 2000, and December 18, 2000, when they could try the case.

This argument borders on the frivolous. First, the record contains references to over thirty minutes of discussion among the parties and the judge's clerk during which they sought a mutually-acceptable hearing date. Second, Kenyota urged the court to accept the December 18 date. Finally, once again, Kenyota did not ask the court to explain more fully its reasons for selecting the December 18 date, and cannot now be heard to complain that the record is insufficient to support the court's conclusion that the hearing should be held on December 18. For these

reasons, this court will affirm the trial court's implicit conclusion that it was necessary to continue the hearing to December 18.

III. Judicial estoppel and invited error

¶25 Although the parties do not raise the issue, this court affirms the orders on alternative grounds: application of the doctrines of judicial estoppel and invited error. This court is bound by precedent establishing that time limits in TPR cases are not waiveable. *See* ***Darlene R.***, 201 Wis. 2d at 640. However, this court concludes that under the appropriate circumstances, the doctrines of judicial estoppel and invited error may nonetheless prevent a party from litigating certain issues on appeal. This is such a case.

¶26 Kenyota, acting through trial counsel, agreed to or requested the continuances and delays at issue in this case. Advocating for the selection of the December 18 trial date, he implicitly argued that there was good cause to continue the hearing beyond the forty-five-day time limit. On appeal, having retained new counsel, he now argues there was no good cause to do so.

¶27 This court concludes that Kenyota is precluded by the doctrines of judicial estoppel and invited error from contesting the trial court's good cause determinations. *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (The doctrine of judicial estoppel recognizes that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error."); ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (Where appellant requests a certain action by the trial court, and the court complies, "[i]f error occurred, [appellant]'s counsel invited it. We will not review invited error.").

By the Court.—Orders affirmed.

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