

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2002

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.

**Appeal Nos. 02-0033
02-0034
02-0035**

**Cir. Ct. Nos. 00-TP-25
00-TP-26
00-TP-27**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 02-0033

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
ELIZABETH R., A PERSON UNDER THE AGE OF 18:**

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JOSEPH A. R.

RESPONDENT-APPELLANT.

No. 02-0034

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
ANDREW R., A PERSON UNDER THE AGE OF 18:**

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JOSEPH A. R.

RESPONDENT-APPELLANT.

No. 02-0035

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
ALAN R., A PERSON UNDER THE AGE OF 18:**

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JOSEPH A. R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Wood County:
DENNIS D. CONWAY, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Joseph A.R. appeals from orders terminating his parental rights. He contends that the circuit court lost competency to proceed when it failed to hold a fact-finding hearing within the forty-five-day time limit required by WIS. STAT. § 48.422(2) (1999-2000). Because we conclude that the delay in holding the fact-finding hearing was the result of a circumstance specified

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.

in WIS. STAT. § 48.315(1), it was excluded from the time requirements of § 48.422(2). Therefore, the circuit court had competence to order the termination of Joseph A.R.'s parental rights. Accordingly, we affirm.

Background

¶2 The facts for purposes of this appeal are undisputed. On September 18, 2000, Wood County filed a petition to terminate the parental rights of Joseph A.R. to his children, Elizabeth R., Andrew R., and Alan R. A hearing on this petition took place on October 13, 2000. Joseph R. appeared with counsel. The district attorney informed the court that Joseph R. was contesting the termination petition. The court proposed a fact-finding date of December 1, 2000, noting on the record that this date would run “a little bit over the time limits.” All parties, including Joseph A.R., through his attorney, the children, through the guardian ad litem, and the district attorney, consented to the December 1 hearing date.

¶3 The fact-finding hearing was held on December 1, 2000. The court found grounds to terminate Joseph's parental rights and declared him unfit. The court terminated Joseph's parental rights to his three children at a dispositional hearing on December 11, 2000. Joseph appeals.

Analysis

¶4 Joseph argues that the circuit court lost competency to proceed when it failed to hold a fact-finding hearing within the time required by WIS. STAT. § 48.422(2). Wood County responds that the delay was authorized under WIS. STAT. § 48.315 because the court granted a continuance with the consent of all parties.

¶5 Whether the circuit court complied with the time limits of WIS. STAT. § 48.422(2) and granted a continuance pursuant to WIS. STAT. § 48.315, under the undisputed facts of this case, presents a legal question of statutory interpretation. We review questions of law independently of the circuit court. *See State v. April O.*, 2000 WI App 70 at ¶6, 233 Wis. 2d 663, 607 N.W.2d 927.

¶6 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.” Joseph contested the petition at the October 13, 2000 hearing, which is when the forty-five-day time limit began running. There were forty-nine days between October 13, 2000, and December 1, 2000. Unless the deadline was tolled, the court exceeded the time limit required by § 48.422(2) by four days.

¶7 Joseph first asks us to accept *April O.* as dispositive of his appeal. In *April O.*, the circuit court failed to hold the initial and dispositional hearings within mandatory time limits and did not grant a continuance until after the time limits expired. *Id.* at ¶1. We held that because the circuit court did not grant a continuance before the time limits expired, it lost competency. *Id.* at ¶10. We reasoned: “Once a court has lost competency it cannot, in a later proceeding, find good cause for a delay and thereby restore competency.” *Id.* Joseph argues that his case is indistinguishable from *April O.* We disagree with Joseph.

¶8 In *April O.* the circuit court did not grant a continuance before the time limits expired. That is not the situation here, where the circuit court and all parties agreed to a continuance on October 13, 2000, well before the forty-five-day time limit had expired. Therefore, this case is not controlled by *April O.*

¶9 Joseph concedes that he and all other parties waived the time limit for the fact-finding hearing, but he argues that none had the authority to do so. Joseph is correct that the Children’s Code contains no provision for waiver of time limits, and the only provisions for delays, continuances and extensions are set out in WIS. STAT. § 48.315. **Waukesha County v. Darlene R.**, 201 Wis. 2d 633, 640, 549 N.W.2d 489 (1996). However, the court construed the terms “waived,” “continued,” or “tolled” to mean a continuance pursuant to § 48.315(2). *Id.* at 636 n.2. Therefore, whatever term is used, a court is authorized to postpone a fact-finding hearing under WIS. STAT. § 48.422(2) more than forty-five days so long as the requirements of § 48.315 are satisfied.

¶10 WISCONSIN STAT. § 48.315(1) contains a list of specific circumstances that toll the running of a time limit under the Children’s Code. **M.G. v. La Crosse County Human Services Dept.**, 150 Wis. 2d 407, 417, 441 N.W.2d 227 (1989). Included in this list is paragraph (b), which provides: “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.*” (Emphasis added.) Subsection (2) deals more generally with continuances under the Children’s Code, providing that good cause must be shown in open court, or on the record, before a court may grant any continuance.

¶11 By conceding that everyone consented to the continuance, Joseph has also conceded that paragraph (1)(b) has been satisfied. The only remaining issue, therefore, is whether consent by all parties is sufficient to toll the time limit, or whether an additional showing of good cause is also necessary. Based on our review of the case law, we conclude that the satisfaction of one of the provisions of subsection (1) also satisfies subsection (2). Specifically, consent by all parties,

under paragraph (1)(b) constitutes good cause, and thus tolls the forty-five-day deadline.

¶12 In *M.G.*, a mother appealed from an order of the circuit court finding her child to be in need of protection or services and placing that child in a foster home. *Id.* at 411. M.G. claimed that the circuit court did not have competency to enter such an order because the court exceeded statutorily mandatory time requirements. *Id.* We affirmed the circuit court’s order because “the parties consented to a continuance as provided by sec. 48.315, tolling the [time] limit.” *Id.* Citing paragraph (1)(b) and subsection (2) of sec. 48.315, the supreme court affirmed, reasoning:

We conclude that the general requirements of sec. 48.315(2), Stats., control all extensions of time deadlines under the Children’s Code. While the enumerated specific circumstances of sec. 48.315(1) are governed by sec. 48.315(2), *the statutory list of specific circumstances does not proscribe all other grounds for extending time deadlines.* A continuance may be granted directly under sec. 48.315(2), Stats.

Id. at 418 (emphasis added). Ultimately, the supreme court affirmed based on its conclusion that subsection (2) was satisfied. *Id.* at 418-19.

¶13 In *J.R. v. State*, 152 Wis. 2d 598, 606, 449 N.W.2d 52 (Ct. App. 1989), we affirmed the circuit court’s decision to adjourn the proceedings based on the request of the child’s counsel to be granted time so that new counsel could be appointed. We held: “Since this adjournment was accomplished at the request of J.R.’s counsel, the thirty day mandatory fact-finding hearing time limit was tolled pursuant to sec. 48.315(1)(b), Stats.” *Id.* at 605.

¶14 *I.P. v. State*, 157 Wis. 2d 106, 112, 458 N.W.2d 823 (Ct. App. 1990), involved a parent claiming that the circuit court lost competency to order

the termination of her parental rights because her dispositional hearing was not held within forty-five days. In that case, the parent, her attorneys, the district attorney and the child's guardian ad litem all approved a continuance. *Id.* at 114. We held that the circuit court "obeyed the dictates of sec. 48.315." *Id.*

¶15 *Jason B. v. State*, 176 Wis. 2d 400, 500 N.W.2d 384 (Ct. App. 1993), was a delinquency case where the court exceeded statutory time limits to permit the child to obtain counsel. We concluded that good cause existed for the delays under WIS. STAT. § 48.315. *Id.* at 409. In addition to our conclusion that good cause existed, based on the child's best interest to obtain counsel, we noted that it was possible that the continuance was granted at the request of the child himself, thereby properly tolling the time limits in accordance with § 48.315(1)(b). *Id.* at 408 n.7. Because no record was made of the initial appearance, however, we could not base our conclusion on the child's consent. *Id.*

¶16 The holdings and reasoning of these cases support our conclusion. Although *M.G.* explicitly held that subsection (2) must always be satisfied in order to grant a continuance, the decision also implied that subsection (1) contains a list of examples that inherently satisfy subsection (2). *Id.* at 417-18. *J.R.* affirmed a continuance based only upon the child's counsel requesting one, in accordance with paragraph (1)(b). 152 Wis. 2d at 605. The decision supports our holding that although subsection (1) does not set forth an exclusive list of good cause, its enumerated examples are sufficient on their own to satisfy the good cause requirements of subsection (2). *I.P.* concluded that WIS. STAT. § 48.315 was satisfied when the parties consented to the continuance. 157 Wis. 2d at 114. The decision supports our holding that consent by all parties satisfies paragraph (1)(b). Finally, although it was not part of the actual holding, *Jason B.* implied that had there been a record of the initial hearing in the *Jason B.* case, and had that record

shown that the child consented to a continuance, a finding of good cause could have been based on the child's consent under paragraph (1)(b). 176 Wis. 2d at 408.

¶17 In sum, we conclude that subsection (1) is a non-exclusive list of factors that were legislatively determined to constitute good cause. By satisfying one of the specific provisions under subsection (1), subsection (2) is also satisfied. Therefore, an additional showing of good cause under subsection (2) was not necessary because the children, through their guardian ad litem, consented to a period of delay resulting from the continuance, in accordance with paragraph (1)(b). Section 48.315 automatically excludes such a continuance from the forty-five-day time requirement.

¶18 Finally, to the extent that Joseph argues that the circuit court did not grant a proper continuance because it failed to make a finding on the record that good cause existed as required by WIS. STAT. § 48.315(2), we disagree. The circuit court was not required to specifically state that good cause existed before it granted a continuance. WISCONSIN STAT. § 48.315(2) requires only that a “showing of good cause” be made. This was done when all the parties consented to the continuance. If the record contains ample evidence to support a finding of good cause, “a judicial incantation of statutory phrases is unnecessary.” *See I.P.*, 157 Wis. 2d at 113.

¶19 Because WIS. STAT. § 48.315(1)(b) was satisfied, there was good cause to grant a continuance. The circuit court was competent to terminate Joseph's parental rights.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports. *See* WIS.

STAT. § 809.23(1)(b)4.

