COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2005

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. 04-2909
04-2910

Cir. Ct. Nos. 03TP000484
03TP000485

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

Appeal No. 04-2909
Cir. Ct. No. 03TP000484

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT K.,

RESPONDENT-APPELLANT.

Appeal No. 04-2910
Cir. Ct. No. 03TP000485

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

¶1 KESSLER, J.[1] Robert K. ("Mr. K") appeals from orders terminating his parental rights to Cody K. and Colt K.[2] Mr. K argues that the circuit court lost competency to proceed because the fact-finding hearing was not held within forty-five days of the plea hearing, as required by WIS. STAT. § 48.422(2) (2003-04).[3] He contends there was no good cause to hold the hearing

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[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 Honorable Michael Malmstadt presided over all proceedings prior to the fact-finding hearing. The Honorable Thomas Donegan presided over the fact-finding and dispositional hearings.

[3] WISCONSIN STAT. § 48.422 provides:

> **Hearing on the petition. (1)** The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition and inform the parties of their rights under sub. (4) and s. 48.423.
>
> **(2)** If the petition is contested the court shall set a date for a fact-finding hearing to be held within forty-five days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately.

beyond the mandatory forty-five-day time limit, and that the hearing was continued for longer than was necessary, all in violation of Wisconsin Statutes. This court affirms the orders for the reasons set forth below.

BACKGROUND

¶2 The petition for termination of parental rights was filed on July 17, 2003. It alleged two distinct grounds for termination, namely that the children were in continuing need of protection or services, and that Mr. K failed to assume his parental responsibilities for them. *See* WIS. STAT. § 48.415(2) and (6). The parental rights to six children were initially addressed at the same time; five of the children were fathered by Mr. K, by two different mothers. The parental rights to children other than Cody and Colt are not at issue in this appeal. This court is aware that Mr. K raised the same legal challenge to the timing of the fact-finding hearing for two of his other children in ***State v. Robert K.***, Nos. 04-2330 and 04-2331, unpublished slip op. (WI App Nov. 16, 2004), *review granted*, (WI Feb. 9, 2005) (Nos. 04-2330 and 04-2331).

¶3 At all times material to this matter, Mr. K was represented by counsel. A plea hearing commenced on August 8, 2003, within the statutory limits for the plea hearing. That hearing was continued to September 19, 2003. Because the termination proceeding was contested by Mr. K, the parties discussed when the fact-finding hearing should be held. The first date the circuit court suggested, the week of November 3-7, fell within forty-five days of the September 19 hearing and would have allowed the fact-finding hearing to take place within the time limit established by WIS. STAT. § 48.422(2). However, both counsel for the State and the guardian ad litem stated that they had conflicts for that week. Mr. K's attorney

remained silent. He raised no objection to moving past that date and did not advise the court that later dates would be beyond the forty-five-day time limit.

¶4 The circuit court then suggested the week of December 15. Again, counsel for the State and the guardian ad litem indicated they had conflicts. Again, Mr. K's attorney remained silent. The circuit court then offered the week of January 26, 2004, and no one, including Mr. K or his counsel, objected. The fact-finding hearing was then set for January 26, 2004, still with no objection by Mr. K or his attorney to the potential loss of the circuit court's competency to proceed because of failure to comply with the forty-five-day statutory requirement for beginning the fact-finding hearing. This adjournment will be referred to as the September adjournment.

¶5 On January 20, 2004, the parties appeared by counsel before the circuit court for an unscheduled appearance. The State moved to adjourn the fact-finding hearing, scheduled to begin six days later, so that it could depose Mr. K. The State explained that when the parties met on January 9 to take the depositions of Mr. K and the children's mother, they ran out of time to take Mr. K's deposition. It was rescheduled for January 15, but Mr. K was arrested on January 14. Consequently, he did not appear for his deposition. The attorney for the State further indicated that she was starting another trial on January 21 and would not be able to take Mr. K's deposition immediately.

¶6 Counsel for Mr. K indicated that he would not oppose the State's motion to set a new date for the fact-finding hearing. Counsel noted that he had a lot of discovery to review and that he and Mr. K "could certainly benefit ... from spending more time preparing with [Robert]." Trial counsel also observed that both he and Mr. K would be involved in the fact-finding hearing for Mr. K's other

children during the week of March 8. The guardian ad litem stated that she did not oppose the adjournment.

¶7 The circuit court agreed to adjourn the fact-finding hearing. This will be referred to as the January adjournment. The circuit court's clerk indicated that the first available date for a week-long fact-finding hearing was June 1. No party or counsel objected to that date. Mr. K's counsel did not alert the court to Mr. K's claim that this adjournment would result in lack of competency by the court to proceed because of violation of WIS. STAT. § 48.422(2). The fact-finding hearing was scheduled to begin June 1, 2004.

¶8 At the conclusion of the June hearing, the jury found grounds to terminate Mr. K's parental rights. After a subsequent contested dispositional hearing, the circuit court exercised its discretion and terminated Mr. K's parental rights.[4] This appeal followed.

DISCUSSION

¶9 Mr. K raises a single issue on appeal. He argues that the circuit court lost competency to proceed when the fact-finding hearing was not held

[4] After a termination-of-parental-rights petition has been filed and the preliminaries have been completed, a contested termination proceeding involves a two-step procedure. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. "The first step is the fact-finding hearing 'to determine whether grounds exist for the termination of parental rights.'" ***Id.***, *citing* WIS. STAT. § 48.424(1). During this step, the burden is on the government, and the parent enjoys a full complement of procedural rights, including the right to a jury trial. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶24. If the State proves grounds for the termination of parental rights, the proceeding moves to the second step, the dispositional hearing. ***Id.***, ¶28, *citing* WIS. STAT. § 48.427. A circuit court may enter an order terminating the parental rights of one or both parents, § 48.427(3), or it may dismiss the petition if it finds the evidence does not warrant the termination of parental rights, § 48.427(2). The dispositional hearing involves the circuit court only, and requires exercise of the court's discretion.

within forty-five days of the plea hearing as required by WIS. STAT. § 48.422(2). Because it is undisputed that the hearing did not occur within the time required by one statute, resolution of this appeal depends on whether an extension of the time available was permitted by another statute, and appropriately granted by the court. The interpretation and application of WIS. STAT. § 48.315, which governs continuances, delays and extensions in termination of parental rights cases, must be considered as applied to the undisputed facts of this case. This presents an issue of law subject to our *de novo* review. ***State v. April O.***, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927.

¶10 "Wisconsin appellate courts have previously held that failure to comply with mandatory time limits under the Children's Code may result in the loss of the circuit court's competency to proceed." ***Id.***, ¶5. Although WIS. STAT. § 48.422(2) requires that fact-finding hearings be held within forty-five days of the plea hearing, this time limit can be tolled, pursuant to WIS. STAT. § 48.315(1), for a variety of reasons. Section 48.315(1) provides in relevant part:

> **48.315 Delays, continuances and extensions. (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.
>
> ….
>
> (d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that the evidence will be available at the later date, or to allow him or her

> additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case.

¶11 Delays pursuant to WIS. STAT. § 48.315(1) are also subject to § 48.315(2), and a "continuance may be granted directly under [§ 48.315(2)]." ***M.G. v. La Crosse County Human Servs. Dep't***, 150 Wis. 2d 407, 418, 441 N.W.2d 227 (1989). Section 48.315(2) 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 consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

(Emphasis added.)

¶12 Extraordinary court congestion may result in good cause to extend the time limit for the fact-finding hearing, when that extension occurs prior to expiration of the original deadline for the hearing. As the court noted in ***J.R. v. State***, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989):

> The good cause requirements of sec. 48.315(2), Stats., control all extensions of time deadlines under the Children's Code. Also, the enumerated specific circumstances noted in sec. 48.315(1) do not provide the exclusive grounds for time extensions. A continuance can be granted by a court to a party under sec. 48.315(2) for court congestion provided that good cause is shown and the trial court does so in a timely manner on the record. A good cause adjournment of a fact-finding hearing by a trial court *sua sponte* due to court congestion is a proper method to adjourn a fact-finding hearing.

A. Application of WIS. STAT. § 48.315(1)(b)

¶13 Mr. K contends that the guardian ad litem's consent to the January 26 and June 1 fact-finding hearing dates fails to satisfy the requirements

of WIS. STAT. § 48.315(1)(b) because the term "guardian ad litem" in that statute refers only to guardians ad litem for unborn children. Mr. K argues only adversary counsel for the children would have the authority to request a delay under § 48.315(1)(b). He contends that because these children are living, and had no adversary counsel, there could be no valid delay pursuant to § 48.315(1)(b) in this case. Mr. K's literal reading of this section is logical, but it is unnecessary to resolve the issue he presents because there is at least one other alternative basis to uphold both the September and January adjournments.

B. There was "good cause" for delay under WIS. STAT. § 48.315(2)

1. The September adjournment

¶14 Mr. K argues that there was no good cause that justified scheduling the fact-finding hearing after November 3, the last day falling within the forty-five-day time limit imposed by WIS. STAT. § 48.422(2). The first trial date offered was the week of November 3-7. But not all counsel were available that week, and no objection to the delay was made by Mr. K's counsel. As a result, the date ultimately selected, based on conflicting attorney calendars and court scheduling problems, was January 26, some eighty-five days beyond the forty-five-day limit.

¶15 This court strongly urges circuit courts to explicitly indicate on the record the reasons for finding good cause to continue or delay a termination of parental rights hearing. However, this court has recognized that even if the circuit court does not make an explicit finding of good cause for the continuance, such good cause can be inferred if the record "'contains ample evidence to support a finding of good cause.'" ***State v. Quinsanna D.***, 2002 WI App 318, ¶39, 259

Wis. 2d 429, 655 N.W.2d 752 (citation omitted).[5] The transcript in this case reflects the difficulty the circuit court had in finding dates that would work for all parties, including parties involved with the four other children. It is clear from the record that the circuit court had specific weeks set aside for week-long fact-finding hearings, which was the estimated length of time needed for this hearing.

¶16 The transcript of the September 19 hearing, at which the initial fact-finding hearing date was ultimately set, demonstrates the inevitable recurring problems faced by a judge in a high volume court who is attempting to manage a calendar and to accommodate multiple attorneys involved in a specific case. The record also demonstrates that, in this particular case, the problem was exacerbated by the fact that six children shared various combinations of mothers, fathers and guardians ad litem, all of whom were involved in cases that were traveling more or less simultaneously on the same statutory time track. Ultimately, decisions as to the best interests of all of these children were the goal of the parents, the district attorney, counsel for each parent, and the guardians ad litem. It is little wonder

[5] As in ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, this case involves continuances granted within the applicable time limits. The following comment from ***Quinsanna*** applies equally here:

> [T]his wholly distinguishes the instant case from *State v. April O.*, 2000 WI App 70, 233 Wis. 2d 663, 607 N.W.2d 927, on which Quinsanna relies. In *April O.*, the trial court rescheduled the dispositional hearing in a termination case beyond the forty-five day deadline but did not do so "on the record or give any reason for rescheduling the hearing" before the time limit expired. ***Id.*** at ¶ 3. We concluded, therefore, that the trial court lost competency because it "did not properly extend the time limit by finding, before the time limit expired and in open court, that good cause existed." ***Id.*** at ¶ 11. Here, by contrast, the continuance was granted before the time limit expired, and in open court for good cause, which was apparent in the record.

Quinsanna D., 259 Wis. 2d 429, ¶39 n.9.

that scheduling problems were immense. This court does not suggest that scheduling problems are always, or even often, good cause for extending statutorily imposed hearing deadlines, because such a holding would render meaningless the time constraints the legislature has deemed important. However, where, as here, unique circumstances make compliance with the deadlines impossible, and where the party later complaining of the delay makes no objection to the delay at the time it occurs, this court concludes that there was good cause at the September adjournment to schedule the fact-finding hearing beyond the forty-five-day time limit. *See* ***J.R.***, 152 Wis. 2d at 607 (continuance can be granted under WIS. STAT. § 48.315(2) for court congestion).

2. The January adjournment

¶17 On January 20, the State moved to continue the fact-finding hearing date because of the inability to depose Mr. K.[6] WISCONSIN STAT. § 48.315(1)(d) permits a continuance at the request of "the representative of the public under [WIS. STAT. §] 48.09" when that representative needs "additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case." Section 48.09 designates the district attorney as "the representative of the public" in proceedings under Chapter 48. Consequently, the January delay was permitted under § 48.315(1)(d) if there was "good cause" under § 48.315(2).

¶18 The State's request was based on the "unavailability of evidence material to the case," namely Mr. K's deposition. *See* WIS. STAT. § 48.315(1)(d).

[6] In addition, as noted earlier, counsel for Mr. K specifically indicated that he would like more time to prepare, and the guardian ad litem specifically said she would not object to a later date for the fact-finding hearing.

There was a showing that the State had exercised due diligence in trying to obtain Mr. K's testimony, but had been unable to do so when Mr. K failed to appear at the scheduled time due to his arrest. This court concludes that under these circumstances the State's request was reasonable and constitutes good cause under § 48.315(2) for the January adjournment.

C. The delays were not longer than necessary

¶19 Mr. K also argues that the delays were longer than necessary, thereby violating the dictate of WIS. STAT. § 48.315(2) that continuances be "only for so long as is necessary." This court is not persuaded. The good cause for the September delay included scheduling difficulties because counsel and the parties were involved in overlapping and parallel proceedings. The January delay, as to which Mr. K's counsel joined in requesting and specifically agreed, was occasioned by Mr. K's own conduct; he did not appear at his previously set deposition necessitating a new date, which again involved attorney and court calendar problems similar to those encountered originally. On both September 19 and January 20, the circuit court carefully looked at dates and selected the first date on the court's calendar for which all counsel and parties were available. There is nothing in the record to suggest that all counsel and necessary parties were available for earlier dates. Nor is there evidence of any objection to the dates or to the delay by Mr. K. In the absence of such evidence, and based on the circumstances of this case, this court concludes that the delays were not longer than necessary.

CONCLUSION

¶20 This court concludes that the fact-finding hearing was appropriately delayed consistent with WIS. STAT. § 48.315(1) and (2). The circuit court did not lose competency to proceed. This court affirms the terminations.

By the Court.—Orders affirmed.

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