COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 17, 1996

No. 96-1570

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

In the Interest of KIMBERLY H.D.,
a Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

BONNIE L.K.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Door County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

LaROCQUE, J. Bonnie L.K. raises numerous issues in her appeal of an order terminating her parental rights to Kimberly H.D. This court rejects her arguments and affirms the order.

Bonnie's first contention is that the trial court lost competency to proceed in the underlying CHIPS proceeding in 1991 because it failed to hold the fact finding hearing within thirty days of the plea hearing, as contemplated

by § 48.30(7), STATS. 1991-92.[1] Bonnie cites ***In re Joshua M.W.***, 179 Wis.2d 335, 341, 507 N.W.2d 141, 143 (Ct. App. 1993). That case and others like it, however, involve a direct attack on the timeliness of the proceeding in question. This case is governed by ***In re L.M.C.***, 146 Wis.2d 377, 432 N.W.2d 588 (Ct. App. 1988), holding that lack of subject matter jurisdiction in one proceeding may not be raised in another proceeding. ***Id.*** at 390-97, 432 N.W.2d at 594-97. Because Bonnie could have litigated the issue she raises now and failed to do so either in the trial court or by an appeal in 1991, she is precluded from doing so now. *See* ***id.*** at 396, 432 N.W.2d at 596-97.

Even if she were not so precluded, Bonnie concedes that time limits are tolled pursuant to the statutory good cause exceptions. Although she argues that no showing of good cause for the continuance was made on the record in 1991, she has furnished this court no transcript of those proceedings to support her argument. The party claiming that a judgment is void for lack of subject matter jurisdiction has the burden of proving the claim. ***State ex rel. R.G. v. W.M.B.***, 159 Wis.2d 662, 668, 465 N.W.2d 221, 224 (Ct. App. 1990). Lack of a transcript limits review to those parts of the record available to the appellate court. *See* ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). This court therefore cannot conclude that the continuance was not made for good cause.

Bonnie next contends the trial court lost competency to proceed by failing to comply with the forty-five-day fact finding hearing requirement of § 48.422(2), STATS.[2] She maintains that the hearing should have been held

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[1] Section 48.30(7), STATS., provides:

> If the citation or the petition is contested, the court shall set a date for the fact-finding hearing which allows reasonable time for the parties to prepare but is no more than 20 days from the plea hearing for a child who is held in secure custody and no more than 30 days from the plea hearing for a child who is not held in secure custody.

[2] Section 48.422, STATS., provides in part:

> 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

within forty-five days of the June 12, 1995, hearing wherein it was determined that the TPR petition was contested. The fact finding hearing was not held until October 16, 1995. Bonnie contends that any failure to comply with this time requirement is jurisdictional.[3]

(..continued)

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 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately.

[3] Section 48.315, STATS., provides:

Delays, continuances and extensions. (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, including an examination under s. 48.295 or a hearing related to the child's mental condition, prehearing motions, waiver motions and hearings on other matters.

(b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and counsel.

(c) Any period of delay caused by the disqualification of a judge.

(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.

(e) Any period of delay resulting from the imposition of a consent decree.

(f) Any period of delay resulting from the absence or unavailability of the child.

(fm) Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under s. 48.365 due to the child having run away or otherwise having made himself or herself unavailable to receive that notice.

(g) A reasonable period of delay when the child is joined in a hearing with another child as to whom the time for a hearing has not expired under this section if there is good cause for not hearing the cases separately.

(1m) Subsection (1) (a), (d), (e) and (g) does not apply to proceedings under s. 48.375 (7).

(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

This court concludes that the "good cause" provisions of § 48.315(2), STATS., supply a basis for continuance of a TPR fact finding hearing, to wit, the request for adjournment by Bonnie's counsel.

Bonnie maintains that because there is no record that she knew of the forty-five-day hearing requirement, she did not waive it. She refers to the trial court's scheduling order indicating that she waived the "30 day time limit."[4] She also argues the absence of a trial court finding of "good cause" for a continuance, the absence of any indication that the continuance was granted "on the record," the absence of an express finding that the date set was "only for so long as is necessary," and the absence of a finding that the court took into account the "the consent of the ... parties" and "the "interest of the public" are fatal.

This court rejects these contentions. First, there is no statutory requirement that the party seeking the continuance "waive" the time limits before a continuance is granted. The court's mistaken reference to a thirty-day time limit in the scheduling order therefore is of no legal consequence.

(..continued)

> 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.

[4] The court's scheduling order provides in relevant part:

> The natural mother, Bonnie L. [K.] testified on the record, after consultation with her attorney, that she waived the *30 day time limit* in this matter pursuant to Wis. Stats. 48.422. The Court finds that said time limit is deemed waived by the natural mother.
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> ....
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> ... The defense counsel's request for an adjournment of the jury trial originally scheduled for Wednesday July 12, 1995, is hereby granted. (Emphasis added.)

Nor is the absence of formal findings a fatal impediment to the TPR order. This court may assume that a missing finding on an issue was determined in favor of or in support of the judgment. ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). Further, this court may affirm a result the evidence would sustain if a specific finding supporting that result had been made. *See* ***Moonen v. Moonen***, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). This court agrees with the county's contention that the trial court order includes reference to facts that would support a finding of good cause. The continuance was granted at the request of Bonnie's newly acquired counsel. It is apparent he did so to allow him to conduct discovery, which the court also granted. These considerations would support a finding that a continuance was for good cause.

Next, Bonnie contends that the basis of an adjournment for good cause was not on the record. The statute does not define "on the record," but Bonnie points to the absence of a court reporter's transcript or clerk's minutes of the proceeding.

Initially, this court concludes that the phrase "on the record" modifies the statutory reference to a telephone conference under § 807.13, STATS. In other words, § 48.315(2), STATS., requires either a showing "in open court" or a showing during a telephone conference "on the record." Bonnie does not contend that the decision was made other than in "open court."

Further, even if the phrase "on the record" were applicable to this proceeding, this court has held that a formal decision notifying the parties of the decision and an entry of the decision in the court records satisfies an "on the record" requirement. ***Orth v. Ameritrade, Inc.***, 187 Wis.2d 162, 168-69, 522 N.W.2d 30, 32 (Ct. App. 1994). The court's issuance of a decision fulfills that requirement here.

Next, this court concludes that the record would support findings that the adjournment was "only for so long as is necessary," and that the trial court did "tak[e] into account the consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases." The fact finding hearing was adjourned from July 12, 1995, to October 16, 1995. This ninety-day adjournment was made at the request of defense counsel. Counsel's need for discovery and the absence of an objection, absent a showing of

prejudice, provides a basis in the record from which the trial court could have made the formal findings to support its order.

There may be a separate reason to disregard the court's failure to make formal findings. In determining whether statutory time provisions are directory or mandatory, "the prime object is to ascertain the legislative intent." ***Wagner v. State Medical Exam. Bd.***, 181 Wis.2d 633, 643, 511 N.W.2d 874, 879 (1994). The general rule has been that the word "shall" is presumed to be mandatory when it appears in a statute. However, the supreme court has held on more than one occasion that statutory time limits may be directory despite the use of the word "shall." Key to the resolution of such a conflict is the legislative intent, reflected in the following factors: The objective of the statute, the history of the statute, consequences of alternative interpretations, and penalties for violation of the statute. ***Id.*** at 643, 511 N.W.2d at 879.

The objective of § 48.315, STATS., is to strike a balance between the potentially competing legislative directives to have TPR's at the "earliest possible time" and to provide "all ... interested parties ... fair hearings ...." Section 48.01, STATS., provides in part:

> This chapter shall be interpreted to effectuate the following express legislative purposes:
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> (a) To provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety.
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> ....
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> (gr) To allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued and termination of parental rights is in the best interest of the child.
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> ....
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> (2) This chapter shall be liberally construed to effect the objectives contained in this section. The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child, the interest of the

> person or persons with whom the child has been placed for adoption and the interests of the public.

A liberal construction of the children's code provisions and the consequences of an alternative interpretation strongly suggest the legislature did not intend to deprive the court of competency to proceed under the circumstances presented here. If so, the absence of trial court findings to support the adjournment do not require the reversal of its final order.

In light of the preceding factors, it is not necessary to address the county's contention that Bonnie is judicially estopped from challenging the adjournment because it was in effect granted at her request.

Next, Bonnie makes numerous challenges to the sufficiency of the evidence to allow jury findings that the Department of Social Services made diligent efforts to provide the ordered services, and that she substantially neglected, wilfully refused or was unable to meet the conditions imposed for her child's return.

The county relies upon ***Strnad v. Co-operative Ins. Mutual***, 256 Wis. 261, 40 N.W.2d 552 (1949), *discussed in* ***Wells v. Dairyland Mutual Ins. Co.***, 274 Wis. 505, 517, 80 N.W.2d 380, 386 (1957). ***Strnad*** holds that the appellate court will not review challenges to the sufficiency of the evidence to sustain a judgment if there has been no motion for a new trial. ***Id.*** at 270, 40 N.W.2d at 558.

Bonnie suggests that ***Strnad*** is no longer the law, supporting her argument with a passing reference to the power of this court to grant a new trial in the interest of justice. Section 752.35, STATS. This court will assume without deciding that Bonnie's contention that a post-hearing motion is unnecessary is correct. Nevertheless, this court has independently reviewed the entire trial transcript and concludes that a new trial in the interest of justice is not appropriate. While there was some evidence the jury might have used to draw inferences favorable to Bonnie on the issues she raises, it was not compelled to do so.

Bonnie next contends that because "new and dramatic" conditions were set regarding Kimberly's return in May 1995, followed by the TPR petition days later, she was denied both procedural due process and her statutory rights because she had no time to meet the new conditions. This case was tried on the basis of prior CHIPS orders and not the May 1995 order. The absence of opportunity to comply with the latest order did not violate Bonnie's rights, statutory or constitutional.

Bonnie also challenges the use of her pre-trial deposition at trial for purposes of impeachment. There was no objection raised to the taking of the deposition. Following the trial in this case, this court decided ***In Re Zachery F.***, 196 Wis.2d 981, 539 N.W.2d 475 (Ct. App. 1995), holding that the discovery procedures of the children's code and not the general civil discovery rules governed ch. 48, STATS., proceedings. ***Id***. at 986-87, 539 N.W.2d at 477. Because our decision post-dated the trial in this matter and because no objection was made on those grounds, this court declines to give that decision retroactive effect. More importantly, even if ***Zachery*** were applied retroactively, under the circumstances, the apparent good faith act of taking the deposition provides no reason in logic or policy to apply an exclusionary rule and suppress the evidence as a sanction.

Bonnie next challenges the county's reading into the record portions of factual allegations of the 1991 CHIPS petition that constituted hearsay. She notes that failure to contest a CHIPS petition does not constitute an admission to the truth of each of the facts therein alleged. The county argues that Bonnie herself raised the issue of the CHIPS petition and the county merely responded. Because there was ample testimony independent of the petition regarding the condition of Bonnie's home, any error was harmless.

Bonnie objects to the trial court's admission of hearsay testimony, namely witnesses' "impressions" of conversations between the witness and others. The court allowed the testimony on grounds that it was not offered to prove the truth of the matter asserted but to show the impact on the social worker who hears the statement. A statement not offered to prove the truth of the matter asserted is not hearsay. The statements related to whether the social workers made diligent efforts to provide services, and the answer to that question depended upon the information available to the workers. The admission of the statements was not an improper exercise of trial court

discretion. Further, the totality of the trial record suggests the statements, if not admitted, would alter the outcome of a new trial.[5]

Bonnie challenges the admission of other trial evidence. She refers to references to the precise nature of her boyfriend's criminal conviction, to opinions concerning whether Bonnie would have continued her relationship with this abusive man even if he had not been sent to prison, as well as his prior act of tattooing the fingers of Kimberly's sister, a child not subject to these proceedings. Because there was no objection, the challenge was waived. ***State v. Peters***, 192 Wis.2d 674, 692-93, 534 N.W.2d 867, 874 (Ct. App. 1995). As with other evidentiary disputes, this court also concludes that a new trial without the challenged evidence would not lead to a different result.

In conclusion, the trial court did not lose competency to proceed, the record does not support the grant of a new trial in the interest of justice, and any evidentiary rulings were either within the trial court's broad discretion or constituted harmless error under the circumstances. The TPR order is therefore affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[5] Bonnie also argues "there was insufficient evidence introduced at the fact finding hearing to allow the jury to find that Kimberly had suffered serious emotional damage." This court agrees with the county's response that there was no finding sought or given regarding emotional damage. If Bonnie means to object to the qualifications of a witness whose testimony included reference to Kimberly's post-traumatic stress disorder, the objection is not well taken. She relies upon a statute, § 48.31(4), STATS., which prohibits a trial court from entering a CHIPS order based upon a finding that a child is suffering serious emotional damage. That statute requires testimony from a licensed expert, and the witness in the TPR hearing was no so licensed. This court concludes that the statute has no application. Generally, the decision whether a witness is qualified to render an opinion rests with the sound discretion of the trial court. ***State v. Dalton***, 98 Wis.2d 725, 730, 298 N.W.2d 398, 400 (Ct. App. 1980).