

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

Nos. 99-0572 & 99-0596

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 99-0572

**IN RE THE TERMINATION OF
PARENTAL RIGHTS OF NICHOLAS J.K.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

LAURIE M.R.,

RESPONDENT-APPELLANT.

No. 99-0596

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

BROWN COUNTY HUMAN SERVICES DEPT.,

PETITIONER-RESPONDENT,

v.

LAURIE M.R.,

RESPONDENT-APPELLANT.

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

CANE, C.J. Laurie M.R. appeals orders terminating her parental rights to Nicholas J.K. and Jeremy R.J. pursuant to § 48.427, STATS. She contends that under *In re Kywanda F.*, 200 Wis.2d 26, 32, 546 N.W.2d 440, 444 (1996), the circuit court lacked competency to enter a dispositional order because: (1) the dispositional hearing was held more than forty-five days after the fact-finding hearing, contrary to § 48.424(4), STATS.; and (2) the order was entered more than ten days after the court heard evidence relating to the disposition, contrary to § 48.427(1). This court concludes that under § 48.315, STATS., the forty-five-day mandatory time restriction was properly extended and that the court complied with the ten-day requirement of § 48.427(1). Accordingly, the orders are affirmed.

I. PROCEDURAL BACKGROUND

The material facts are undisputed. Laurie M.R. is the mother of both Nicholas J.K. and Jeremy R.J., but the boys have different fathers. Roy K. is Nicholas' father, and Walter J. is Jeremy's father. The Brown County Human Services Department petitioned for the termination of Laurie's parental rights and the termination of the respective fathers' parental rights. At a July 13, 1998, fact-finding hearing, Nicholas' parents opposed termination of their parental rights; Roy admitted to the petition's allegations, while Laurie pled "no contest." Accordingly, the court scheduled a dispositional hearing for August 24.

In an August 11 letter, however, Roy's attorney requested an adjournment so that Roy and Nicholas could undergo psychological evaluations. The letter indicated that Roy's attorney had discussed the adjournment with the attorneys of record and that all had agreed to the adjournment. Additionally, Roy's attorney stated that she would coordinate a new date and time to "avoid the need for another hearing simply to select a new hearing date." The court rescheduled the hearing for October 16.

Roy's psychologist began his testimony at the October 16 hearing. At the hearing, the circuit court cited scheduling problems¹ and continued the hearing to November 5, at which time the psychologist gave additional testimony. After the close of evidence on November 5, the court took the matter under advisement. On November 11, the court issued a written decision terminating

¹ In adjourning the hearing until November 5, the court noted that the matter was scheduled for two hours, that the two hours had elapsed, and that they had not yet begun cross-examination.

Laurie's parental rights to both Nicholas and Jeremy. On December 1, the court entered orders terminating Laurie's parental rights.²

II. ANALYSIS

Laurie maintains that the circuit court lacked competency to enter a dispositional order because the dispositional hearing was held more than forty-five days after the fact-finding hearing and because the order was entered more than ten days after the court heard evidence related to the disposition. The County and the guardian ad litem respond that the circuit court properly granted continuances under § 48.315, STATS. Laurie counters that the continuance³ was invalid because the circuit court did not grant it "in open court" or during a telephone conference "on the record" as § 48.315(2), STATS., requires. While this court agrees with Laurie that the continuance from August 24 to October 16 was invalid under § 48.315(2) because it was not granted in open court or during a telephone conference on the record, the continuance was proper under § 48.315(1)(b) because it was granted with all the parties' consent. Additionally, this court concludes that the second continuance was proper under § 48.315(2), STATS. Thus, the circuit court did not lose competency to proceed.

² The court also terminated Roy K.'s parental rights to Nicholas and Walter J.'s parental rights to Jeremy, but only the orders terminating Laurie's parental rights are before this court on appeal.

³ Laurie makes her § 48.315(2), STATS., argument for the first time in her reply brief, apparently in response to the County's and guardian ad litem's contentions. With respect to her § 48.315(2) argument, she does not specify to which continuance she is referring. From our reading of her reply brief, it appears that she is referring to the continuance from August 24 to October 16 because she cites the psychological evaluations as the reason that the dispositional hearing was rescheduled.

The County also contends that in determining whether the order was entered within ten days, this court should use the circuit court's November 11 decision, not the December 1 order, to begin its computation. This court concludes that the County and the guardian ad litem are correct.

Our legislature has directed that the Wisconsin's Children's Code, ch. 48, STATS., be liberally construed to give paramount consideration to the best interest of the child. Section 48.01(1), STATS.; *In re G.H.*, 150 Wis.2d 407, 412, 441 N.W.2d 227, 229-30 (1989). Prompt disposition of a termination petition "is in the best interest of the child." See § 48.01(1)(gr), STATS.⁴ To that end, the Code establishes time restrictions to protect a child's constitutional due process rights. See *Kywanda F.*, 200 Wis.2d at 34-35, 546 N.W.2d at 444-45. One such mandatory restriction is contained in § 48.424(4), STATS., which provides:

If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427. The court may delay making the disposition and *set a date for a dispositional hearing no later than 45 days after the fact-finding hearing if:*

(a) *All parties to the proceeding agree....* (Emphasis added.)

Generally, failure to comply with the Code's mandatory time provisions causes the circuit court to lose its competency to proceed and requires

⁴ Section 48.01(1)(gr), STATS., provides that the children's code be liberally construed to effectuate the following express legislative purposes: "To allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued in accordance with this chapter and termination of parental rights is in the best interest of the child."

dismissal of the termination petition.⁵ See *Kywanda F.*, 200 Wis.2d at 34-35, 546 N.W.2d at 444-45 (discussing *In re B.J.N.*, 162 Wis.2d 635, 657, 469 N.W.2d 845, 854 (1991)). Noncompliance with the mandatory time provisions will not always result in a loss of competency, however. *Id.* at 33, 546 N.W.2d at 444. Section 48.315, STATS., tempers the strictness of this general rule and permits delays, continuances, and extensions of the Code's various time periods. See *G.H.*, 150 Wis.2d at 416-17, 441 N.W.2d at 231. Section 48.315(1) lists the specific circumstances that toll the running of a time limit under the Code. See *G.H.*, 150 Wis.2d at 417, 441 N.W.2d at 231. For example, § 48.315(1)(b) excludes any period of delay resulting from a continuance granted at the request of or with the consent of the child and counsel. A continuance under § 48.315(1)(b) need not be granted in open court on the record.

The statutory list of specific circumstances does not proscribe additional grounds for extending time deadlines. See *G.H.*, 150 Wis.2d at 418, 441 N.W.2d at 232. A court may also grant a continuance under § 48.315(2), STATS., see *id.* at 417, 441 N.W.2d at 231, upon a showing of good cause:

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.

⁵ The Wisconsin Constitution confers subject matter jurisdiction on a circuit court to consider and determine any type of action, but failure to comply with a statutory mandate may result in a loss of competency that can prevent a court from adjudicating a specific case before it. *In re Bollig*, 222 Wis.2d 558, 565, 587 N.W.2d 908, 911 (Ct. App. 1998). Competency is grounded in the court's power to exercise its subject matter jurisdiction. *Id.* at 566, 587 N.W.2d at 911.

Section 48.315(2), STATS. (emphasis added). Moreover, a continuance may be granted under § 48.315(2) for court congestion provided good cause is shown and if the court does so on the record in a timely manner. See *In re J.R.*, 152 Wis.2d 598, 607, 449 N.W.2d 52, 55-56 (Ct. App. 1989). Whether this case's circumstances comply with § 48.315 is a question of law. See *In re Jason B.*, 176 Wis.2d 400, 407, 500 N.W.2d 384, 387 (Ct. App. 1993). Applying these standards, this court concludes that the continuances fall within § 48.315.

First, the continuance from August 24 to October 16 is excluded from the computation of the mandatory time restriction under § 48.424(4), STATS., because it was granted with all parties' consent. See § 48.315(1)(b), STATS. There is no dispute that the adjournment and continuance were accomplished with Laurie's counsel's consent and without objection from all other parties. The August 11 letter from Roy's attorney indicated that all parties agreed to the adjournment; the record contains nothing to indicate that any of the parties objected. The time limits were met because only forty-four days passed between the July 13 fact-finding hearing and the scheduled August 24 dispositional hearing date. The delays that occurred from August 24 to October 16 fall within the tolling provisions of § 48.315(1)(b) because Laurie's attorney consented to the continuance so that Roy's psychologist could evaluate both Roy and Nicholas. Pursuant to § 48.315(1)(b), the forty-five-day mandatory dispositional hearing time limit was tolled. See *J.R.*, 152 Wis.2d at 605-06, 449 N.W.2d at 55.

Second, the delay from October 16 to November 5 is also properly excluded from computation under § 48.315(2), STATS. The court adjourned the October 16 hearing until November 5 because it was concerned about calendar management and court congestion. The two-hour period allotted for the morning of October 16 had already expired, and the psychologist had not yet been

cross-examined. Court congestion and calendar management constitute good cause for a continuance, and the continuance was granted on the record and in a timely manner. *See J.R.*, 152 Wis.2d at 607, 449 N.W.2d at 55-56. Thus, the continuance of the dispositional hearing from October 16 to November 5 complies with § 48.315(2)'s requirements. *See id.* Accordingly, this court concludes that the trial court did not lose competency to proceed because the continuances were ordered in conformance with § 48.315.

Last, Laurie asserts that the circuit court's failure to comply with § 48.427(1), STATS., deprived the court of competency to enter the dispositional order. The County argues that using the court's November 11 written decision for the initial computation date, the court complied with § 48.427(1), which provides: "After receiving any evidence related to the disposition, the court shall enter one of the dispositions specified under subs. (2) to (4) within 10 days." Subsection (3) provides that "the court may enter an order terminating the parental rights of one or both parents."

The court received evidence related to the disposition on both October 16 and November 5. It then issued its written decision on November 11, six days after the latter proceeding. The dispositional order was entered December 1, twenty-six days after the last evidence was received. After setting forth findings of fact, the court's November 11 decision terminated Laurie's parental rights to both Nicholas and Jeremy and Roy's and Walter's parental rights to Nicholas and Jeremy, respectively. Following this conclusion, the court's November 11 decision lists the reasons for the circuit court's determination and notes that such termination is in the best interests of the children.

This court concludes that the November 11 decision complies with § 48.427(1), STATS., requirements. The November 11 decision is essentially the same as the December 1 order; it contains findings of fact, terminates Laurie's parental rights and the children's respective fathers' rights, and includes the reasons for termination. Moreover, the November 11 written decision complies with both § 48.427(1), because it was issued within ten days of the dispositional hearing, and in turn, § 48.427(3), because it terminated the parents' parental rights. Laurie's argument that the circuit court lacked competency for failure to comply with the ten-day restriction thus fails.

By the Court.—Orders affirmed.

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

