

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 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 No. 2005AP2155

Cir. Ct. No. 2004TP68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JEROME W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Jerome W. appeals from the dispositional order terminating his parental rights to Aneissa W. His rights were terminated

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

after the fact finder found grounds existed to terminate his rights as there was a continuing need of protection and services under WIS. STAT. § 48.415(2) (2003-04)² and he failed to assume parental responsibility under WIS. STAT. § 48.415(6). The trial court determined that it was in the best interests of the child to terminate Jerome's parental rights. Jerome alleges that the trial court lost competency to proceed when it failed to hold the fact-finding hearing within the time required by statute. *See* WIS. STAT. §§ 48.422(2) and 48.315(1)(b). Because the trial court either expressly or impliedly tolled the statutory time limits, this court concludes that the trial court retained competency to proceed and terminate the parental rights of Jerome W. Accordingly, the order is affirmed.

BACKGROUND

¶2 Aneissa W. was born on May 27, 2001. Her father is Jerome W. and her mother is Victoria G. Aneissa was detained and placed in foster care on July 11, 2002, when Victoria left her at Jerome's mother's home and did not return for her. At this time, Jerome W. was incarcerated. During that period of time, Jerome did not see Aneissa, and he did not contribute anything toward her care. The court entered an order on August 9, 2002, finding that Aneissa was in need of the protection and services pursuant to WIS. STAT. § 48.13(10). The court ordered that Aneissa be placed in foster care and established the conditions for the parents to meet so that the child could be returned to them.

¶3 Jerome did not comply with the court-ordered conditions for the return of Aneissa during the period from October 20, 2003, to sometime after June

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

2004. He continued to use marijuana, did not participate in Aneissa's medical or dental care, and did not provide any financial support for her.

¶4 On February 11, 2004, the State filed a petition for the termination of the parental rights of Jerome and Victoria to Aneissa. The petition alleged involuntary grounds for termination of parental rights pursuant to continuing need of protection and services under WIS. STAT. § 48.415(2), and failure to assume parental responsibility under WIS. STAT. § 48.415(6).

¶5 Jerome appeared before the court for an initial hearing on March 3, 2004. The court informed him of his rights and, because he was not represented by counsel, the court tolled the statutory time limits so Jerome could seek counsel. On April 29, 2004, Jerome appeared in court with counsel. He was informed of his rights by the court, and he entered a contest posture to the original petition and requested a jury trial. A trial date was set for August 24, 2004, without objection from the GAL.

¶6 On August 5, 2004, a pretrial conference was held in which the parties jointly moved the court for an adjournment of the trial. The court granted adjournment, and ordered Jerome to appear for a deposition as he had failed to appear for a deposition that had been previously scheduled. A new jury trial was scheduled for November 2004, and the GAL consented to the jury trial.

¶7 On August 24, 2004, Jerome did not appear at the trial, and the State asked that he be held in default, which the court took under advisement. Jerome appeared for the final pretrial on November 1, 2004. The State's motion for adjournment of trial was discussed. On November 12, 2004, the trial was adjourned and a final pretrial was scheduled for March 4, 2005, again with the GAL's consent.

¶8 Jerome later agreed to a court trial for the fact-finding hearing. This trial took place on March 22-23, 2005. The court found grounds for continuing CHIPS, pursuant to WIS. STAT. § 48.15(2) and failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). At the dispositional hearing on May 25, 2005, the court found that it was in the best interests of Aneissa to terminate the parental rights of Jerome, and the court terminated his parental rights.

¶9 Jerome now appeals the trial court's termination of his parental rights on the grounds that it lost competency to proceed because of its failure to hold the fact-finding hearing within the time required by statute without first finding good cause for failing to do so.

DISCUSSION

¶10 Jerome argues that the trial court lost competence because the fact-finding hearing took place more than forty-five days after the hearing on the petition, in violation of WIS. STAT. § 48.422. He contends that the GAL did not consent to the extension and that there was no good cause to justify the delay. This court rejects Jerome's challenge of the trial court's competence.

¶11 Timelines for TPR petitions in Wisconsin are governed by two statutory sections of the Children's Code, WIS. STAT. ch. 48, namely WIS. STAT. §§ 48.422 and 48.315. Application of statutes is a legal issue subject to our *de novo* review. *State v. April O.*, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927.

¶12 The language of WIS. STAT. §§ 48.422 and 48.315 is clear and unambiguous and therefore subject to the plain meaning rule. WIS. STAT.

§ 48.422(2) proscribes the time for a fact-finding hearing if a petition is to be contested:

48.422 Hearing on the petition.

....

(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.

¶13 This statute, however, does not stand alone. In assessing whether the time deadline was satisfied, it is also necessary to consult WIS. STAT. § 48.315, which applies to any delays, continuances, or extensions in cases under ch. 48. This statute provides:

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.

¶14 In applying WIS. STAT. § 48.315 here, this court concludes that the forty-five day time requirement of WIS. STAT. § 48.422 was not violated. The hearing on the petition was held on March 3, 2004. At the conclusion of the hearing, the trial court adjourned the matter to April 29, 2004, because Jerome did not have counsel representing him. At the April 29, 2004 hearing, all parties agreed to a trial date of August 24, 2004.

¶15 At this time, Jerome is correct that the trial court did not specifically toll time limits or address the issue of good cause. However, in like situations, this

court has reviewed the record to determine whether it contained evidence to support such a determination. *R.A.C.P. v. State*, 157 Wis. 2d 106, 113, 458 N.W.2d 828 (Ct. App. 1990). In reviewing the record, this court concludes that there was good cause to adjourn the case.

¶16 In picking the date, the court's clerk offered August 23rd as the first available date. It can be reasonably inferred from this information that congestion of the court's calendar prevented the clerk from offering an earlier date. Congestion of a court's calendar is presumed to constitute good cause to toll the TPR time limits. *J.R. v. State*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989).

¶17 In addition, the record that follows the April 24th transcript demonstrates repeatedly that all the parties agreed to additional continuances of this case and tolling of the time limits. At subsequent hearings, the trial court noted that additional delays required tolling of time limits. For example, Jerome failed to appear for a scheduled deposition, thus delaying discovery, and the August 24th trial date was adjourned to November because of a change of counsel. All of the subsequent case history supports the inference that all parties, including the guardian, consented to repeated delays in this case.

¶18 Additionally, although the time deadline in WIS. STAT. § 48.422 cannot be waived, the fact that all parties agree to delays can constitute good cause to toll time limits. There was no objection by any party with respect to the initial selection of the August trial date.³ In addition, the additional delays subsequent to

³ The only discussion was that due to a conflict, the hearing would have to begin on August 24th, rather than August 23rd.

the August trial date were consented to by all the parties. Thus, the trial court found on that basis that tolling of the time limits was permissible.

¶19 Based on the foregoing, this court concludes that the trial court did not lose competency to preside over this case. Rather, the record demonstrates that there was good cause for the repeated delays and that no party objected to the repeated continuances or tolling of the time limits.

¶20 Moreover, the statute provides that a GAL appointed for a child in a TPR proceeding may toll time limits by way of their consent or objection. This rule is consistent with the legislative purpose of the time limits. “What seems like a short wait to an adult can be an intolerable separation to a young child to whom a week can seem like a year and a month forever.” *M.G. v. LaCrosse County H.S.D.*, 150 Wis. 2d 407, 412, 441 N.W.2d 227 (1989).

¶21 A plain meaning of the statutes in the factual context of this case leads to the clear conclusion that the circuit court retained competency to proceed. Counsel for the children appeared in court on April 24, 2004, and consented to the August 24, 2004 trial date. While this consent was implied rather than expressed in specific terms, the fact remains that the GAL, on behalf of Aneissa, consented to the August 24, 2004 trial date. Accordingly, WIS. STAT. § 48.315(1)(b) directs that any time between the hearing on April 29, 2004, and the trial scheduled for August 24, 2004, is “excluded in computing time requirements within [ch. 48]” as there was consent from the counsel for the child.

¶22 Finally, the interests of Aneissa are best protected by interpreting the language of WIS. STAT. §§ 48.422(2) and 48.315(1)(b) in conformity with its plain language in order to allow a trial court to retain competency over the TPR petition if a time period within ch. 48 has not been met. It is undisputed that this particular

case required repeated delay, either because of Jerome's own actions, or because of other situations, under which Jerome consented to the delay.

¶23 Based on the foregoing, this court concludes that Jerome failed to show that the court lost competency to proceed in this case. Therefore, the order terminating Jerome's parental rights is affirmed.

By the Court.—Order affirmed.

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

