COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1150 **Cir. Ct. No. 2003TP237**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GERALD P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Gerald P. appeals the order terminating his parental rights to Joseph P. on the grounds that Joseph was a child who had a continuing

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

need for protection and services under WIS. STAT. § 48.415(2) (2003-04),[2] and that Gerald had failed to assume parental responsibility under WIS. STAT. § 48.415(6). He contends that the trial court lost competency to proceed when it failed to hold a fact-finding hearing within the time required by statute, and that it thus lacked competency to later terminate his parental rights. Gerald therefore submits that the dispositional order terminating his parental right should be vacated. Because proper continuances were granted, the trial court did not lose competency to proceed. Thus, the order is affirmed.

I. BACKGROUND.

¶2 On April 24, 2003, the State filed a petition for the termination of the parental rights of Gerald, Joseph's adjudicated father, and Printthia P., Joseph's mother, to Joseph. With respect to Gerald, the petition alleged Joseph was in continuing need of protection or services under WIS. STAT. § 48.415(2), and that Gerald had failed to assume parental responsibility for him under WIS. STAT. § 48.415(6), as grounds for termination.

¶3 After a petition for termination of parental rights is filed, a court has thirty days from the date of the filing to conduct an initial hearing[3] to determine whether any party wishes to contest the petition. WIS. STAT. § 48.422(1). If a party contests the petition, the court must set a date for a fact-finding hearing

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

[3] The trial court and the parties used both the terms "initial hearing" and "initial appearance" when referring to the hearing discussed in WIS. STAT. § 48.422(1). For purposes of consistency only the term "initial hearing" will be used.

("trial"),[4] which must begin within forty-five days of the initial hearing on the petition. Sec. 48.422(2). If these statutory time limits cannot be met, delays may be permitted under WIS. STAT. § 48.315(1), and continuances may be granted for good cause under § 48.315(2).

¶4 After the petition was filed an initial hearing was scheduled for May 13, 2003, nineteen days after the petition was filed. Gerald and Printthia appeared in court but neither had been appointed counsel. The court adjourned the hearing, and tolled the time limits due to the need for the Public Defender's Office to appoint Gerald and Printthia counsel, and for them to consult with their attorneys. A new hearing was scheduled for June 13, 2003.

¶5 On June 13, 2003, Gerald and Printthia appeared with attorneys. Printthia's initial hearing was completed when she told the court she contested the petition and requested a jury trial. Gerald's attorney, however, explained that there was a potential conflict of interest in his representing Gerald and asked the court to allow him to withdraw. The court granted the request and rescheduled the hearing for July 24, 2003, and with Joseph's guardian ad litem's consent found Gerald's need for new counsel and the need to set deposition dates to be good cause to toll the time limits.

¶6 On July 24, 2003, Gerald appeared with new counsel. Gerald requested a jury trial, thereby completing his initial hearing. Gerald, Printthia, and Joseph's guardian ad litem, all agreed to waive their right to a jury trial within

[4] The trial court and the parties used both the terms "trial" and "fact-finding hearing" when referring to the "fact-finding hearing" discussed in WIS. STAT. § 48.422(2). For purposes of consistency only the term "trial" will be used.

forty-five days, and a trial date was set for October 6, 2003. *See* WIS. STAT. § 48.424(4). The court also scheduled a status hearing for August 21, 2003 to resolve the question of whether to hold a jury or a court trial.

¶7 On August 21, 2003, Gerald again appeared with his attorney. His attorney brought up a discovery request and informed the court that she had yet to receive some of the requested materials. Both Gerald's and Printthia's attorneys agreed that they would not be ready for trial by October 6, 2003, and both requested that a final pretrial be scheduled. Gerald's attorney also alerted the court to the fact that her client was seriously considering voluntarily terminating his parental rights, but due to the lack of discovery she was uncomfortable with him doing so at this time. She also informed the court that Gerald had recently been hospitalized for depression but she did not believe it would amount to a competency concern. October 2, 2003 was chosen for a final pretrial and as a date on which Gerald could voluntarily terminate his parental rights. The trial date was postponed until October 22, 2003. Joseph's guardian ad litem stated that she agreed with the October 2, 2003 pretrial. The court did not explicitly find good cause on the record to schedule a pretrial for October 2, 2003, or to set October 22, 2003 as the trial date.

¶8 On October 2, 2003, the date on which the pretrial was to take place, the district attorney informed the court that the State had attempted to depose Printthia on September 9, 2003, but had been unable to do so, because Printthia had failed to appear. The district attorney explained that due to Printthia's failure to appear, the State would not be prepared for trial on October 22, 2003. Gerald's attorney told the court that her client was no longer considering a voluntary termination and wished to try the case. The court acknowledged that although the parents are entitled to a timely trial, this delay was the mother's fault, and

rescheduled the trial for February 2, 2004 with a pretrial set for December 11, 2003. The court tolled the time limits due to the need for additional discovery and change in trial dates, and warned both parents that if they failed to appear at scheduled depositions or court appearances they could be sanctioned or found in default.

¶9 On December 11, 2003, the parties appeared for a final pretrial. Some documents were missing, so the court was about to reschedule the pretrial, when Gerald uttered: "I feel I can represent myself. I don't need an attorney." His attorney explained that Gerald wanted a court trial, instead of a jury trial for which the case was set. Joseph's guardian ad litem, however, was unwilling to give up the right to a jury trial. After attempting to convince Gerald to maintain his attorney, the court ultimately denied Gerald's request to allow his attorney to withdraw, and found the problem to be "lack of communication" and that the issue needed to be "ironed out" between Gerald and his attorney. The court rescheduled the final pretrial for January 20, 2004, and kept the trial date as February 2, 2004.

¶10 On January 20, 2004, the date on which the final pretrial was to take place, Gerald was not in court. The district attorney moved for default. Gerald's attorney, however, moved for a competency evaluation, stating that her client had a history of mental health problems, including schizophrenia, and explained that he had reported hearing voices during a recent deposition and was very difficult to work with. The court took Gerald's default under advisement and granted the request for a competency evaluation. A status conference was scheduled for January 27, 2004, because a finding of incompetency would hold up the proceeding for not only Gerald but also Printthia. The court found good cause and Joseph's guardian ad litem consented.

¶11 At the January 27, 2004, status conference Gerald was present; Printthia, however, was not. Gerald repeated his desire to have his attorney withdraw from the case and to represent himself. His attorney again expressed her frustration with representing Gerald, and told the court that she did not believe he understood why they were in court and that whenever she talks to him about the case he gets upset. Gerald insulted his attorney numerous times and again told her that he did not want her to represent him. This prompted the court to inquire whether her client's behavior was normal, to which Gerald's attorney answered that it was and that she felt it was best that she stayed on the case. The trial was still scheduled to begin the following Monday, February 2, 2004, while Gerald's competency evaluation was scheduled for that Friday, January 30, 2004, affording the parties only two days to prepare. The district attorney suggested a status conference, feeling that keeping the February 2, 2004, trial date would be a waste of judicial resources due to the apparent unlikelihood that the parties would be able to proceed and because one trial for both parents, would be in the best interest of the child. In the interest of giving the parties adequate time, the court changed the February 2, 2004, trial date to a status conference, and took Printthia's default under advisement. The court did not explicitly state on the record that it was finding good cause to toll the time limits.

¶12 On February 2, 2003, the court was to schedule a new trial date when Gerald's attorney requested that the court allow her to withdraw. She explained that her client completely refused to talk to her and wanted to represent himself, and that because the competency evaluation was still outstanding this was the best time for a new attorney to take over. The court granted the request to withdraw, but denied Gerald's request to represent himself, and ordered him to contact the Public Defender's Office to have a new attorney appointed. The court

was forced to adjourn the case and scheduled a new status hearing for March 12, 2004. With Joseph's guardian ad litem's agreement the court tolled the time limits, "good cause being the need to settle the attorney issue and the outstanding competency evaluation before a trial date is set.

¶13 On March 12, 2004, Gerald appeared at the status hearing with new counsel. Printthia was not in court and her attorney explained that she had been hospitalized after a downturn in her mental health after she had been found outside in very cold weather with no shoes on. The court ordered a competency evaluation for Printthia. The parties now had the results of Gerald's evaluation, which did not endorse Gerald's desire to represent himself and suggested the appointment of a new public defender. Gerald's new attorney asked that he be given time to familiarize himself with the case, and speak with his client before the court decided on whether to appoint a guardian ad litem for Gerald. The court agreed and scheduled a new hearing for May 14, 2004. With Joseph's guardian ad litem's consent, the court tolled the time limits and found the need for a competency evaluation for Printthia to be good cause.

¶14 On April 7, 2004, Printthia's competency evaluation was in. The evaluation concluded that she was not competent. At the district attorney's request, with the agreement of Printthia's attorney and Joseph's guardian ad litem, the court ordered a guardian ad litem to be appointed for Printthia.

¶15 At the May 14, 2004, hearing the court scheduled a trial for September 27, 2004, and a final pretrial for September 16, 2004. Gerald's attorney indicated that he believed his client would benefit from a guardian ad litem. The court agreed and one was appointed. The court tolled the time limits

with Joseph's guardian ad litem's consent; good cause being the appointment of a guardian ad litem for Gerald and calendar conflicts.

¶16 The final pretrial was held on September 16, 2004, as scheduled. Gerald's guardian ad litem made a motion to withdraw on the basis that he was "not needed or necessary." The court granted the motion. It was reiterated, by contrast, that Printthia was not competent and she maintained her guardian ad litem.

¶17 On September 27, 2004, the day on which the trial was to begin, Gerald's attorney asked for an adjournment due to a problem with discovery and told the court that there was new evidence that was exculpatory in nature and included numerous new witnesses that he wished to contact. The court agreed that an adjournment was appropriate. After numerous difficulties in trying to find a date that worked for all parties, the trial was rescheduled for January 18, 2005, and, with Joseph's guardian ad litem's consent, the court tolled the time limits and found the discovery issue and calendar concerns, to be good cause.

¶18 On January 18, 2004, the trial was set to begin. Printthia was not present and the State moved for default. The court said it was considering default and would decide on it at 1:30 p.m. Gerald's attorney, by contrast informed the court that his client was willing to stipulate to the first phase of the termination

proceeding, the grounds phase,[5] on the failure to assume parental responsibility ground, *see* WIS. STAT. § 48.415(6), but that his client was not willing to stipulate to the continuing need for protection and services ground, *see* WIS. STAT. § 48.415(2), and remained in contest posture for the dispositional phase of the proceeding. Gerald began to stipulate to the State's proof of his failure to assume parental responsibility, but at one point his attorney asked for a moment to speak with his client outside the courtroom. When Gerald and his attorney returned Gerald stated that he had changed his mind and wanted a trial. By 1:30 p.m., Printthia's attorney had located his client. The court decided not to default Printthia and the trial was set to start the following day, and to proceed as originally planned. The court also addressed a motion in limine, filed by the State, to admit evidence of charges against Gerald of battering Printthia, by throwing a milk crate at her and hitting her in the head with it. The court admitted the evidence, finding it to be relevant to the continuing need of protection and services ground because Gerald had failed to obey a court order not to do anything that could cause him to go to jail. The court again warned Printthia that if she did not appear for the trial she would be found in default.

[5] Wisconsin has a two-part procedure for the involuntary termination of parental rights. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the first, or "grounds" phase of the proceeding, the petitioner must prove that one or more of the statutory grounds for termination of parental rights exist. ***Id.***; *see* WIS. STAT. § 48.31(1). There are twelve statutory grounds of unfitness for termination of parental rights under WIS. STAT. § 48.415(1)-(10), and if a petitioner proves one or more of the grounds for termination by clear and convincing evidence, "the court shall find the parent unfit." ***Steven V.***, 271 Wis. 2d 1, ¶25 (citation omitted). A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated. ***Id.***, ¶26. Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount. ***Id.*** "At the dispositional phase, the court is called upon to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished." ***Id.***, ¶27.

¶19 The jury trial began as planned on Wednesday January 19, 2005, and continued until the following Monday, January 24, 2005. According to testimony, Joseph, who was born on December 10, 2000, was detained on July 18, 2001 from Printthia's care after the Bureau of Milwaukee Child Welfare was notified that Printthia had been observed screaming that she was going to injure Joseph. Testimony showed that due to Printthia's drug use and decline in her mental stability, Joseph was determined to be a child in need of protection and services, and that after Joseph was detained he could not be placed with Gerald due to, among other things, Gerald's diagnosis of schizophrenia and use of crack cocaine. Joseph was placed in foster care and conditions were placed on the parents for his return. Testimony showed that Gerald has failed to meet the conditions established for the return, including therapy, the completion of programs, and following the recommendations of his psychiatrist. Gerald himself testified that: (1) he does not work and cannot remember the last time he did; (2) he receives a disability check but does not know what his disability is or how much he receives; (3) he moves frequently and has lived in a number of different places, including housing programs, a drug house and the street; and (4) he suffers from mental problems, including paranoid schizophrenia and hears voices. Joseph has been living in foster care ever since he was detained on July 18, 2001.

¶20 On the special verdict question inquiring whether Gerald had failed to assume parental responsibility for Joseph, the jury answered "yes." *See* WIS. STAT. § 48.415(6). The jury also found, with respect to the ground that Joseph was a child in continuing need for protection or services: that the Bureau of Milwaukee Child Welfare had made reasonable efforts to provide services ordered by the Court; that Gerald had failed to meet the conditions established for the return of Joseph; and that it was unlikely that Gerald would meet those conditions

within a twelve-month period. *See* § 48.415(1). The jury thus found that the State established both grounds alleged to terminate Gerald's parental rights, thereby completing the grounds phase. The jury returned the same verdicts for Printthia.

¶21 The second phase of the termination of parental rights proceeding, the dispositional hearing to determine the best interest of Joseph, took place on February 1, 2005. The court concluded that termination of Gerald's parental rights was in Joseph's best interest. *See* WIS. STAT. § 48.426(3)(a)-(f). The same day, the circuit court issued a written order granting the involuntary termination of Gerald's parental rights to Joseph, concluding that Gerald was unfit to be a parent on the ground of failure to assume parental responsibility and continuing need of protection or services. *See* WIS. STAT. § 48.415(2) and (6).

¶22 On February 2, 2005, Gerald, through counsel, filed a notice of his intent to pursue post-dispositional relief. Gerald was appointed new appellate counsel, who filed a no-merit notice of appeal with the trial court, and a no-merit report with this court. In the no-merit report, Gerald's attorney stated that Gerald had not responded to any of his letters and that as a result he had been unable to discuss the appeal with his client, as required by WIS. STAT. RULE 809.32(1), but nonetheless believed Gerald was aware that he had been appointed to represent Gerald. This court ordered appellate counsel to explain his attempts to communicate with Gerald, and declined to take action regarding the no-merit report until an explanation is filed. Gerald's attorney timely filed the requested explanation.

¶23 On August 10, 2005, after determining that counsel's explanation was sufficient to consider the no-merit report, this court issued an order noting that although the issues addressed in the no-merit report lacked arguable merit, an

issue of arguable merit had been raised by a case decided after the report was filed. Based on ***Sheboygan County Dep't of Social Servs. v. Matthew S.***, 2005 WI 84, ¶37, 282 Wis. 2d 250, 698 N.W.2d 631, in which the Wisconsin Supreme Court held that "a competency challenge based on the violation of the statutory time limitation of Wis. Stat. § 48.422(2) cannot be waived, even though it was not raised in the circuit court," this court directed counsel to make more diligent efforts to contact Gerald to ascertain whether he wished to pursue the issue.

¶24 One day before the deadline established by this court, counsel sent two letters, one to Gerald and one to Gerald's trial counsel, and then asked this court for additional time to locate his client. On September 12, 2005, this court "reluctantly" granted the extension. On September 19, 2005, counsel informed this court that he had received correspondence from Gerald in which Gerald stated that he wished to pursue an appeal. This court ordered the previously filed no-merit report rejected and the case converted to a direct appeal. Gerald's attorney timely filed a brief on the new issue.

II. ANALYSIS.

¶25 Gerald contends that the trial court lost competency to proceed when it failed to hold a fact-finding hearing within the time required by statute.

¶26 As noted, when a petition for the termination of parental rights has been filed, WIS. STAT. § 48.422(1)[6] requires that a court conduct a hearing within

[6] WISCONSIN STAT. § 48.422(1) provides:

(continued)

thirty days of the date of the filing of the petition to "determine whether any party wishes to contest the petition." If a party does wish to contest the petition, the court must set a date for fact-finding hearing, often referred to as trial, which must begin within forty-five days of the initial hearing. Sec. 48.422(2).[7]

¶27 The Children's Code makes clear that none of the time limits may be waived. ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. "[F]ailure to comply with mandatory time limits under the Children's Code may result in the loss of the [trial] court's competency to proceed." ***Id.*** (citation omitted). A competency challenge is not waived even if it is not made before the trial court. ***Matthew S.***, 282 Wis. 2d 150, ¶1, ¶37. A competency challenge based on a violation of the statutory time limits of § 48.422(2), is a question of law that this court reviews de novo. ***Matthew S.***, 282 Wis. 2d 150, ¶15.

¶28 The time limits set forth in the Children's Code must, however, be read in conjunction with WIS. STAT. § 48.315, which sets forth circumstances under which delays, continuances and extensions to these time limits may be permitted. Section 48.315(1) provides a list of circumstances that are excluded from the time limits altogether.

> (a) Any period of delay resulting from other legal actions concerning the child …

> 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.

[7] 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."

> (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 …
>
> (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 …
>
> (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.
>
> (h) Any period of delay resulting from the need to appoint a qualified interpreter.

(Emphasis added.) Section 48.315(2) explains the circumstances under which a court may grant continuances:

> A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conversation 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.

¶29 In ***In re J.R.***, 152 Wis. 2d 598, 449 N.W.2d 52 (Ct. App. 1989), this court interpreted WIS. STAT. §§ 48.315(1) and (2), and held that "the enumerated specific circumstances noted in sec. 48.315(1) do not provide the exclusive grounds for time extensions." ***Id.*** at 607. This court also held that "[t]he good

cause requirements of sec. 48.315(2), Stats., control all extensions of time deadlines under the Children's Code" and that the trial court must make a good cause finding "in a timely manner on the record." ***J.R.***, 152 Wis. 2d at 607 (emphasis added).

¶30 An explicit finding of good cause is not always necessary to satisfy the requirement of WIS. STAT. § 48.315(2). ***State v. Quinsanna D.***, 2002 WI App 318, ¶38, 259 Wis. 2d 429, 655 N.W.2d 752.

> Where the record "contains ample evidence to support a finding of good cause" for a continuance of a termination hearing, the trial court's "incantation of statutory phrases [is] unnecessary" for this court to conclude that a continuance beyond what otherwise would have been the statutory time limits, does not deprive the trial court of competence.

Id. In ***Quinsanna***, the fact that the court and the parties attempted to schedule the dispositional hearing within forty-five days, located the earliest date, only one week beyond the forty-five day limit, and all agreed on the date, was "ample evidence to support a finding of good cause." ***Id.***, ¶39 (citation omitted).

¶31 The provisions relevant for this case are WIS. STAT. §§ 48.315(1)(b) and (2), which means the trial court could have granted a continuance: either at the request of the child's guardian ad litem, § 48.315(1)(b), or by making a finding of good cause on the record, § 48.315(2). Consequently, with respect to the court's competency to proceed, the court must both fail to hold a trial within the forty-five day time limit of WIS. STAT. § 48.422(2), *and* fail to grant a proper continuance, either with consent of the guardian ad litem under § 48.315(1)(b), or by making a finding of good cause under § 48.315(2), for it to lose competency to proceed. *See* ***Matthew S.***, 282 Wis. 2d 150, ¶37. "Once a court has lost competency it cannot,

in a later proceeding, find good cause for a delay and thereby restore competency." ***April O.***, 233 Wis. 2d 663, ¶10.

¶32 Gerald argues that in this case two delays did not satisfy either of the statutory requirements for a lawful delay, extension or continuance, under WIS. STAT. § 48.315, and that because the combined time of those two continuances was forty-eight days, three days over the statutory forty-five day limit, the trial court lost competency to proceed. He alleges that, on August 21, 2003, the trial court failed to grant a proper continuance because "[t]here was no finding, on the record, of good cause for the new trial date, nor was there any indication of the consent of any of the attorneys for the parties ..." He thus claims the trial court did not properly grant a continuance until the parties next appeared in court, forty-two days later, on October 2, 2003, and that this amounted to a forty-two day delay. Gerald then alleges that because on January 27, 2004, "[t]he court did not seek or receive the consent of the parties to this continuance and did not find good cause for doing so on the record," and did not grant a proper continuance until February 2, 2004, this resulted in a delay of an additional six days. He therefore reasons that the two continuances add up to forty-eight days, and constitute a violation of the forty-five day limit in WIS. STAT. § 48.422(2), which entitles him to have the dispositional order vacated. This court disagrees.

¶33 It is undisputed that on August 27, 2003, when the court scheduled the trial for January 14, 2003, and on January 27, 2004, when the court scheduled the trial for February 2, 2004, the court granted continuances but failed to make explicit findings of good cause on the record. The issue is therefore whether the trial court nonetheless complied with the "good cause" requirement and whether Joseph's guardian ad litem consented to the continuances.

¶34 At the hearing on August 21, 2003, both Gerald and Printthia's attorneys explained that they had not received the discovery they had requested. Both attorneys felt that because of the discovery request, a pretrial was needed and agreed that they could not be ready by the trial date. Immediately thereafter Gerald's attorney told the court that her client "is very serious about doing a voluntary [termination of parental rights]." This exchange followed:

> THE COURT: All right. We will take off the 10/16 jury trial date.
>
> [DISTRICT ATTORNEY]: 10/6
>
> THE COURT: Pardon me. And look for a new date for that. If I understand your position, you're asking to schedule that also for the voluntary for your client, Ms. [Gerald's defense attorney]?
>
> [GERALD'S ATTORNEY]: Yes, Your Honor.
>
> THE COURT: We'll need more than 15 minutes if you're going to do a voluntary.
>
> THE CLERK: October 2 at 2:00?
>
> [GERALD'S ATTORNEY]: That's fine.
>
> [DISTRICT ATTORNEY]: Fine.
>
> [PRINTTHIA'S ATTORNEY]: That's fine.
>
> [JOSEPH'S GUARDIAN AD LITEM]: That's fine.
>
> [DISTRICT ATTORNEY]: That's the final pretrial and possible voluntary?
>
> THE COURT: Right. Let's look for a trial date. We may as well set that now.
>
> (Off the record to check dates.)
>
> THE CLERK: October 22 at 8:30 in Branch 40.
>
> THE COURT: All right.
>
> [DISTRICT ATTORNEY]: The pretrial is October 2nd at what time?

> THE CLERK: 2:00.
>
> THE COURT: All right. And the scheduling order, which I will provide all of you, requires that the pretrial…

These events at the August 21, 2003 hearing present "ample evidence" that the trial court had good cause to reschedule the trial. The missing discovery alone strongly indicates that the court had good cause to postpone the trial date. *See* ***Quinsanna***, 259 Wis. 2d 429, ¶39. Similarly, Gerald's own attorney's announcement that her client was "very serious about doing a voluntary" is unquestionably a powerful indication that good cause existed, because had Gerald in fact proceeded to voluntarily terminate his parental right, that decision would have disposed of the entire need for the trial. *See* ***id.*** These facts show that the court did make an implicit finding of good cause, even though it did not specifically articulate that finding on the record. *See* ***id.***

¶35 In addition, the trial was scheduled for what seems to have been the earliest available date, a date which, unlike the date in ***Quinsanna***, alone did not even push the delay beyond the time limit allowed by WIS. STAT. § 48.422(2), but caused a delay of only forty-two days. *See* 259 Wis. 2d 429, ¶39.

¶36 Gerald is also incorrect in his assertion that there was no "indication of the consent of any of the attorneys for the parties...." First, as is evident from the above exchange, all parties, including Joseph's guardian ad litem, explicitly approved of October 2, 2003, as the date for the pretrial. The parties do not dispute the fact that by virtue of the guardian ad litem's consent, this continuance is excluded from the time limits under WIS. STAT. § 48.315(1)(b). The parties also do not dispute the fact that on October 2, 2003, the court found good cause and tolled the time limits, under WIS. STAT. § 48.315(2). Gerald's challenge, however, is based on the fact that thereafter the court set October 22, 2003, as the

trial date. He essentially argues that because, on August 21, 2003, the court did not grant a proper continuance for scheduling the trial date for October 22, 2003, but did grant a proper continuance on October 2, 2003, the time between August 21, 2003, and October 2, 2003, forty-two days, was an unlawful delay. This argument is absurd because by the time the court scheduled the trial for October 22, 2003, all the attorneys, including Joseph's guardian ad litem, had consented to the October 2, 2003, pretrial. The continuance for the October 2, 2003, pretrial was thus lawful. Because the parties agree that on October 2, 2003, another lawful continuance was granted, it is clear that there was no stretch of time between August 21, 2003, and October 2, 2003, during which a lawful continuance was not in effect.

¶37 Moreover, while it is true that none of the attorneys expressed direct approval of October 22, 2003, as the new date, it is equally true that they did not object. Indeed the hearing was not adjourned until after a further discussion between Printthia's attorney, the district attorney and the court. The conversation took place with Gerald's attorney and the guardian ad litem still present in the courtroom. It is reasonable to conclude that had the attorneys not consented to the new trial date they would have brought it to the court's attention. In fact, at previous hearings the attorneys regularly objected to proposed dates when such dates posed conflicts. Since they did not object, and since in the past they commonly did so whenever they did not consent to a date, it is fair to conclude that they did indeed consent, albeit implicitly, to the new trial date. Therefore, because all the attorneys, including the guardian ad litem, consented to the trial date, the continuance is excluded from the time limits under WIS. STAT. § 48.315(1)(b).

¶38 The second date on which Gerald alleges that the court failed to grant a continuance is January 27, 2004. On this date, Printthia failed to appear in court. Gerald expressed his desire to have his attorney withdraw and to represent himself, while his attorney expressed her frustration with representing Gerald, but insisted on staying on the case. The trial was scheduled to begin the following Monday, February 2, 2004, however, Gerald's competency evaluation was scheduled for the Friday of that week, January 30, 2004, affording the parties only two days to prepare. In light of the parties not having adequate time to prepare, the court changed the February 2, 2004, trial date to a status conference. The following discussion led to the change:

> [DISTRICT ATTORNEY]: I'm suggesting perhaps a status date to get the eval[uation] and get [Printthia] back here and find out why she wasn't in here today.
>
> THE COURT: Well, I think we have a date, when was the next date?
>
> [JOSEPH'S GUARDIAN AD LITEM]: It's a Monday jury trial.
>
> [DISTRICT ATTORNEY]: But we won't have the evaluation by then.
>
> THE COURT: Okay, we'll adjourn this case today. I'll take a default under advisement as to Printthia. She'll need to be here Monday, obviously, and we have to be here Monday anyway, I think, because she might show up.
>
> [DISTRICT ATTORNEY]: Right.
>
> THE COURT: For that reason alone, we have to keep that date on, and we'll use that as a set date.

At the end of the hearing the date was further clarified:

> [PRINTTHIA'S ATTORNEY]: I'm sorry, is the trial for sure off?
>
> THE COURT: Yes, I'm sorry, the trial is off.

> [DISTRICT ATTORNEY]: Thank you, Your Honor.
>
> THE CLERK: Changed to status for February 2nd at 10 o'clock Branch 40, Judge's Wall's Court.

The fact that Gerald's competency exam had yet to be completed most definitely constitutes good cause for the continuance, since a finding of incompetency would have impacted all subsequent proceedings. *See* ***Quinsanna***, 259 Wis. 2d 429, ¶39. Additionally, the fact that Printthia failed to appear and the court's reasoning that she likely would appear on the date for which the trial had originally been scheduled, also implies that the court had good cause to change the trial date to a status conference. *See* ***id.*** These facts show that even though the court did not explicitly state on the record that it was making a good cause finding, it had "ample evidence" of good cause to grant the continuance. *See* ***id.***

¶39 Further, as on August 21, 2003, on January 27, 2004, the proceeding was again postponed to what seems to have been the earliest available date, resulting in a delay of only eight days, which alone is nowhere near the forty-five, required under WIS. STAT. § 48.422(2). *See* ***Quinsanna***, 259 Wis. 2d 429, ¶39.

¶40 In sum, the court did not lose competency to proceed when it granted continuances on August 21, 2003, and on January 27, 2004, because in both instances the court had good cause to toll the time limits and grant the continuances, thereby satisfying the requirements of WIS. STAT. § 48.315(2). On August 21, 2003, the court also had the guardian ad litem's consent to grant the continuance, thereby satisfying the requirements of WIS. STAT. §§ 48.315(1)(b). Therefore, the order terminating Gerald'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.