COURT OF APPEALS
DECISION
DATED AND FILED

December 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 Nos. 2005AP2431, 2005AP2432

Cir. Ct. Nos. 2004TP61, 2004TP62

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

NO. 2005AP2431

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BONNIE L.,

RESPONDENT-APPELLANT.

NO. 2005AP2432

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BONNIE L.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Reversed.*

¶1 LUNDSTEN, P.J.[1] Bonnie L. appeals orders of the circuit court terminating her parental rights to her children, Crystal A.L. and Jeremiah A.L. Bonnie argues that the circuit court lost competency over the proceedings because it did not hold her initial hearing within the thirty-day statutory time limit and it did not comply with the statute governing continuances. There were several delays after the termination petitions were filed. The issue before us is whether any of these delays deprived the circuit court of competency to proceed. We conclude that the delay between November 16, 2004, and December 22, 2004, was not in compliance with WIS. STAT. § 48.315(2). We reverse.

Background

¶2 On August 30, 2004, the Rock County Department of Human Services filed petitions for the termination of Timothy and Bonnie L.'s parental rights to Jeremiah A.L. and Crystal A.L. The petitions alleged that both children were in continuing need of protection or services under WIS. STAT. § 48.415(2).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 An initial hearing was scheduled for September 27, 2004, before Judge Richard T. Werner. Bonnie did not appear personally at that hearing. Attorney Philip Brehm, who was representing Bonnie in a pending appeal, indicated that he could arrange for Bonnie to obtain representation from the Public Defender's office. The circuit court continued the initial hearing until October 18, 2004.

¶4 At the October 18, 2004 hearing, Bonnie again did not appear in person, and attorney Brehm appeared on her behalf. Attorney Brehm told the court that he was still attempting to obtain permanent representation for Bonnie through the Public Defender's office, and that process was not yet complete. At this hearing, the court continued the proceeding until November 8, 2004, so that "Mr. Brehm can find out what's happening with his potential client." Attorney Brehm agreed to a continuance until November 8.

¶5 On November 8, 2004, Attorney Brehm appeared again without Bonnie. At that hearing, Jeremiah and Crystal's father Timothy L., a co-party to the proceedings, filed a request for a substitution of judge. The court stated that it would remand the files to the newly assigned judge for scheduling.

¶6 On November 16, 2004, the cases were reassigned to Judge Daniel T. Dillon. A notice of hearing, prepared by the County and dated November 22, 2004, was sent to Bonnie indicating that the hearing had been continued until December 22, 2004. At the December 22, 2004 hearing, Bonnie appeared personally by telephone and by attorney Brehm. At that hearing, the court informed Bonnie of her right to an attorney, her right to a jury trial, and her right to request a substitution of the judge. This was the first time Bonnie had been

informed of those rights. Bonnie denied the allegations in both petitions, and requested a jury trial.

¶7 Bonnie entered into a stipulation providing that she admitted the existence of grounds that her children were in need of protection and services, but would be permitted to withdraw her admission if the children's father was successful in contesting that issue. Bonnie stipulated that if the father did not prevail, both parents would have a combined dispositional hearing. The father did not prevail. Consequently, the court found sufficient grounds for the termination of Bonnie's parental rights and entered orders terminating Bonnie's parental rights as to both children. Bonnie appeals.

Discussion

¶8 WISCONSIN STAT. § 48.422(1) provides that, after a petition to terminate parental rights is filed, the circuit court "shall" hold an initial hearing within thirty days. At that hearing, the court must determine whether any party contests the petition, and must inform the parties of their right to a jury trial. *See* WIS. STAT. § 48.422(1) and (4).[2]

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[2] 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.
>
> ….
>
> **(4)** Any party who is necessary to the proceeding or whose rights may be affected by an order terminating parental

(continued)

¶9 The law is clear that compliance with time limits in parental rights termination proceedings is mandatory and that the failure to comply with time limits, absent an applicable exception, results in a court's loss of competency to proceed. *See* ***Sheboygan County Dep't of Soc. Servs. v. Matthew S.***, 2005 WI 84, ¶¶16-18, 282 Wis. 2d 150, 698 N.W.2d 631. However, the court will not lose competency if any failure to comply with the time requirements is based on a delay, continuance, or extension pursuant to WIS. STAT. § 48.315. ***Matthew S.***, 282 Wis. 2d 150, ¶18.[3] Here, the parties dispute whether there was compliance with § 48.315.

¶10 Whether the time limits in the Children's Code were complied with, given undisputed facts, is a question of law that we review *de novo*. ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 639, 549 N.W.2d 489 (Ct. App. 1996).

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rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition.

[3] WISCONSIN STAT. § 48.315 states, in pertinent part:

> **(1)** The following time periods shall be excluded in computing time requirements within this chapter:
>
> ….
>
> (c) Any period of delay caused by the disqualification of a judge.
>
> ….
>
> **(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 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.

A. None Of The Hearings Prior To December 22, 2004, Were Hearings On The Petition Within The Meaning Of WIS. STAT. § 48.422(1)

¶11 The parties first dispute whether any of the appearances by Bonnie's attorney alone, prior to December 22, 2004, was a "hearing on the petition" within the meaning of WIS. STAT. § 48.422(1). Bonnie argues that none of these proceedings qualify as an initial hearing as required by § 48.422(1) because she was not present and, therefore, not informed of her rights as required by the statute.

¶12 The County responds that the failure to inform a party of their rights in a termination of parental rights case is not a reversible error if the party is already aware of those rights. The County also argues that the doctrines of judicial estoppel and invited error should preclude Bonnie from asserting on appeal that none of the hearings prior to the December 22, 2004 hearing qualify as a "hearing on the petition" because Bonnie *chose* not to appear at those hearings, thus prohibiting the court from complying with WIS. STAT. § 48.422(1). We disagree with both contentions.

¶13 First, whether the failure to inform Bonnie of her rights is a "reversible error" is not the issue. Bonnie is not asking this court to reverse based on that failure. Rather, Bonnie is arguing that none of the hearings prior to December 22 complied with the statute and, therefore, a "hearing on the petition" did not occur until December 22. We agree. The essence of a § 48.422(1) hearing is that it is when the circuit court determines whether "any party" contests the termination petition and informs the parties of their rights. Applied to Bonnie, the court needed to determine whether she contested the petition and inform her of her right to a trial. That did not occur until December 22.

¶14 We next address the County's judicial estoppel/invited error argument. This argument relies on the County's assertion that Bonnie exploited what the County perceives to be a problem with the construction of the Children's Code. The County states that, because this is a civil action, Bonnie's personal appearance is generally not required; she may appear by counsel. However, as the County points out, to comply with WIS. STAT. § 48.422(1), regarding initial hearings, a court must inform "the parties" of their rights. Thus, compliance with the statute seems to require the personal presence of the parties. According to the County, a parent could thwart termination proceedings by declining to appear personally and by repeatedly sending an attorney to appear. If this is permitted, a circuit court could never comply with § 48.422(1). It follows, according to the County, that if a parent voluntarily absents himself or herself from a scheduled § 48.422(1) hearing, thereby preventing the circuit court from holding a § 48.422(1) hearing, the parent should be estopped from later claiming that a timely hearing was not held. We disagree.

¶15 Continuances are plainly contemplated by WIS. STAT. ch. 48 and neither party disputes that a court may continue a hearing or extend a time limit under WIS. STAT. § 48.315.

¶16 As for the County's concern that an uncooperative parent could stifle a termination proceeding by simply declining to personally show up for a § 48.422(1) hearing, the flaw in the County's analysis is that it assumes the court is powerless to compel such a parent to attend. If a party unreasonably declines to personally appear, a court may order the party to appear and, if the party still fails to appear, the court may enter default judgment if the court otherwise complies with termination requirements. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶8-9, 17-19, 246 Wis. 2d 1, 629 N.W.2d 768 (holding that a default judgment against a

parent who ignores a court order to personally appear at trial is proper, so long as sufficient evidence is shown for grounds for termination). If a party fails to comply with a court order, that party may be subject to a default judgment against them. ***Id.***, ¶17. Furthermore, even if default judgment is not the proper remedy for a party's failure to comply with a court order to appear at an initial hearing, we think that ***Evelyn*** makes clear that, in the event of such a failure, a circuit court has the authority to move ahead with termination proceedings, despite a party's failure to cooperate with a § 48.422(1) hearing.

¶17 In any event, while it is true that Bonnie, through her attorney, requested two continuances, so far as the record discloses, her purpose was to obtain representation from the public defender's office, not to prevent the termination proceeding from progressing. The doctrine of judicial estoppel is "intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions." ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (citations omitted). We do not see why the doctrines of judicial estoppel or invited error should be applied here.

¶18 Therefore, we conclude that none of the hearings prior to December 22, 2004, were hearings on the petition as required by WIS. STAT. § 48.422(1).

B. The Continuance From November 16, 2004, To December 22, 2004, Was Not Properly Granted

¶19 WISCONSIN STAT. § 48.315(2) provides that, in a WIS. STAT. ch. 48 proceeding, a continuance may be granted 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."

¶20 Bonnie offers two arguments that the various continuances in this case were not properly granted. First, she argues that at least two of the periods of delay were longer than necessary, contrary to WIS. STAT. § 48.315(2). And, second, she contends the last continuance, which extended the initial hearing until December 22, 2004, was not granted in open court and on the record, contrary to § 48.315(2).

¶21 We agree that the delay preceding the December 22 hearing was not in compliance with the statutes. It is, therefore, unnecessary for us to determine whether all of the various continuances complied with WIS. STAT. § 48.315(2). *See* ***Norwest Bank Wisconsin Eau Claire v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994) (we need not address arguments other than those that are dispositive of the appeal).[4]

¶22 The last explicit continuance that was granted in open court in Bonnie's initial hearing proceedings was granted on October 18, 2004. That continuance was granted until November 8. On November 8, there was a short proceeding at which the County filed an amended petition and the children's father, Timothy L., filed a motion for substitution of the judge.[5] The cases were

[4] Bonnie also argues that she did not file for a judicial substitution, and that her proceeding and Timothy L.'s proceeding "could have been heard separately." The County responds that Bonnie did not request severance and did not object to the substitution. Because we reverse on other grounds, we do not address this topic.

[5] Neither party argues that the filing of the amended petition has any effect on the time requirements under WIS. STAT. ch. 48. We, therefore, assume it has no effect.

not expressly continued to a new date. The cases were then reassigned to Judge Dillon on November 16. Bonnie received a "notice of continued hearing," dated November 22, 2004, that informed her the hearing had been continued until December 22, 2004.

¶23 Bonnie argues that the continuance until December 22 "was not granted … in open court or during a telephone conference under sec. 807.13 on the record" as required by WIS. STAT. § 48.315(2). Bonnie makes this argument in her brief-in-chief. In her reply brief, Bonnie argues that the County has conceded the issue by failing to respond to it. We agree.

¶24 Bonnie contends the delay following judicial substitution was a separate continuance that was not granted in open court or on the record. The County's brief does not respond to this argument, or attempt to characterize the delay in any other way. Instead, the County argues that the "December 22, 2004 hearing was a continuance of the initial, September 27, 2004 hearing on the petition." We agree that the December 22 hearing may be considered a continuance of the originally scheduled initial hearing, but the County does not address Bonnie's argument regarding the time after November 8 that, because no continuance was granted in open court and on the record, the continuance was not in compliance with WIS. STAT. § 48.315(2).

¶25 We note that the County does make an argument that at least some of the delay was attributable to the judicial substitution and, therefore, should not be counted. We agree that delay attributable to judicial substitution should not be counted, but the County has failed to demonstrate that the substitution accounted for more than about eight days of the forty-four days between November 8 and December 22.

¶26 Both parties agree that any period of delay caused by the disqualification of a judge is discounted for the purposes of any time requirements under WIS. STAT. ch. 48. WIS. STAT. § 48.315(1)(c). Thus, the period from November 8, 2004, when the request for reassignment was made, until November 16, 2004, when the case was reassigned to Judge Dillon, is excluded from any time requirements.

¶27 Additionally, the period of delay that must be discounted in the event of a judicial disqualification does include more than merely the time required for reassignment. ***State v. Joshua M.W.***, 179 Wis. 2d 335, 343, 507 N.W.2d 141 (Ct. App. 1993). It includes delays caused by "those periods of time necessary to send out any statutorily required notices, notify the parties of the newly scheduled hearing date and to arrange for calendar time on the court's calendar." ***Id.***

¶28 In this case, however, the December 22 hearing was put on the court's calendar on November 16, 2004, the same day that it was reassigned to Judge Dillon. The notice to Bonnie was sent out on November 22, six days after the case was reassigned. There is no indication in the record that the County could not obtain an earlier date from the newly assigned judge.

¶29 Whether the delay following a judicial substitution is proper depends on whether it is "reasonable." *See* ***id.*** at 343-44. "The question of reasonableness will of necessity vary with the circumstances of each case." ***Id.*** at 344. Beyond pointing out that the Thanksgiving holiday fell within the thirty-six-day period of delay, however, the County offers nothing more that would tend to show the delay was reasonable.

¶30 WISCONSIN STAT. § 48.422(1) requires that an initial hearing be held within thirty days of the termination petition being filed. It follows that a delay after a judicial substitution that exceeds thirty days is unreasonable if it is unexplained and not consented to by the parties.

¶31 In sum, whether the delay in this case is viewed as a separate continuance that was not granted in open court and on the record, or as part of the delay as a result of the judicial substitution, the court lost competency to proceed. If it is viewed as a continuance that was granted out of court and not on the record, the court lost competency by failing to comply with WIS. STAT. § 48.315(2). If the delay is viewed as the result of a judicial substitution, the court lost competency because it was an unreasonable delay, contrary to ***Joshua M.W.***

¶32 Although it is possible that the interruption in the proceedings in this case was caused wholly by the delay involved with the judicial substitution and subsequent scheduling difficulties, there is nothing in the record that would permit this court to make such an assumption. The Children's Code places strict time limits on termination proceedings. "'The legislative history of the Children's Code shows that the legislature considers that strict time limits between critical stages within the adjudication process are necessary to protect the due process rights of children and parents.'" ***Matthew S.***, 282 Wis. 2d 150, ¶17 (quoting ***T.H. v. La Crosse County***, 147 Wis. 2d 22, 33, 433 N.W.2d 16 (Ct. App. 1988)).

¶33 It seems counterintuitive that a represented parent may sit back, not complain about a hearing date set too late to comply with a statutory time limit, and then on appeal raise the issue for the first time and force a new termination proceeding, thus further disrupting the lives of his or her children, all with no showing of actual prejudice or that the parent has any better chance to prevail in a

new proceeding. If we were writing on a clean slate, we might reach a different result, but we are not. The law is clear that a parent may challenge a court's competency to proceed, based on the failure to abide by time limits, for the first time on appeal. *See* ***Matthew S.***, 282 Wis. 2d 150, ¶30.

By the Court.—Orders reversed.

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