COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 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. 2005AP1979
2005AP1980

Cir. Ct. Nos. 2004JC35
2004JC36

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2005AP1979

IN THE INTEREST OF CHRISTOPHER K.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PATRICIA E. K.,

RESPONDENT-APPELLANT.

NO. 2005AP1980

IN THE INTEREST OF ISAIAH K.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PATRICIA E.K.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Patricia K. appeals dispositional orders finding her children, Christopher K. and Isaiah K., to be in continuing need of protection and services. She also appeals the court's denial of her post-adjudication motions in each case. Patricia contends that the court erred when it denied her motion for an adjournment and substitution of counsel, that her trial counsel was ineffective, and that a specific factual finding in the dispositional orders is unsupported by the record. We reject Patricia's arguments and affirm the orders.

FACTS

¶2 On March 1, 2004, the State filed petitions alleging that Christopher and Isaiah were in need of protection and services. The petitions alleged multiple grounds, including abuse, risk of abuse, and neglect. At a hearing on March 15, Patricia denied the allegations. A trial date was later set for May 10.

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

¶3 On May 7, Patricia moved for an adjournment based upon the State's late disclosure of several witnesses. The court granted the adjournment and rescheduled the trial for July 21.

¶4 On June 25, Patricia moved for an adjournment and substitution of counsel. Her counsel, Shane Brabazon, informed the court that he had accepted a demanding criminal case, and he felt he could not adequately represent both Patricia and his client in the criminal case. Patricia found a proposed substitute for Brabazon, attorney Gregory Parker, who was also present at the hearing. Parker informed the court that he would need an adjournment of the trial date to be prepared.

¶5 The State objected to any substitution that would further delay the trial. The State had already subpoenaed its witnesses and asserted that an adjournment would not be in the best interests of the children. The guardian ad litem joined in the State's argument, noting that the trial had already been continued well beyond the statutory time limits. The court agreed that further delay was not in the best interests of the children and denied Patricia's motion.

¶6 The trial proceeded with Brabazon as Patricia's counsel. A jury found that Christopher and Isaiah were victims of abuse and neglect. The court then found that both children were in need of protection and services. A dispositional hearing occurred on December 6.

¶7 Patricia filed motions for relief, alleging the court erred in denying her motion for an adjournment and substitution of counsel, that trial counsel was ineffective, and that there were errors in the dispositional orders. The court denied her motions. Patricia appeals.

DISCUSSION

¶8 Patricia first challenges the court's denial of her motion for an adjournment and substitution of counsel. She contends the court improperly failed to apply the balancing test put forth in ***Phifer v. State***, 64 Wis. 2d 24, 218 N.W.2d 354 (1974), where our supreme court adopted several factors for determining whether to grant such a request. ***Id.*** at 31. The State argues that because this is a CHIPS action, the appropriate standard is found in WIS. STAT. § 48.315(2), which requires that any continuance tolling the statutory time limits must be supported by good cause. In response, Patricia argues that her motion should have been granted under either standard.

¶9 We agree with the State's position that WIS. STAT. § 48.315(2) applies here. At the time of Patricia's motion, the case had already been continued well beyond the statutory time limits.[2] Any continuance granted under WIS. STAT. § 48.315 must be supported by good cause. WIS. STAT. § 48.315(2). In ***F.E.W. v. State***, 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988), we determined that the paramount factor for determining whether good cause exists is the best interests of the child. We also determined that additional relevant factors include whether: (1) the party seeking the enlargement of time has acted in good faith; (2) the opposing party has been prejudiced; and (3) the dilatory party took prompt action to remedy the situation. ***Id.***

[2] Notwithstanding continuances complying with WIS. STAT. § 48.315, Patricia's trial should have been held within thirty days of her initial appearance. *See* WIS. STAT. § 48.30(7). Patricia's initial appearance occurred on March 15. At the time of her motions, the trial was scheduled to begin on July 21.

¶10 Patricia cites ***F.E.W.***, but her analysis of the factors ignores the paramount factor: the best interests of her children. With no argument on this factor, Patricia effectively concedes that further delay would not have been in the best interests of her children. Given that this is the paramount factor, even if we were to agree with Patricia's arguments regarding the additional relevant factors, we would not conclude that those factors outweigh the children's best interests.

¶11 Patricia next claims that her trial counsel was ineffective. She argues three bases for this claim. First, she argues that counsel failed to adequately investigate the causes of Christopher's bruising. Second, she contends counsel failed to contact an expert witness located by Patricia or an alternative expert to impeach Christopher's videotaped statement. Finally, she claims counsel failed to call Patricia's counselors as witnesses, who could testify as to Patricia's efforts to deal with Christopher's problems.

¶12 The State and guardian ad litem address the merits of Patricia's ineffective assistance claim, but the State also contends that such a claim was effectively abolished by a 1995 revision of WIS. STAT. § 48.23. The 1995 revision abolished statutory language requiring that parents in CHIPS actions be provided counsel. 1995 Wis. Act 27, § 2442t. In its place, the legislature adopted language prohibiting courts from appointing counsel where a child is alleged to be in need of protection or services.[3] 1995 Wis. Act 27, § 2442v. The State contends that

[3] This prohibition against appointing counsel was held unconstitutional in ***Joni B. v. State***, 202 Wis. 2d 1, 549 N.W.2d 411 (1996). Our supreme court concluded that it violated Wisconsin's separation of powers doctrine. ***Id.*** at 11. The court also held that it violated due process because it prevented courts from using their discretion to appoint counsel in cases where fundamental fairness requires it (for example, where a parent is not competent to represent oneself). ***Id.*** at 18.

ineffective assistance claims in CHIPS cases were premised on the prior version of the statute. The State refers to ***In re M.D.(S.)***, 168 Wis. 2d 995, 485 N.W.2d 52 (1992), where our supreme court concluded that "where the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel." ***Id.*** at 1004 (emphasis in original). Therefore, the State argues that by virtue of the legislature's abolition of the right to counsel, there can be no right to effective assistance of counsel, either. Patricia fails to respond to this argument, thereby conceding it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Therefore, for the purposes of this decision, we agree that Patricia has no claim for ineffective assistance of counsel.[4]

¶13 Patricia's final claim is that one of the court's findings in the dispositional orders is not supported by the record. Specifically, Patricia challenges the finding in paragraph 2.c. of the orders, which addresses the efforts made to effect the permanency plan. The finding reads: "The Department has offered to set up services and a psychological evaluation for Patricia. Given her level of denial and continuing claim of innocence, she is not willing to do so on a voluntary basis…." Patricia contends that she participated in two psychological evaluations before her dispositional hearing. She argues that the only testimony supporting this finding regarded an occasion where she contends she did not refuse to participate in counseling, but only refused to pay for it.

[4] Were we to address the merits of Patricia's ineffective assistance claim, however, we would be inclined to agree with the State and guardian ad litem.

¶14 The State and guardian ad litem contend there is evidence to support this finding. The guardian ad litem elaborates on the facts, noting that Patricia did not attend a counseling session recommended by her social worker in March 2004 because she refused to pay for it. The guardian ad litem also notes that the two evaluations she did undergo were to support her case at the dispositional hearing: the first was with an expert retained on Patricia's behalf, and the second was ordered to allow the State to rebut her expert.

¶15 A circuit court's findings of fact will only be reversed if clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We do not view the finding as clearly erroneous. Given that Patricia failed to comply with her social worker's request for an evaluation, and that the only evaluations she did attend were to support her case at the dispositional hearing, the court could reasonably conclude that Patricia was not cooperating with the State's efforts to provide psychological and counseling services.

By the Court.—Orders affirmed.

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