

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2006

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. 2005AP2112
2005AP2113
2005AP2118
2005AP2119**

**Cir. Ct. No. 2004TP51
2004TP52**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2005AP2112

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JUAN P.,

RESPONDENT-APPELLANT.

No. 2005AP2113

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

JUAN P.,

RESPONDENT-APPELLANT.

No. 2005AP2118

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

SHARON P.,

RESPONDENT-APPELLANT.

No. 2005AP2119

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SHARON P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ In a decision issued on December 8, 2005, this court rejected Sharon P.'s appeal of orders terminating her parental rights to Cameron P. and Alyisha P. In that appeal, Sharon P. argued the trial court lost competency to proceed to the fact-finding hearing because it failed to hold the hearing within forty-five days of the initial hearing on the petition, as required by WIS. STAT. § 48.422(2),² and it failed to comply with WIS. STAT. § 48.315(2)³

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.

² 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.

³ WISCONSIN STAT. § 48.315(2) states:

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.

governing continuances for good cause. Sharon P. filed a petition for review with the supreme court, which granted the petition, summarily vacated this court's decision, and remanded the case for further consideration in light of its decision in *Sheboygan County Department of Social Services v. Matthew S.*, 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631.

¶2 The trial court delayed the proceedings three times after the hearing on the termination petitions. The issue on appeal is whether the delays were properly made under WIS. STAT. § 48.315 such that the trial court had competency to proceed. After further consideration of this case in light of *Matthew S.*, we conclude the trial court lost competency to proceed because it failed to hold the fact-finding hearing within forty-five days of the hearing on the petition, due to the continuance between February 11, 2005, and April 11, 2005, being made without a finding of good cause in contravention of WIS. STAT. § 48.315(2).⁴ We therefore reverse the orders.

BACKGROUND

¶3 The petitions to terminate Sharon P.'s and Juan P.'s parental rights to Cameron P. and Alyisha P. were filed on September 30, 2004. The petitions

⁴ Initially, Sharon P.'s appeal was consolidated with the appeal of her husband's, Juan P. Juan P. then moved for severance for the purpose of holding a *Machner* hearing before the circuit court because of allegations that his trial counsel was ineffective. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The circuit court denied Juan's post-dispositional motion, and Juan P. subsequently brought his appeal here. Because we conclude the trial court lost competency to proceed, that conclusion reverses the termination orders as to both Sharon P. and Juan P. Consequently, we do not address any arguments made by Juan P. in his briefs on appeal and ignore arguments made by the County against Juan P. Any reference in this opinion to Sharon P. applies equally to Juan P.

alleged the children were in continuing need of protection or services under WIS. STAT. § 48.415(2)(a). An adjourned hearing on the petitions was held on November 9, 2004, where Sharon P. and Juan P. entered denials and demanded a fact-finding hearing. Due to the complexity of the case, and with consent by all counsel, the court gave the parties ninety days to complete any necessary pretrial discovery. The fact-finding hearing was not scheduled at this time. Instead, a status conference hearing was scheduled for February 25, 2005.

¶4 On La Crosse County's request, the status conference was moved up to February 11, 2005. The hearing was on the record, although it is not clear as to whether the hearing was held in the courtroom or in the judge's chambers.⁵ Sharon P. and Juan P. did not appear and Juan P.'s attorney also did not appear. Present counsel briefly discussed the need to set a fact-finding hearing date, indicating a three-day trial would be necessary, not including jury selection. After discussion ensued on an unrelated topic, the trial court scheduled the fact-finding hearing for April 11, 2005, without explanation as to why it was necessary to

⁵ The record does not contain the minute sheets of the hearings at issue in this case. Minutes of the hearings are customarily included in the appellate record. The minutes could have been helpful in determining whether a hearing was held on the record and in open court. Because the record in the instant case contains no minute sheets we are unable to determine whether the hearings were held in the courtroom or in the judge's chambers. Since neither Sharon P. nor Juan P. argue the hearings were not held in open court, we do not consider this topic any further.

schedule the hearing beyond the forty-five day time limit of March 28, 2005.⁶ At Sharon P.'s counsel's request, the court also extended discovery until March 7.

¶5 A motion hearing was held on April 4, 2005, with all counsel and parties present, including the guardian ad litem. The court confirmed jury selection would commence on April 25, 2005, rather than April 11, 2005. No discussion was held on the record as to the reason for setting over the fact-finding hearing date from April 11 to April 25.

¶6 The fact-finding hearing was held from April 25, 2005, through April 28, 2005. At the conclusion of the hearing, the jury found grounds to terminate Sharon P.'s and Juan P.'s parental rights. At the conclusion of the May 23, 2005 dispositional hearing, the circuit court orally terminated Sharon P.'s and Juan P.'s parental rights to both Cameron P. and Alyisha P. A written order memorializing this decision was entered on May 27, 2005. Sharon P. and Juan P. appeal.

DISCUSSION

¶7 WISCONSIN STAT. § 48.422(2) provides that a fact-finding hearing on a petition to terminate parental rights shall be held within forty-five days of the initial hearing on the petition if the petition is contested, unless the necessary parties agree to hold a hearing on the merits immediately. Under the Children's

⁶ As we discuss below, Sharon P. does not dispute that the continuance of the fact-finding hearing beyond December 27, 2004, the latest date on which the hearing would have been held had the parties kept to the original forty-five day time limit as mandated by WIS. STAT. § 48.422(2), was for good cause. Her objection goes to holding the fact-finding hearing beyond forty-five days after February 11, 2005, without a finding of good cause by the trial court.

Code, time limits are mandatory and the failure to comply may result in the loss of the circuit court's competency to proceed. See *Matthew S.*, 282 Wis. 2d 150, ¶¶16-18. However, delays, continuances, and extensions may be permitted if there is "good cause," and the showing of good cause is made in open court or during a telephone conference, 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." WIS. STAT. § 48.315(2); see also *Matthew S.*, 282 Wis. 2d 150, ¶18. Furthermore, under certain circumstances, certain delays may not factor into computing time requirements, such as when delay results from "a continuance granted at the request of or with the consent of the child and his or her counsel." Section 48.315(1)(b).

¶8 The issue presented in this appeal is whether the trial court complied with WIS. STAT. § 48.315 when it continued the fact-finding hearing beyond March 28, 2005, the date at which the forty-five day limit would have been reached from the February 11 status conference. This is a question of law we review de novo. See *State v. April O.*, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927.

¶9 Sharon P. argues the circuit court lost competency to proceed because it failed to hold a fact-finding hearing within forty-five days of the February 11, 2005 status conference. More specifically, Sharon P. contends the February 11, 2005 continuance, which extended the fact-finding hearing until April 11, 2005, was granted without a finding of good cause, contrary to WIS. STAT. § 48.315(2), thereby causing the circuit court to lose competency to proceed. We agree.

¶10 The hearing on the petitions terminating Sharon P.’s and Juan P.’s parental rights was held on November 9, 2004. Thus, the fact-finding hearing should have been held no later than December 27, 2004 to comply with the forty-five-day time limit mandated by WIS. STAT. § 48.422(2). However, with all counsel present and at their request, the trial court continued the fact-finding hearing indefinitely, ordered that discovery should be completed within ninety days (February 9, 2005), and scheduled a status conference for February 25, 2005.⁷ Sharon P. impliedly concedes the trial court properly granted this continuance.

¶11 The status conference was rescheduled to February 11, 2005, at the County’s request. Neither Sharon P. nor Juan P. appeared. All counsel appeared at the February 11 status conference except for Juan P.’s attorney. The guardian ad litem requested that the fact-finding hearing be held “soon” without recommending any particular date for the trial. Counsel and the court discussed the length of time necessary to try the matter. Shortly thereafter, the trial court scheduled the fact-finding hearing to commence on April 11 for jury selection, and to proceed with the actual trial on April 18. The trial court did not explain or

⁷ The record of the November 9, 2004 hearing on the petition indicates Sharon P. and Juan P. waived all time limits. We note, however, that under *State v. April O.*, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927, a party cannot waive the mandatory time limits under WIS. STAT. ch. 48. Moreover, a parent subject to a termination petition may not waive a competency challenge, even if not raised in the circuit court. *Sheboygan County Dep’t. of Soc. Servs. v. Matthew S.*, 2005 WI 84, ¶30, 282 Wis. 2d 150, 698 N.W.2d 631. Applying these principles, we summarily reject the County’s argument that Sharon P. was judicially estopped from arguing that good cause did not exist for continuing the fact-finding hearing.

discuss the reasons for scheduling the trial on April 11. We note that forty-five days from February 11 is March 28, 2005.

¶12 We conclude that the continuance from February 11 to April 11 was not granted with good cause as required by WIS. STAT. § 48.315(2). The record does not indicate any discussion concerning the reasons for continuing the proceedings past March 28, 2005. Indeed, we are left to speculate as to why and how the court scheduled the fact-finding hearing for April 11. Even after examining the record, we cannot infer any reason for continuing the proceedings past March 28. Essentially, the record is silent on this topic. Thus, we are left with no alternative but to conclude that good cause was not shown.⁸

¶13 La Crosse County argues the trial court did give good cause for continuing the fact-finding hearing beyond forty-five days. The County asserts that at the November 9, 2004 hearing, the court, counsel, and all parties agreed that extensive discovery was required because of the complexity of the case, thereby providing good cause for continuing the fact-finding hearing. The County's argument is flawed.

¶14 There is no dispute that good cause existed to extend discovery for ninety days and that a status conference was properly scheduled for February 25, 2005. Indeed, as we noted above, Sharon P. impliedly concedes that good cause

⁸ Sharon P. also contends in the alternative that, should we conclude the court properly continued the proceedings on February 11, the record demonstrates that the trial court continued the fact-finding hearing from April 11 to April 25 without good cause and not in open court or on the record. Because we conclude the February 11 continuance was not properly granted, we need not discuss this issue.

existed. But the County fails to point to anything in the record, much less any statement made by the trial court in open court and on the record, indicating good cause to continue the fact-finding hearing beyond forty-five days from the February 11 status conference. In short, while the initial finding of good cause is supportable by the record, the record is silent as to good cause for extending the fact-finding hearing a second time beyond the statutory time limit.

¶15 The County also argues the guardian ad litem consented to each and every continuance. Therefore, according to the County, the forty-five day time period for holding the fact-finding hearing was tolled each time the GAL consented to a continuance. The supreme court has made it clear that the first inquiry in determining whether a trial court lost competency to act in termination matters is whether under WIS. STAT. § 42.315(2) the court gave good cause on the record and in open court for continuing the hearing. *Matthew S.*, 282 Wis. 2d 150, ¶24. Having concluded that the trial court failed to do so here, we need not further address the County's argument.

By the Court.—Orders reversed.

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

