COURT OF APPEALS DECISION DATED AND FILED

April 18, 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 No. 2006AP248

Cir. Ct. No. 2004TP436

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DIAMOND D.J., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RUSHUN L. J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Reversed*.

¶1 KESSLER, J.[1] Rushun L.J. appeals from an order terminating her parental rights to her daughter, Diamond D.J. At issue is whether the circuit court lost competency to proceed when it held the fact-finding hearing beyond the forty-five-day limit of WIS. STAT. § 48.422(2) (2003-04). We conclude that the circuit court lost competency to proceed because: (1) even if we assume that a guardian ad litem's consent to a fact-finding hearing date beyond forty-five days is sufficient to retain competency, there was no affirmative evidence of consent in this case; and (2) there is no evidence to permit us to infer that there was good cause to schedule the hearing beyond the statutory forty-five-day limit. Therefore, we are compelled to reverse.

BACKGROUND

¶2 On September 15, 2004, the State filed a petition to terminate the parental rights of the mother, Rushun, and the alleged father, Robert S.[2] The petition alleged as grounds for termination of Rushun's rights that she had failed to assume parental responsibility, contrary to WIS. STAT. § 48.415(6), and had abandoned the child, contrary to WIS. STAT. § 48.415(1)(a)2.

¶3 On October 5, 2004, the circuit court[3] began an initial appearance for Rushun by telephone, as Rushun was being held at the Southern Oaks Girls School. A continued plea hearing was scheduled for October 27, 2004.

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

[2] The parental rights of Robert S. are not at issue in this appeal and will not be addressed.

[3] The continuances at issue were based on a fact-finding hearing date set by the Hon. Mary Triggiano. The Hon. Dennis R. Cimpl presided over the fact-finding and dispositional hearings.

¶4 On October 27, 2004, Rushun and her attorney appeared for the continued plea hearing. The guardian ad litem and the attorney for the State also appeared. Rushun was advised of her rights and requested a jury trial. The State advised the circuit court that it wished to amend the petition to include a "continuing CHIPS" allegation against Rushun. The circuit court asked if Rushun's counsel objected, to which he replied: "Because I haven't seen it yet and she's moving to amend it, I would rather see the petition first, in its entirety, before I make a decision." This exchange followed:

> THE COURT: [Assistant District Attorney], file the amended petition and we'll take it up at the next court hearing.
>
> [Assistant District Attorney], does that mean you don't want the trial on that same day?
>
> [ASSISTANT DISTRICT ATTORNEY]: I guess I would prefer it, but I certainly understand [defense counsel's] objection.
>
> THE COURT: I will schedule it for a different day.
>
> [DEFENSE COUNSEL]: Thank you, Judge. I appreciate that.
>
> THE CLERK: February 21st at 10 a.m., jury trial.
>
> [ASSISTANT DISTRICT ATTORNEY]: That's fine.
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: We will set a pretrial date.
>
> THE CLERK: February 3rd at 1:30, pretrial.

The guardian ad litem made no statements during this discussion. After a discussion on visitation, in which the guardian ad litem did participate, the hearing ended with the clerk announcing "December 8th, ten a.m., for initial appearance on an amended TPR petition."

¶5 The amended petition was filed on November 15, 2004, and was subsequently served on Rushun. On December 8, 2004, the parties appeared for the initial appearance on the amended TPR petition. The circuit court considered the amended petition and found it legally sufficient. There was an extensive discussion concerning visitation, in which the guardian ad litem participated. At the conclusion of that discussion, the assistant district attorney stated: "I think we are set with trial dates." No one responded to that comment. Instead, defense counsel asked if his client could have some photographs of Diamond and the social worker said she would send some. The circuit court said that would be fine and the hearing concluded.

¶6 Although the fact-finding hearing was originally scheduled for February 21, 2005, the fact-finding hearing was again rescheduled for reasons not relevant to this appeal. The jury found grounds to terminate Rushun's parental rights. The circuit court subsequently found that termination of Rushun's parental rights was in the child's best interest. This appeal followed.

DISCUSSION

¶7 At issue is whether the circuit court lost competency to proceed when it scheduled the fact-finding hearing for February 21, 2005, a date more than forty-five days after October 27, 2004, the date of the continued initial appearance on the termination petition. *See* WIS. STAT. § 48.422(2).[4] A hearing may be held

[4] 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."

outside the forty-five-day limit if a continuance is granted.[5] WISCONSIN STAT. § 48.315(2) provides the basis for continuing the fact-finding hearing:

> 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.

Id.

¶8 Although the Wisconsin Supreme Court has strongly encouraged circuit courts to state on the record reasons for continuing a fact-finding hearing beyond forty-five days, emphasizing that a "circuit court's failure to comply with the statutory time periods may result in loss of competency to proceed[,]" the court has also noted that circuit courts need not engage in an "'incantation of statutory phrases'" to properly invoke WIS. STAT. § 48.315(2). ***State v. Robert K.***, 2005 WI 152, ¶¶33, 57, 286 Wis. 2d 143, 706 N.W.2d 257 (citation omitted). In the absence of an explicit statement of reasons in the record, good cause and the necessity of the length of the delay can be inferred if we find ample support in the record. ***Id.***, ¶¶33, 34.

¶9 The issue of whether the circuit court complied with the time limits and properly granted a continuance under WIS. STAT. § 48.315(2) presents a question of law we review independently. ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752. When evaluating whether good

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[5] The Wisconsin Supreme Court recently held that the word "continuance" in WIS. STAT. § 48.315(2) "is sufficiently broad to encompass situations in which the fact-finding hearing is originally scheduled beyond the statutory 45-day time period." ***State v. Robert K.***, 2005 WI 152, ¶28, 286 Wis. 2d 143, 706 N.W.2d 257.

cause existed, we consider four main factors: "(1) good faith of the moving party; (2) prejudice to the opposing party; (3) prompt remedial action by the dilatory party; and (4) the best interest of the child." ***Robert K.***, 286 Wis. 2d 143, ¶35.

¶10 On appeal, Rushun challenges for the first time the continuances granted on October 27, 2004, and December 8, 2004.[6] She argues that the circuit court did not grant a continuance upon a showing of good cause, in open court, for only so long as was necessary. She acknowledges that even if the circuit court did not use "magic words" to make those findings, this court can still affirm if it can infer from the record "ample evidence" to support a finding of good cause. *See* ***id.***, ¶¶33, 34. However, she contends this court cannot find good cause existed because "the record not only lacks any finding of good cause, but there are simply no facts in the record that support a finding of good cause for scheduling the trial date 117 days beyond the October 27 initial appearance on the original petition."

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[6] Unlike other areas of the law, a competency challenge based on the circuit court's failure to act within the statutory time periods listed within WIS. STAT. ch. 48 cannot be waived, even if an objection is 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. Thus, it is imperative that all parties in a termination of parental rights case be vigilant to insure that if a fact-finding hearing is being scheduled outside the time limits, the circuit court has the information needed to find good cause on the record to continue the hearing. Attention to this critical matter will avoid challenges to the circuit court's competency raised for the first time on appeal, months after the fact-finding and dispositional hearings, which can lead to unfortunate reversals and require cases to be refiled months or years after the initial petition, potentially wreaking havoc on the life of the child. *See* ***Robert K.***, 286 Wis. 2d 143, ¶56 ("When a circuit court states on the record its basis for finding good cause, the parties and reviewing courts are assured that the circuit court has considered the legislative directive for prompt disposition of [termination of parental rights] cases. With such a record, fewer appeals are likely to ensue based on whether good cause existed under Wis. Stat. § 48.315(2). While we recognize such a procedure might place a slight burden on the circuit court, this burden is outweighed by the substantial benefit to the parties, the public, and the legal system.").

¶11 Rushun adds that even if the December 8, 2004, hearing is considered a continued initial appearance, "the February 21 trial date previously set by the court still fell well beyond the 45-day deadline for holding a fact-finding hearing … as this deadline expired on January 22, 2005…."

¶12 In response, the State argues that there was no loss of competency because: (1) the guardian ad litem's consent to the delay excludes that period of time from the requirements of WIS. STAT. § 48.422, so even without a good cause finding, the circuit court retains competency; and (2) even if a good cause finding is necessary, there is sufficient evidence to support a finding that the continuance was for good cause, and for only so long as was necessary. The guardian ad litem makes the same arguments, although it is not clear if she agrees that her consent alone is sufficient to allow the circuit court to retain competency.

A. Guardian ad litem consent

¶13 The State argues that the guardian ad litem's consent to delaying the fact-finding hearing until February 21, 2005, which it infers from the guardian ad litem's silence, was sufficient to maintain circuit court competency. It relies on WIS. STAT. § 48.315(1), which provides:

> **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.

(Emphasis added.) The State argues that "counsel" includes guardians ad litem. It further contends that the guardian ad litem's consent is itself sufficient to delay the proceedings, even without a finding of good cause.

¶14 This is not the first time that the State has presented this argument. In ***Robert K.***, the State made the same argument in support of affirming a circuit court order where there was no finding of good cause on the record. *See* ***id.***, 286 Wis. 2d 143, ¶3. The supreme court affirmed the circuit court order, but on different grounds, concluding that there was good cause to continue the fact-finding hearing. ***Id.***, ¶4. The supreme court explicitly declined to address "whether a guardian ad litem's acquiescence in the circuit court's setting the fact-finding hearing beyond the 45-day period fulfills the consent requirement of Wis. Stat. § 48.315(1)(b)." ***Robert K.***, 286 Wis. 2d 143, ¶58.

¶15 Even if the State is correct that a guardian ad litem can consent to the delay and that no good cause finding is required—issues this court need not decide—this court concludes that the facts in this case provide no proof that the guardian ad litem provided consent. Therefore, we must reject guardian ad litem consent as a basis to affirm the termination order in this case.

¶16 A guardian ad litem is not to be a passive observer in termination proceedings. As the representative of the best interest of the child, the guardian ad litem has a particular responsibility to that child to either affirmatively consent to the continuance or to object to the continuance. The guardian ad litem should tell the circuit court, on the record, the reasons for the position taken.

¶17 In this case, the guardian ad litem did not address the continuance, remaining silent during the selection of a date for trial—a date upon which the circuit court's competency to proceed was utterly dependent. There is no

reference to, or reasonable inference of, any off-the-record discussion among the circuit court and counsel in which the guardian ad litem might have consented to the delay. The evidentiary cupboard is bare of any evidence of the guardian ad litem's position.

¶18 The State and the guardian ad litem maintain affirmative evidence is unnecessary. The guardian ad litem argues: "Although the consent was implied, consent was in fact expressed in the absence of objection to the February 21, 2005 [court date]." Similarly, the State contends:

> While this consent was implied rather than expressed in specific terms, the fact remains that the GAL, on behalf of Diamond J., consented to the February 21, 2005 trial date, and Rushun J. does not suggest otherwise. Accordingly, Wis. Stat. § 48.315(1)(b) directs that any time between the hearing on October 27, 2005 and the trial scheduled for February 21, 2005 is "excluded in computing time requirements within [Chapter 48]" as there was consent from counsel for the child[].

We disagree.

¶19 Under the analysis offered by the State and the guardian ad litem, any time a guardian ad litem is in court and says *nothing* in response to a date set beyond forty-five days, the circuit court would retain competency. Such a system would effectively eradicate the legislative requirement that, unless there is consent by "the child and his or her counsel" or good cause, a hearing must be held within forty-five days. Under the State's argument, *any* date could be set in the absence of the guardian ad litem's affirmative objection.

¶20 While the forty-five-day limit may well be unrealistic, or even impossible, in a busy urban court, we do not have the power to ignore the legislature's mandate. The legislature was explicit in its desire to expedite these

proceedings by requiring that the time limits be observed. Subsequent case law has supported that view. *See* ***Robert K.***, 286 Wis. 2d 143, ¶57. Assuming that, as counsel for the child, a guardian ad litem's consent is sufficient to exclude the time between the initial hearing and the fact-finding hearing, there still was no affirmative evidence of consent in this case.

B. Good cause

¶21 We can still affirm the circuit court's order terminating Rushun's parental rights if we can conclude from the record that there was good cause to set the fact-finding hearing beyond forty-five days. ***Id.***, ¶¶32-33. Like the court in ***Robert K.***, this court

> must now decide whether the facts of record in the present case constitute good cause justifying the setting of the fact-finding hearing beyond the 45-day time period established in Wis. Stat. § 48.422(2) and whether, in accordance with § 48.315(2), the continuance was only for so long as was 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.

Id., 286 Wis. 2d 143, ¶31 (footnote omitted). ***Robert K.*** recognized that court congestion and scheduling problems can constitute good cause, *see* ***id.***, ¶¶29, 30, and that is the basis for the State's argument that good cause existed here.

¶22 The State contends:

> Clearly, the trial court was attempting to provide the earliest available trial date to the parties. There was the necessity of a hearing on the amended petition and it was clear from the October 5, 2004 hearing that Judge Triggiano was attempting to provide Ms. J with the best and most well-informed representation possible.
>
> Rushun J. argues that there is no evidence in the record to support the proposition that the delay was due to court calendar congestion or scheduling conflicts.… In picking

> the date, the court's clerk offered February 21, 2005 as the first available jury trial date. It can be reasonably inferred from the record that congestion of the court's calendar prevented the clerk from offering an earlier date….

The facts of record[7] in the present case do not support the State's argument. All we know from the record is that the court clerk stated a jury trial date. There was absolutely no discussion on the record of the reasons for that date or why no earlier date (within the forty-five-day limit) was available. Nothing suggests a prior off-the-record discussion about the circuit court's calendar or conflicts attorneys may have had with particular trial dates. The State essentially asks us to infer that because the clerk offered that date, it was the first available jury trial date. The record is barren of any facts to support that inference. Were we to acquiesce in the leap of faith the State urges, *any* date offered by a clerk would establish good cause for a continuance. Surely the State is aware of court scheduling problems and cognizant of the need to make efficient use of judicial resources. Assisting the circuit court by pointing out the forty-five-day limit when needed, and making a record of cause for continuing a matter, would address both concerns.

¶23 This court is mindful of the fact that there is significant court congestion in Milwaukee County. Indeed, ***Robert K.*** commented on this. *See* ***id.***, ¶57 n.34. But this court cannot assume, without evidence in the record, that any date a court clerk offers is the earliest available date, and that court congestion or attorney conflicts make earlier dates impossible. To do so would be to effectively

[7] The record reflects a circuit court that patiently and carefully explained the proceedings to Rushun. We have no doubt that the circuit court was doing everything possible to insure that the proceedings were fair to Rushun. It is unfortunate that no counsel or other participant in the case reminded the circuit court of the statutory forty-five-day competency loss problem.

rewrite the applicable statutes and create an automatic exception to the time and condition requirements established by the legislature. This court cannot announce such a rule.

CONCLUSION

¶24 This court has no choice but to conclude that the circuit court lost competency to proceed when it failed to hold the fact-finding hearing within forty-five days, because the record does not establish either consent to the continuance by the guardian ad litem or good cause for a continuance for only so long as is necessary. Therefore, this court must reverse the order terminating Rushun's parental rights.

By the Court.—Order reversed.

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