

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 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. 2006AP1546
2006AP1547
2006AP1548**

**Cir. Ct. Nos. 2004TP233
2004TP234
2004TP235**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**APPEAL NO. 2006AP1546
CIR. CT. NO. 2004TP233**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KERRY R.,

RESPONDENT-APPELLANT.

**APPEAL NO. 2006AP1547
CIR. CT. NO. 2004TP234**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KERRY R.,

RESPONDENT-APPELLANT.

APPEAL NO. 2006AP1548
CIR. CT. NO. 2004TP235

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KERRY R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Kerry R. appeals from orders terminating her parental rights to her children, Filemon B., Teresa B., and Giovanni B. Kerry

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

argues that the orders are not valid because the trial court lost competency to proceed when it failed to hold the fact-finding hearing within the time required by statute. *See* WIS. STAT. §§ 48.422(2) and 48.315(1)(b) (2003-04).² Because the trial court either expressly or impliedly tolled the statutory time limits, this court concludes that the trial court retained competency to proceed and terminate the parental rights to Kerry. Accordingly, the orders are affirmed.

BACKGROUND

¶2 On May 21, 2004, the State filed a petition seeking to terminate Kerry's parental rights to her children, Filemon, Teresa and Giovanni. The petition alleged two grounds for termination: failure to assume parental responsibility and continuing need of protection or services, pursuant to WIS. STAT. §§ 48.415(2) and (6). The initial plea hearing was adjourned to afford Kerry an opportunity to obtain counsel. At the re-set plea hearing on July 23, 2004, Kerry, through counsel, advised the court that she was contesting the petition and requesting a jury trial. The court proceeded to select a date for the fact-finding hearing. The following occurred:

THE CLERK: November fifteen at ten.

THE COURT: Sounds like that's the earliest date. Parties waive time limits?

[KERRY'S COUNSEL]: I will.

THE COURT: Father?

[FATHER'S COUNSEL]: Yes.

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

¶3 At the court trial, the court found that grounds existed to terminate Kerry's parental rights. At the dispositional hearing, the court found that it was in the children's best interests to terminate Kerry's parental rights. The trial court entered orders to that effect. Kerry now appeals from those orders.

DISCUSSION

¶4 Kerry argues that the trial court lost competence because the fact-finding hearing took place more than forty-five days after the hearing on the petition, in violation of WIS. STAT. § 48.422. She contends that the guardian *ad litem* ("GAL") did not consent to the extension and that there was no good cause to justify the delay. This court rejects Kerry's challenge of the trial court's competence.

¶5 Timelines for TPR petitions in Wisconsin are governed by two statutory sections of the Children's Code, WIS. STAT. ch. 48, namely WIS. STAT. §§ 48.422 and 48.315. Application of statutes to the undisputed facts is a legal issue subject to *de novo* review by this court. *State v. April O.*, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927.

¶6 The language of WIS. STAT. §§ 48.422 and 48.315 is clear and unambiguous and therefore subject to the plain meaning rule. WIS. STAT. § 48.422(2) proscribes the time for a fact-finding hearing if a petition is to be contested:

48.422 Hearing on the petition....

(2) 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.

¶7 This statute, however, does not stand alone. In assessing whether the time deadline was satisfied, it is also necessary to consult WIS. STAT. § 48.315, which applies to any delays, continuances, or extensions in cases under ch. 48. This statute provides:

48.315 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.

¶8 In applying WIS. STAT. § 48.315 here, this court concludes that the forty-five-day time requirement of WIS. STAT. § 48.422 was not violated. The hearing at issue in this appeal was on July 23, 2004. At this hearing, which served as the initial appearance with counsel, the trial court advised the parents of their rights. The trial court then asked whether the parents were contesting the petition. Both indicated they were contesting the petition and requested a jury trial. Then the trial court asked both mother and father if they would waive time limits. Both did. The clerk then provided the court with a date for the trial, which was November 15. The record accounting of this was set forth above—the transcript suggests that this date was the earliest possible date available.

¶9 Kerry now claims that the trial court lost competence to proceed in this matter because it did not specifically address the issue of good cause or explicitly elicit consent to waive time limits from the GAL. In situations such as this, this court may review the record to determine whether it contained evidence

to support a good cause determination. *R.A.C.P. v. State*, 157 Wis. 2d 106, 113, 458 N.W.2d 828 (Ct. App. 1990), *aff'd*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992). In reviewing the record, this court concludes that there was good cause to adjourn the case.

¶10 In selecting the date, the court's clerk offered the first available date. It can be reasonably inferred from this information that congestion of the court's calendar prevented the clerk from offering an earlier date. Congestion of a court's calendar is presumed to constitute good cause to toll the TPR time limits. *J.R. v. State*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989).

¶11 In addition, the record that follows the July 23 transcript demonstrates repeatedly that all the parties agreed to additional continuances of this case and tolling of the time limits for good cause. At subsequent hearings, the trial court noted that additional delays, some directly attributable to Kerry's failure to cooperate with answering discovery requests and failure to meet with her attorney, required tolling of the time limits. Further, Kerry failed to appear on several dates, triggering further delays of the fact-finding hearing.

¶12 Additionally, although the time deadline in WIS. STAT. § 48.422 cannot be waived, the fact that all parties agree to delays can constitute good cause to toll time limits. There was no objection by any party with respect to the initial selection of the November trial date. Also, the additional delays subsequent to the November trial date were consented to by all the parties. Thus, the trial court found on that basis that tolling of the time limits was permissible.

¶13 Based on the foregoing, this court concludes that the trial court did not lose competency to preside over this case. Rather, the record demonstrates

that there was good cause for the initial selection of the November trial date and the subsequent continuances. No party objected to the repeated continuances or tolling of the time limits.

¶14 Moreover, the statute provides that a GAL appointed for a child in a TPR proceeding may toll time limits by way of their consent or objection. This rule is consistent with the legislative purpose of the time limits. “What seems like a short wait to an adult can be an intolerable separation to a young child to whom a week can seem like a year and a month forever.” *M.G. v. LaCrosse County H.S.D.*, 150 Wis. 2d 407, 412, 441 N.W.2d 227 (1989) (citation omitted).

¶15 A plain meaning of the statute in the factual context of this case leads to the clear conclusion that the circuit court retained competency to proceed. Counsel for the children appeared in court on July 23, 2004, and consented to the November 15 trial date. While this consent was implied rather than expressed in specific terms, the fact remains that the GAL, on behalf of Filemon, Teresa and Giovanni, did not object to the November 15 trial date at the hearing or any time subsequent to the hearing. Accordingly, WIS. STAT. § 48.315(1) and para. (b) direct that any time between the hearing on June 23, 2004, and the trial scheduled for November 15, is “excluded in computing time requirements within [ch.48]” as there was consent from the counsel for the child.

¶16 Finally, the interests of the children here are best protected by interpreting the language of WIS. STAT. §§ 48.422(2) and 48.315(1)(b) in conformity with its plain language in order to allow a trial court to retain competency over the TPR petition if a time period within ch. 48 has not been met. It is undisputed that this particular case required repeated delays, either because of

Kerry's own actions, or because of other situations, under which Kerry consented to the delay.

¶17 Based on the foregoing, this court concludes that Kerry failed to show that the court lost competency to proceed in this case. Therefore, the orders terminating Kerry's parental rights are affirmed.

By the Court.—Orders affirmed.

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

