

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 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. 2006AP711
2006AP712
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2004TP112
2004TP113**

**IN COURT OF APPEALS
DISTRICT IV**

No. 2006AP711

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

SHETRIA B.,

RESPONDENT-APPELLANT.

No. 2006AP712

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SHETRIA B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Reversed and causes remanded with directions.*

¶1 DYKMAN, J.¹ Shetria B. appeals from orders terminating her parental rights to Marcellus B. and Jordan B. and from an order denying her postjudgment motion to vacate those orders. Shetria B. contends that the circuit court lost competency to exercise jurisdiction over both cases when it failed to hold a fact-finding hearing within forty-five days of the hearing on the petitions as required by WIS. STAT. § 48.422(2). The Dane County Department of Human Services contends that the circuit court retained competency to exercise jurisdiction despite exceeding the statutory time limit because there was good cause under WIS. STAT. § 48.315 to continue the matter beyond forty-five days. We conclude that the record does not support a finding of good cause to continue the matter beyond the required forty-five days, and therefore reverse.

Background

¶2 The following facts are taken from the circuit court's order denying the postjudgment motion. Dane County filed petitions to terminate Shetria B.'s

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.

parental rights to Marcellus B. and Jordan B. on September 30, 2004.² On October 25, 2004, a hearing on the petitions was held before Judge Gaylord. At that hearing, Shetria B. denied the petition and Judge Gaylord granted a request to substitute judges.³ On October 28, 2004, Judge O'Brien's branch received notice from the juvenile clerk's office that Judge O'Brien would be assigned to these cases. The chief judge assigned the cases to Judge O'Brien on November 30, 2004. At a December 20, 2004, hearing, Judge O'Brien found good cause to continue the cases to March 28, 2005.

¶3 On March 15, 2005, Shetria B.'s attorney withdrew from the case. On the record and in open court, the court found good cause to postpone the trial based on the need to assign new counsel to Shetria B. The State Public Defender's Office appointed a new attorney to Shetria B. on April 15, 2005. The court received notice of the appointment of a new attorney on April 19, 2005. The next hearing was held on June 6, 2005, forty-eight days after the court received notification that a new attorney had been assigned.⁴

¶4 A jury found grounds to terminate Shetria B.'s parental rights. At the dispositional hearing on November 16, 2005, the circuit court found Shetria B. unfit and terminated her parental rights. Shetria B. then filed a postjudgment

² The petitions were originally filed to terminate the parental rights of both parents. The children's father, Santiel B., voluntarily terminated his parental rights before trial and is not a party to this appeal.

³ The request to substitute judges was made by Santiel B.

⁴ The record contains one hearing held between March 15, 2005, and June 6, 2005. That hearing was held on May 18, 2005, and was limited to Santiel B.'s consenting to termination of his parental rights. It was held before a substitute judge while Judge O'Brien was on vacation and there was no discussion of a further continuance of the cases at that hearing.

motion requesting that the court vacate the orders terminating her parental rights because the court had lost competency to exercise jurisdiction over the cases before entering those orders. After a hearing, the court denied the motion. Shetria B. appeals the orders terminating her parental rights and the order denying her post-judgment motion to vacate those orders.

Discussion

¶5 Whether a time limit of the Children’s Code has been violated on undisputed facts is a question of statutory interpretation, which we decide de novo. *Waukesha County v. Darlene R.*, 201 Wis. 2d 633, 639, 549 N.W.2d 489 (Ct. App. 1996). Thus, we review whether the statutory time limits were met in this case without deference to the trial court. *See id.*

¶6 Under WIS. STAT. § 48.422(2), when a petition to terminate parental rights is contested, the court must hold a trial within forty-five days of the hearing on the petition. The case may be continued beyond the forty-five day limit, but “only upon a showing of good cause in open court or during a telephone conference ... on the record and only for so long as is necessary” Section 48.315(2). If a court exceeds the forty-five day limit without a proper continuance, it loses competency to exercise jurisdiction over the case. *Sheboygan County Dep’t of Soc. Servs. v. Matthew S.*, 2005 WI 84, ¶¶16-18, 282 Wis. 2d 150, 698 N.W.2d 631.

¶7 Shetria B. argues that the circuit court lost competency on two occasions. First, she argues the court lost competency when trial was not set within forty-five days of October 28, 2004. Shetria B. argues October 28, 2004, was the date Judge O’Brien was assigned and the forty-five days began running because that was the date it was notified by the clerk of courts that it was being

assigned the cases. Second, Shetria B. argues the court lost competency when trial was not set within forty-five days of new counsel being assigned on April 15, 2005. We address each argument in turn.

1. Time Period 10/25/04-12/20/04: Assignment of New Judge

¶8 Delay caused by the disqualification of a judge is excluded in computing the time requirements under the Children’s Code. WIS. STAT. § 48.315(1)(c). Thus, the time required to schedule trial before a substituted judge is excluded from the computation of the time period, “provided the delay is caused by the disqualification and is not unreasonable.” *State v. Joshua M.W.*, 179 Wis. 2d 335, 343, 507 N.W.2d 141 (Ct. App. 1993). However, “a delay by the newly assigned judge exceeding [forty-five] days after the assignment is unreasonable as a matter of law, unless the court finds good cause for granting a continuance under sec. 48.315(2), Stats.” *Id.* at 344.

¶9 Shetria B. contends that the court lost competency when it failed to hold a fact-finding hearing within forty-five days of October 28, 2004, the date on which Judge O’Brien’s branch was notified that Judge O’Brien was being assigned.⁵ Dane County, however, correctly asserts that Judge O’Brien was not assigned until November 30, 2004, when the chief judge signed the order. Wisconsin SCR 70.23(4) (2003-04) provides, in pertinent part:

⁵ Shetria B. asserts that Judge O’Brien denied her request to substitute judges based on the date the court was notified by the clerk of courts it was being assigned these cases. However, Shetria B. does not appeal denial of her request to substitute judges, and we therefore do not discuss whether that denial was proper. Instead, we base our decision on SCR 70.23(4) (2003-04), which explains the procedure for assigning a new judge after a request for substitution is granted.

In cases of substitution, mandatory disqualification or self-disqualification, the judge shall direct the clerk of courts or register in probate of his or her county promptly to notify the chief judge. The chief judge shall assign another judge to preside in the case. The chief judge may direct assignment of judges under this subsection by lot under a tab system.

While the tab system assures equitable case distribution, the chief judge is still required to assign the new judge. In this case, the chief judge assigned Judge O'Brien to these cases on November 30, 2004. We conclude, therefore, that November 30, 2004, is the date from which the forty-five day limit began.

¶10 Judge O'Brien held a hearing on December 20, 2004, which was twenty days after she was assigned. On that date, she found good cause to continue the cases until March 28, 2005.⁶ Because good cause was found on the record within forty-five days of the official assignment of Judge O'Brien, the court retained competency to exercise jurisdiction.

2. Time Period 3/15/04-6/6/05: Substitution of Counsel

¶11 The parties agree that the court properly continued the case on March 15, 2005, to allow new counsel to be assigned to Shetria B. They disagree, however, whether delaying trial until June 6, 2005, was a proper continuance under WIS. STAT. § 48.315(2).

¶12 Shetria B. argues that the court was required to begin the trial within forty-five days of April 15, 2005, and that it lost competency when it failed to do so. She contends that because there was no further continuance on record, the

⁶ This point is undisputed by the parties. Their argument is limited to the date on which Judge O'Brien was assigned.

court exceeded the time limit of forty-five days after assignment of new counsel. Dane County argues that the trial court properly continued the cases to the soonest date that trial could be scheduled. It argues that the record establishes good cause to continue the cases until June 6 because the court found good cause on March 15 to delay trial for new counsel to be appointed, and because testimony at the hearing on Shetria B.'s postjudgment motion established that June 6 was the earliest date the court could set the hearing. We agree with Shetria B. that because there was no continuance on the record before the expiration of forty-five days after the assignment of new counsel, the court lost competency to proceed.

¶13 In *State v. April O.*, 2000 WI App 70, ¶¶9-10, 233 Wis. 2d 663, 607 N.W.2d 927, we rejected the State's argument that the circuit court properly continued the case due to court congestion when its finding of good cause on the record was made after the time limit expired. We explained a finding of good cause after the time limit expires is insufficient because "[o]nce a court has lost competency it cannot, in a later proceeding, find good cause for a delay and thereby restore competency." *Id.*, ¶10.

¶14 The supreme court reiterated this holding in *Matthew S.*, explaining that to avoid losing competency when continuing a case under WIS. STAT. § 48.315(2), a court must grant a continuance in a proceeding before the time limit expires, in open court and on the record. *Matthew S.*, 282 Wis. 2d 150, ¶24. The court concluded that the circuit court lost competency to proceed because it had scheduled the fact-finding hearing outside the forty-five day limit without establishing good cause to continue the case in open court or by telephone conference on the record. *Id.* Thus, the County's argument that the circuit court had good cause to delay trial due to scheduling conflicts failed because the court

had not made that finding on the record before the time limit expired. *Id.*, ¶¶ 20-24.

¶15 Here, the circuit court continued the case on March 15, 2005, for appointment of new counsel. It made no further finding on the record until June 6, 2005, forty-eight days after it was notified of new counsel on April 19, 2005. As the supreme court said in *Matthew S.*:

We do not decide whether the scheduling conflicts, noted on the record at later hearings, would have constituted good cause for a continuance. Such a determination distinguishes this case from *State v. Quinsanna D.*, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, and other cases where scheduling conflicts were discussed on the record, within the statutory time limit.

....

Because of the clear statutory language and legislative intent behind these statutes, we must emphasize the importance of strictly following the provisions of Wis. Stat. ch. 48. While we recognize the need for flexibility in the Children's Code, we believe the legislature addressed this problem with the enactment of Wis. Stat. § 48.315. In this case, for example, the court perhaps could have granted a continuance if it had recognized good cause for the delay in open court or during a telephone conference on the record. Without such action, however, there is no choice for us but to follow the plain language of the statutes, and to hold that the court lost competency to proceed

Matthew S., 282 Wis. 2d 150, ¶¶24 n.8, 36.

¶16 We conclude that because the court made no finding on the record to support a continuance until after forty-five days beyond appointment of new counsel, it lost competency to exercise jurisdiction over these cases. As we said under similar facts in *April O.*:

Precedent compels us to reach a result in this case that is, to say the least, unfortunate.... We empathize with

the circuit court that this is not a good result for the children. However, we may not rewrite clear statutory language, and precedent compels reversal. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

April O., 233 Wis. 2d 663, ¶12. We therefore reverse and remand with directions to dismiss the Dane County Department of Human Services' petitions.

By the Court.—Orders reversed and causes remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

