

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2008

David R. Schanker
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. 2007AP1932

Cir. Ct. No. 2006TP19

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

KEVIN B.,

RESPONDENT-APPELLANT,

KAYLA C.,

RESPONDENT.

APPEAL from an order of the circuit court for Oneida County:
MARK MANGERSON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Kevin B. appeals an order terminating his parental rights. He argues the trial court lost competency to exercise jurisdiction because it failed to complete the fact finding hearing within mandatory time limits and did not properly grant a continuance pursuant to WIS. STAT. § 48.315(2). We conclude the court complied with statutory time limits and therefore affirm.

BACKGROUND

¶2 On October 4, 2006, Oneida County filed a petition for the termination of the parental rights of Kevin B. and Kayla C. to their child Riley C.-B. A jury trial was initially scheduled for December 5 and 6, 2006. However, that date was taken off the calendar. On December 13, the trial was rescheduled for January 8, 2007. The court found good cause to toll the time limits and the guardian ad litem did not object. The jury trial did not occur as scheduled. At a January 12, 2007 hearing, the court ordered a psychological evaluation of Kayla. The court noted, “As I understand it, this has been scheduled far enough out so we don’t have to worry about this being accomplished in a timely fashion.”

¶3 On April 18, 2007, Kayla consented to the voluntary termination of her parental rights. On April 30, the trial for Kevin commenced. The jury found grounds to terminate his parental rights and his rights were terminated on May 30. Kevin filed a post-dispositional order to vacate the TPR order and dismiss the TPR petition alleging the court lost competency to proceed because the April 30 hearing was beyond the forty-five day time limit.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 On November 16, the trial court held a hearing on the motion. The County moved to supplement the record with a stipulation and order dated January 4. The document indicated that a continuance of the January 8 jury trial was requested by Kayla, signed by all of the parties and approved by the court. However, the document had not been filed. The trial court received the stipulation and order into the record and denied Kevin's motion to vacate and dismiss.

DISCUSSION

¶5 This case involves the time requirements of the Wisconsin Children's Code. Construction of a statute and its application to the facts presents a question of law we review without deference. *State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. We begin with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. That language is given its common, ordinary, and accepted meaning. *Id.* It is interpreted in the context in which it is used and in relation to the language of surrounding or closely related ordinances. *Id.*, ¶46. We also consider the scope, history, and the object which the legislature intended to accomplish so far as it can be determined from the text of the statute. *Id.*, ¶48.

¶6 Under WIS. STAT. § 48.422(2), when a petition to terminate parental rights is contested, the court must hold a fact-finding hearing within forty-five days of the hearing on the petition. However, certain time periods may be excluded in computing the requirements. WIS. STAT. § 48.315. If the trial court fails to comply with statutory time limits, it loses competency to exercise jurisdiction over the case. *See 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 WISCONSIN STAT. § 48.315 reads in relevant part:

Delays, continuances and extensions. (1) The following time periods shall be excluded in computing time requirements within this chapter:

(a) Any period of delay resulting from other legal actions concerning the child, including an examination under s. 48.295 or a hearing related to the child’s mental condition, prehearing motions, waiver motions and hearings on other matters.

....

(2) 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.

¶8 The parties agree the forty-five day time period began running on December 13. The County argues the time period was tolled on January 12, 2007 when the court ordered Kayla’s psychological evaluation.² Kevin argues the forty-five days continued to run despite the court’s order, and ran out on January 29, 2007.

¶9 Under WIS. STAT. § 48.315(1)(a) any period of delay resulting from a psychological examination shall be excluded in computing the time requirements. Kevin does not dispute that Kayla’s examination met the requirements of WIS. STAT. § 48.315(1)(a). Rather, he argues that even if the

² The County cites various estoppel theories to argue this court should not review the issue of competency because Kevin signed the January 4, 2007, request for a continuance. The County has provided no cases applying its estoppel theories to TPR proceedings and we can find none. Indeed, the supreme court has specifically noted the “importance of strictly following the provisions of Wis. Stat. ch. 48.” *Sheboygan County Dep’t of Soc. Servs. v. Matthew S.*, 2005 WI 85, ¶36, 282 Wis. 2d 150, 698 N.W.2d 631. We therefore address the merits of Kevin’s argument.

requirements of § 48.315(1)(a) are met, the requirements of § 48.315(2) must also be met.³ In other words, even if the delay was for the purpose of a psychological examination, the court still had to hold a hearing in open court, find good cause, and find that the delay was for only so long as necessary. This, he contends, the court did not do.

¶10 Thus, we must decide whether WIS. STAT. § 48.315(1)(a) is a tolling provision which automatically excludes certain time periods from the computation of the forty-five-day time limit. The alternative is that delays under subsec. (1)(a) are continuances that must also satisfy the requirements of subsec. (2): good cause, open court, on the record, only as long as necessary, etc. Subsection (2) applies to a “continuance.” Subsection (1)(a) does not use the term “continuance.” Rather, it refers to a “period of delay.” Each of the time periods in subsec. (1) begins with the term “[a] period of delay,” but two of them also specifically mention continuances. For example, subsec. (1)(d) refers to, a “period of delay resulting from a continuance granted at the request of the representative of the public....” Thus, the statute differentiates between delays and continuances. We presume the legislature used different terms for a reason. If the legislature had

³ We note, despite Kevin’s failure to cite any support for this conclusion, that some language in a decision by the supreme court could be read to support Kevin’s position. In *M.G. v. La Crosse County Human Servs. Dep’t*, 150 Wis. 2d 407, 418, 441 N.W.2d 227 (1989), the court stated, “the general requirements of sec. 48.315(2), Stats., control all extensions of time deadlines under the Children’s Code[,]” and “the enumerated specific circumstances of sec. 48.315(1) are governed by sec. 48.315(2)...” However, *M.G.* involved a situation in which subsec. (2), but not subsection (1), had been satisfied. In other words, the exact opposite of our case, it did not specifically address whether subsec. (1), or any part thereof, can stand alone. Therefore, the court’s brief reference to the application of subsection (2) to subsec. (1) went beyond the facts of the case and is nonbinding dictum. See *State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W. 2d 449 (1996) (“Dicta is a statement ... in a court’s opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it.”).

intended subsec. (2) to apply to all of subsec. (1), it could have specifically referred to subsec. (1) in the text of subsec. (2).

¶11 Further, applying WIS. STAT. § 48.315(2) to all of subsec. (1) would lead to absurd results. For example, subsec. (1)(c) references, “[a] period of delay caused by the disqualification of a judge.” It would be impossible to comply with subsec. (2) in this situation because the judge would not have the authority to conduct a hearing to make the findings required by subsec. (2). We must interpret the language of the statute to avoid absurd results. *Kalal*, 271 Wis. 2d 633, ¶46.

¶12 For these reasons, we conclude that WIS. STAT. § 48.315(2) is an additional set of requirements that applies only to continuances, not to other periods of delay. Thus, subsec. (1)(a) automatically excludes any time periods related to the psychological examination of a parent. Where time periods are tolled due to the ordering of a psychological examination, “the party seeking to terminate such tolling is properly charged with the burden to accomplish that end.” *Waukesha County v. Darlene R.*, 201 Wis. 2d 633, 644-45, 549 N.W.2d 489 (Ct. App. 1996). It makes no difference that Kayla did not in fact submit to the psychological exam. *See id.* at 644. In this case, the time limits were tolled as the result of an order for a psychological exam and Kevin took no steps to terminate the tolling. Therefore, the court complied with the time requirements of the Wisconsin Children’s Code.

By the Court.—Order affirmed.

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

