COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0925
03-0926

Cir. Ct. Nos. 02TP000003
02TP000004

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NO. 03-0925

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

ASHLAND COUNTY,

PETITIONER-RESPONDENT,

V.

LISA R.,

RESPONDENT-APPELLANT.

NO. 03-0926

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

ASHLAND COUNTY,

PETITIONER-RESPONDENT,

V.

LISA R.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Ashland County: PATRICK J. MADDEN, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Lisa R. appeals orders terminating her parental rights. She argues, (1) the circuit court was incompetent to order the termination of her parental rights because the dispositional hearing was held outside the statutory required forty-five days; (2) the circuit court did not comply with WIS. STAT. § 48.422(7) when it accepted Lisa's admission to the allegations against her in the termination petition; and (3) the circuit court erroneously exercised its discretion by terminating her parental rights. We affirm the orders.

BACKGROUND

¶2 Lisa is the biological mother of Michael R. and Nicholos R. On February 1, 2002, a petition for the termination of Lisa's parental rights was filed. The basis for the petition was that the children were adjudged to be in need of protection or services, had been placed outside the parental home for a cumulative period of six months or longer, Lisa failed to meet the conditions established for

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the safe return of the children to the home, and there was a substantial likelihood she would not meet the conditions within the twelve-month period following the fact-finding hearing. *See* WIS. STAT. § 48.415(2)(a)3.

¶3 On June 5, 2002, Lisa waived her rights with regards to contesting the petition and admitted its allegations. She also stipulated to this in writing:

> I specifically agree and stipulate that the following grounds for the termination of my parental rights to my sons, Michael and Nicholos exist:
>
> 1. Michael and Nicholos have been adjudged to be in need of protection or services and placed outside of my home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law.
>
> 2. The Ashland County Department of Human Services has made a reasonable effort to provide the services ordered by the Court.
>
> 3. I, Lisa [R.], have failed to meet the condition established for the safe return of my sons, Michael and Nicholos to my home.
>
> 4. There is a substantial likelihood that I, Lisa [R.], will not meet these conditions within the twelve-month period following the approval of this stipulation by the Court.

¶4 While Lisa stipulated to the petition's allegations, she reserved her right to challenge the termination of her parental rights at the dispositional hearing. The stipulation also contained a provision that waived the mandatory forty-five day time limit for scheduling the dispositional hearing. *See* WIS. STAT. § 48.424(4). The guardian ad litem also consented to waive the forty-five day time limit.

¶5 The dispositional hearing was scheduled for September 3, 2002, and was later rescheduled for November 15, 2002. On that date, the circuit court terminated Lisa's parental rights to Michael R. and Nicholas R.

DISCUSSION

¶6 The first issue is whether the orders terminating her parental rights are invalid because the circuit court lost competence. Lisa claims that because the dispositional hearing was held after the statutorily required forty-five day time limit, the trial court lost competency to order the termination of her parental rights. *See* WIS. STAT. § 48.424(4); ***Green County D.H.S. v. H.N.***, 162 Wis. 2d 635, 657, 469 N.W.2d 845 (1991). While Lisa concedes she stipulated to waiving any applicable statutory time limits for the scheduling of the dispositional hearing, she cites ***State v. April O.***, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927, as holding the forty-five day time limit in § 48.424(4) cannot be waived. Lisa maintains the dispositional hearing can only be held after forty-five days if a continuance is granted pursuant to WIS. STAT. § 48.315. Here, she insists a continuance was not granted because there was no "showing of good cause in open court … on the record" to justify delaying the matter. *See* WIS. STAT. § 48.315(2). Further, she claims that because the court gave no explanation as to why the hearing was set when it was, it cannot be concluded the hearing was continued "only for so long as is necessary." *See* ***id.*** We hold the circuit court properly continued this matter only for so long as is necessary.

¶7 Whether the circuit court complied with the time limits of WIS. STAT. § 48.424(4) and granted a continuance pursuant to WIS. STAT. § 48.315(2) presents questions of law. *See* ***April O.***, 233 Wis. 2d 663, ¶6. We review questions of law independently. ***Id.***

¶8 Lisa correctly points out there is no provision for waiver of time limits in WIS. STAT. ch. 48. However, the courts have construed the terms "waived," "continued," or "tolled" as implicating whether the trial court granted a continuance pursuant to WIS. STAT. § 48.315. ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 636 n.2, 549 N.W.2d 489 (Ct. App. 1996). Section 48.315(2) reads:

> 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.

¶9 The court does not have to explicitly state it is making a finding of "good cause" on the record for good cause to exist as the basis for a continuance. ***State v. Quinsanna D.***, 2002 WI App 318, ¶38, 259 Wis. 2d 429, 655 N.W.2d 752. If the record contains "ample evidence to support a finding of good cause," ***id.***, this court can conclude a continuance occurred without there actually being the "incantation of [the] statutory phrase." ***Id.*** In determining whether good cause exists, we consider the following 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 interests of the child. ***M.G. v. LaCrosse County H.S.D.***, 150 Wis. 2d 407, 418 n.12, 441 N.W.2d 227 (1989); ***F.E.W. v. State***, 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988).

¶10 Considering the factors, Lisa's stipulation to waive the applicable time limits of WIS. STAT. § 48.424(4) is good cause to continue the dispositional hearing. There is no allegation or evidence of a lack of good faith, and there is no showing Lisa was harmed by holding the hearing outside of the forty-five day time limit. *See* ***F.E.W.***, 143 Wis. 2d at 862. Because the guardian ad litem joined in

waiving the time limits, the best interests of the child cannot be said to have been adversely affected. As a result, the stipulation was good cause to schedule the dispositional hearing outside the forty-five day time limit.

¶11 Our conclusion is bolstered by case law. In ***R.A.C.P. v. State***, 157 Wis. 2d 106, 112, 458 N.W.2d 823 (Ct. App. 1990), a parent claimed the circuit court lost competency to order the termination of her parental rights because her dispositional hearing was not held within forty-five days. However, the parent, her attorneys, the district attorney and the child's guardian ad litem all approved a continuance. ***Id.*** at 114. We held that the circuit court "obeyed the dictates of sec. 48.315." ***Id.***

¶12 Here, Lisa stipulated in writing to waive any applicable statutory time limits for the scheduling of the dispositional hearing. At the admission hearing, the court questioned Lisa as to the scheduling of the hearing in light of the stipulation, and she stated she did not want the hearing scheduled as soon as possible. She again agreed to schedule the hearing outside the forty-five day time limit. Neither the district attorney nor the guardian ad litem raised any objections to the stipulation. In line with ***R.A.C.P.***, there was good cause to continue the dispositional hearing.[2]

[2] Even if there was not good cause to continue the matter under WIS. STAT. § 48.315(2), the guardian ad litem agreed to waive the time limits of WIS. STAT. § 48.424(4). This is sufficient to continue the dispositional hearing by virtue of § 48.315(1)(b). Section 48.315(1)(b) provides that "[a]ny period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel" shall be excluded in computing time requirements.

¶13 Lisa asserts that because no reason for the continuance was provided, it cannot be said the continuance was granted "only for so long as is necessary." *See* WIS. STAT. § 48.315(2). We disagree.

¶14 The record reflects the following testimony from the admission hearing.

> THE COURT: … The next thing would be to schedule this dispositional phase within the statutory time limits. I believe that is 30 days or is it 45 days?
>
> [ASSISTANT DISTRICT ATTORNEY]: 45 days, judge.
>
> THE COURT: Now, because of my physical illness it's most likely that a new judge will be assigned to this and it's my understanding, [Lisa], that you are waiving the time limits of 45 days to have this matter scheduled if it cannot be scheduled within that time period. If it takes 60 days to schedule this, that is all right with you, is that correct?
>
> [LISA]: Yes.
>
> THE COURT: If we can do it within 45 days, that's fine with you as well, is that correct? As soon as possible?
>
> [LISA]: I don't want it as soon as possible.
>
> THE COURT: So, by that statement you're saying as soon as the court can schedule this it's all right with you, whether it's 45 days or 60 days or 100 days, whatever, you're waiving the requirement that it be scheduled within 45 days?
>
> [LISA]: Yes.
>
> THE COURT: That's what you testified to earlier with your attorney. It's consistent with your other agreements. So, I'm going to ask that this matter, by order, that it be scheduled as soon as possible with another judge to comply with statutory requirements, if possible. If not, I find that [Lisa] has waived her right to a hearing within 45 days and it will be scheduled as soon as possible thereafter.

¶15 Two points are noteworthy from this dialogue: first, because of the judge's illness another judge from outside the county had to be assigned, and second, Lisa did not want the dispositional hearing soon. Under these circumstances, we cannot say there was an unreasonable delay. The matter was properly continued. Therefore, the trial court did not lose competence, and its orders terminating Lisa's parental rights stand.

¶16 The next issue is whether the circuit court complied with WIS. STAT. § 48.422(7) when it accepted Lisa's admission to the allegations against her in the petition. Lisa claims the procedure at the admission hearing was flawed in two respects. First, she maintains the court never established the existence of a factual basis for the petition's allegation by testimony. *See* WIS. STAT. §§ 48.422(3), 48.422(7)(c). Second, she argues the circuit court never established whether a proposed adoptive parent of the children had been identified and, if so, never ordered a report including itemizations of payments to be made by the proposed adoptive parents. *See* WIS. STAT. §§ 48.422(7)(bm), 48.913(7). Because of these errors, Lisa avers the termination of parental rights orders should be vacated and a new admission or fact-finding hearing should be held. We are not persuaded.

¶17 WISCONSIN STAT. § 48.422(3) requires testimony in support of a petition's allegations when a parent pleads no-contest. It reads, "[i]f the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." ***Id.*** This section, though, is inapplicable here because Lisa agrees she admitted to the allegations in the petition. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶52, 233 Wis. 2d 344, 607 N.W.2d 607 ("Deciding not to contest the allegations of the petition is not the equivalent to admitting the allegations in a petition."). When a parent admits to

the allegations of the petition, the appropriate procedure is stated in WIS. STAT. § 48.422(7)(c). This section only requires the trial court to "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission." ***Id.*** The language of the statute does not incorporate a requirement that the factual basis for the admission be ascertained exclusively by testimony.

¶18 The language of WIS. STAT. § 48.422(7)(c) is similar to its criminal code counterpart, WIS. STAT. § 971.08(1)(b). Section 971.08(1)(b) states that before the circuit court can accept a plea of guilty or no contest it must, among other things "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." The phrase "such inquiry" only requires the court to "guarantee[] that the defendant is aware of the elements of the crime, and [that] the defendant's conduct meets those elements." ***State v. Thomas***, 2000 WI 13, ¶22, 232 Wis. 2d 714, 605 N.W.2d 836.

¶19 In addition to similar language, the purpose of WIS. STAT. § 971.08(1)(b) is comparable to the duty imposed by WIS. STAT. § 48.422(7)(c) on circuit courts in termination of parental rights cases. ***Burnett County v. Kimberly M.W.***, 181 Wis. 2d 887, 892, 512 N.W.2d 227 (Ct. App. 1994). Section 971.08(1)(b) serves to ensure "[t]hat the conduct which the defendant admits constitutes the offense charged." ***Thomas***, 228 Wis. 2d 508, ¶17. Likewise, § 48.422(7)(c) assures that the power to terminate the parental relationship is justly exercised. It ensures "that the parental rights will not be terminated precipitously, arbitrarily, or capriciously." ***Kimberly M.W.***, 181 Wis. 2d at 892 (citation omitted).

¶20 Given the similarity in language of the two statutes and their purposes, we turn to cases construing WIS. STAT. § 971.08(1)(b) for guidance on

how a factual basis can be established. The supreme court has held that a factual basis under § 971.08(1)(b) can be found by one of several means: the court can question the defendant on the record or it can take into account representations made by the defendant's counsel; the state can offer witness testimony, read police reports or other statements of evidence; or the defendant can stipulate to the facts in the criminal complaint. ***Thomas***, 232 Wis. 2d 714, ¶21.

¶21 Turning to the facts of this case, there was sufficient inquiry to establish a factual basis for Lisa's admissions. At the admission hearing, Lisa testified the grounds for terminating her parental rights were set forth in both the written stipulation agreement as well as in the petition. She testified that the allegations contained in the petition existed. The petition lists detailed factual allegations of the services provided, the conditions Lisa failed to meet, and why there is a substantial likelihood that she will not be able to meet the conditions. The trial court read the written stipulation and found Lisa agreed to stipulate that there are grounds for the termination of her parental rights. The trial court also reviewed the petition as well as the reports filed with it and found that they provided a sufficient factual basis for the termination of parental rights. Looking at the entire record, there was a sufficient factual basis for Lisa's admission.

¶22 The second alleged procedural defect at the admission hearing concerns the trial court's failure to establish whether a proposed adoptive parent had been identified for the children. *See* WIS. STAT. § 48.422(7)(bm). A circuit court must do the following before it can accept an admission of the facts alleged in a termination of parental rights petition:

> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions

> (b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. …
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission

WIS. STAT. § 48.422(7).

¶23 When confronted with an alleged deficient admission proceeding under WIS. STAT. § 48.422(7), we apply the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986). ***Steven H.***, 233 Wis. 2d 344, ¶42. Under ***Bangert***, Lisa has the initial burden to produce a prima facie case comprised of the following two parts. First, she must show the trial court accepted her admission without conforming to WIS. STAT. § 48.422. ***Steven H.***, 233 Wis. 2d 344, ¶42. Second, she must show this was prejudicial by merely alleging she did not know or understand the information that should have been provided at the plea hearing. ***Id.*** If Lisa satisfies this initial burden of production, the burden of persuasion then shifts to the County to show by clear and convincing evidence that Lisa's plea was somehow otherwise knowingly, voluntarily, and intelligently made, despite any shortcomings at the admission hearing. ***Id.***

¶24 Lisa has not made a prima facie case under ***Bangert***. While the record supports Lisa's assertion that the trial court did not conform to WIS. STAT. § 48.422(7) because it did not establish whether a proposed adoptive parent of the child had been identified, Lisa has not shown prejudice. That is, she has not alleged she did not in fact know or understand the information that should have been provided at the admission hearing. As a consequence, we do not disturb the

termination of parental rights orders. *See* ***Kimberly M.W.***, 181 Wis. 2d at 893 (neglect to allege prejudice results in failure to meet initial burden).

¶25 The final issue is whether the trial court erroneously exercised its discretion in terminating Lisa's parental rights. The trial court should "explain the basis for its disposition, on the record, by alluding specifically to the factors in WIS. STAT. § 48.426(3) and any other factors that it relies upon in reaching its decision." ***Sheboygan County D.H.H.S. v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. Section 48.426(3) provides the following non-exhaustive list of factors for the trial court to consider:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶26 The "best interests of the child is the polestar of all determinations under ch. 48." ***David S. v. Laura S.***, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993); *see also* WIS. STAT. § 48.426(2). "Hence, at a dispositional hearing, the court must explore the child's best interests and then determine whether maintaining the parent's rights serves the child's best interests." ***Julie A.B.***, 255

Wis. 2d 170, ¶38. While the best interests of the child are paramount, "the record should reflect adequate consideration of and weight to each factor." ***State v. Margaret H.***, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475. A picture-perfect example of findings is not required. ***State v. Joseph P.***, 200 Wis. 2d 227, 241, 546 N.W.2d 494 (Ct. App. 1996). As long as the record is thorough enough for us to analyze the trial court's handling of factors, we will not remand the case for further findings. ***Id.***

¶27 Lisa claims the court failed to consider the second, third, and fourth factors: the health of the children, the nature of Lisa's relationship with the children and the harm from severing those relationships, and the wishes of the children, respectively. As a result, she argues a new dispositional hearing is required. We conclude the trial court gave adequate consideration to all the factors.

¶28 Regarding the health of the children, the court found the children had special needs that, unfortunately, Lisa could not meet. The dispositional hearing testimony reflected there were concerns about the children's behavioral disorders and developmental delays. Dr. Grace Heitsch, the children's pediatrician, surmised both children may be autistic. In light of this testimony, the court gave adequate consideration to this factor.

¶29 With regards to the Lisa's relationship with the children, the court found there was a relationship between them, but the sheer length of time they were separated from each other weighed in favor of terminating Lisa's parental rights. Terminating her rights would not be harmful, the court found, because Lisa's ability to provide for the children's special needs was limited. The court further found there would be harm to the children should Lisa's parental rights not

be terminated, since the children were likely to remain outside the family home and under the jurisdiction of the juvenile court for a significant period of time. This, the court concluded, was unfair to the children and contrary to their best interests. Accordingly, the court gave adequate consideration to this factor as well.

¶30 Finally, with respect to the wishes of the children, the court stated it was adopting the recommendation of the guardian ad litem. The guardian ad litem expressed reservation as to any value in seeking the wishes of the children because the record indicated the children might be autistic. The guardian ad litem noted that nothing in the record indicated a desire on their part to return home. Given the uniqueness of these considerations, the trial court did its best in giving adequate consideration to this factor. We therefore conclude the trial court properly exercised its discretion.

By the Court.—Orders affirmed.

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