

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2003

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. 03-1737
03-1738**

**Cir. Ct. Nos. 02TP000097
02TP000098**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 03-1737

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
DESIRE M.W., A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY,

PETITIONER-RESPONDENT,

v.

JESSICA M.,

RESPONDENT-APPELLANT.

No. 03-1738

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

BROWN COUNTY,

PETITIONER-RESPONDENT,

v.

JESSICA M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Jessica M. appeals orders terminating her parental rights to her two children. She argues the trial court erred by failing to dismiss this action based on the failure (1) to personally serve her with a written order containing the termination of parental rights warnings, (2) to conclude the initial appearance within thirty days, and (3) to extend the CHIPS order. In the alternative, she argues the trial court erroneously exercised its discretion by terminating her parental rights. We resolve all issues against Jessica and affirm the trial court's orders.

BACKGROUND

¶2 Jessica is the biological mother of Desire M.W. and Marcus A.W. A dispositional order finding these children to be in need of protection and services was entered on December 13, 2001. At that hearing, the court orally informed Jessica of the conditions for the return of her children. Written notification of the conditions was sent by certified mail to Jessica's home address. Levi W., Jessica's

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.

live-in companion and biological father of the children, signed for the letter, and Jessica read the letter within one week of its receipt.

¶3 On October 22, 2002, petitions to terminate Jessica's parental rights were filed. The grounds for the petitions were 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, that Jessica failed to meet the conditions established for 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. Jessica appeared for the initial appearance on November 19, 2002. At the hearing, she indicated she wanted an attorney and the hearing was continued to December 10. On that date, Jessica appeared with counsel and indicated she wished to contest the petitions.

¶4 A jury trial began on January 7, 2003. The jury found grounds existed to terminate Jessica's parental rights, and on February 20 the trial court ordered her parental rights terminated.

DISCUSSION

¶5 Jessica first argues the trial court erred by not dismissing this action based on the failure to personally serve her with the written orders containing the termination of parental rights warnings. *See* WIS. STAT. § 48.356(2). She concedes that the warnings were delivered to her residence by certified mail, that Levi signed for them, and that she viewed the warnings within a week of their delivery. Nevertheless, she argues, without citation to authority, that personal service of the warnings is required to assure parental rights are not terminated arbitrarily. We disagree.

¶6 Questions of statutory interpretation present questions of law we review de novo. *Czapinski v. St. Francis Hosp.*, 2000 WI 80, ¶12, 236 Wis. 2d 316, 613 N.W.2d 120. The purpose of statutory construction is to ascertain the legislature’s intent, and our first resort is to the statutory language itself. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). Our inquiry ends if the legislature’s intent is clear from the plain words of the statute. *Id.* We will not look beyond the plain language of the statute to search for other meanings, but apply the language to the facts of the case before us. *Id.* at 255-56.

¶7 When a court orders a child to be placed outside of his or her home because the child is in need of protection or services, WIS. STAT. § 48.356(1) requires a parent to be orally notified of any applicable grounds for termination of parental rights listed in WIS. STAT. § 48.415 and the conditions necessary for the return of the child to the home. Section 48.356(1) states:

Whenever the court orders a child to be placed outside his or her home ... because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.

In addition to the oral notification, § 48.356(2) requires written notification of the same information where a child is placed outside of the home by written dispositional order. The statute provides: “In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home ... under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).”

¶8 The statute does not prescribe the specific manner by which the written information is to be conveyed to the parent. The plain language of the statute cannot be said to include a requirement of personal service of the written information. Other sections within WIS. STAT. ch. 48 specifically require personal service of various legal documents. *See* WIS. STAT. § 48.273(1) and (4)(b). We conclude the legislature’s refusal to include such language here is decisive that personal service of the written warnings under WIS. STAT. § 48.356(2) is not required.

¶9 The statute simply requires “notice.” WISCONSIN STAT. § 48.356(2) is meant “to forewarn parents that their parental rights are in jeopardy” and to give “adequate notice of the conditions with which the parent must comply for a child to be returned to the home.” *Waukesha County v. Steven H.*, 2000 WI 28, ¶37, 233 Wis. 2d 344, 607 N.W.2d 607. It is undisputed that Jessica received written notice of the information required in § 48.356(2).

¶10 Jessica cites *D.F.R. v. Juneau County*, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), as holding substantial compliance with WIS. STAT. § 48.356(2) is insufficient. However, that case concluded substantial compliance with the substantive content required under § 48.356(2) is insufficient. *D.F.R.*, 147 Wis. 2d at 497. Here, there is no dispute as to the content of the notification, rather only to the means by which Jessica acquired it. *D.F.R.*, therefore, has no bearing here.

¶11 Jessica next argues the trial court lost competence to proceed because the initial hearing was held outside of the thirty-day mandatory time limit. *See* WIS. STAT. § 48.422; *T.H. v. La Crosse County*, 147 Wis. 2d 22, 25, 433 N.W.2d 16 (Ct. App. 1988). The petition for the termination of parental rights

was filed on October 22, 2002. The initial hearing began on November 19. At the hearing, Jessica requested an attorney. The judge referred her to the office of the public defender and delayed the conclusion of the hearing until December 10. On these facts, Jessica agrees the initial hearing was timely commenced. Her argument, though, is that the hearing must be concluded within thirty days after the petitions are filed unless a continuance is granted. She reasons that because the trial court did not make an explicit finding that Jessica's request for an attorney is "good cause" for a continuance, it did not grant a continuance, thereby losing competency to proceed. We disagree with this argument.

¶12 Whether the circuit court complied with the time limits and granted a continuance pursuant to WIS. STAT. § 48.315(2) presents a legal question of statutory interpretation. *State v. April O.*, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927. Our review is independent. *Id.*

¶13 WISCONSIN STAT. § 48.422(1) is silent as to whether the initial appearance must be concluded within thirty days of the petition date. It states:

The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition and inform the parties of their rights under sub. (4) and s. 48.423.

However, WIS. STAT. § 48.315(2) does allow the trial court to grant continuances for good cause. It provides:

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.

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.*

¶14 Jessica nevertheless cites *April O.* as requiring the court to make an explicit finding of good cause before continuances can be granted. However, this is not the precise legal proposition stated in *April O.* In that case, the trial court never granted a continuance at any proceeding before the statutory time period expired. *April O.*, 233 Wis. 2d 663, ¶10. We held the trial court lost competence because of this and could not regain it by retracing its steps after the statutory time period expired to make a finding of good cause. *Id.* Here, the judge granted a continuance on November 19, 2002, well before the thirty-day time period expired. Thus, *April O.* is not controlling.

¶15 Here, the court granted a continuance for good cause. WISCONSIN STAT. § 48.422(5) requires the trial court to grant a continuance for “[a]ny nonpetitioning party ... for the purpose of consulting with an attorney on the request for a jury trial.” The record reveals Jessica requested an attorney; consequently, the trial court was required to grant a continuance in this matter. This alone is ample evidence to support a finding of good cause for a continuance; therefore, the trial court did not lose competence.

¶16 The third issue is whether the trial court erred by not dismissing the action based on its failure to extend the CHIPS order. Jessica contends there is a conflict between WIS. STAT. § 48.365(2), which states “[n]o order may be

extended without a hearing,” and WIS. STAT. § 48.368(1), which provides “[i]f a petition for termination of parental rights is filed ... the dispositional or extension order shall remain in effect until all proceedings related to the filing of the petition ... are concluded.” She argues these statutes cannot be reconciled, and because there was no hearing to extend the CHIPS orders the trial court lost competence. We are unpersuaded.

¶17 There is no statutory conflict. It is a cardinal rule of statutory construction that when a general and specific statute relate to the same subject matter, the specific statute controls. *Martineau v. State Cons. Comm’n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). The general statute states “[n]o order may be extended without a hearing.” WIS. STAT. § 48.365(2). The specific statute provides, “[i]f a petition for termination of parental rights is filed ... the dispositional or extension order shall remain in effect until all proceedings related to the filing of the petition ... are concluded.” WIS. STAT. § 48.368(1). Here, the specific statute controls. The trial court did not lose competence because the original dispositional order remained in effect at all times during the termination of parental rights proceedings. See *Green County D.H.S. v. H.N.*, 162 Wis. 2d 635, 657, 469 N.W.2d 845 (1991).

¶18 The final issue is whether the trial court erroneously exercised its discretion by terminating Jessica’s parental rights. The decision to terminate parental rights is within the discretion of the trial court. *Jerry M. v. Dennis L.M.*, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). We will not overturn the decision of the trial court unless there has been an erroneous exercise of discretion. *Id.* “A circuit court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and an application of the

correct standard of law.” *Sheboygan County D.H.H.S. v. Julie A.B.*, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402.

¶19 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.” *Id.*, ¶30. 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.

¶20 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* WIS. STAT. § 48.424(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.

¶21 The court appropriately exercised its discretion. Based on the factors of WIS. STAT. § 48.426(3), it concluded the best interests of the children required the court to order Jessica’s parental rights terminated.

¶22 First, based on the report compiled by the Department of Health and Family Services, the court noted it had no reason to believe the children were not likely to be adopted.

¶23 Second, the court observed the children were young and relatively healthy, due in large part to the efforts of the Department of Health and Family Services and the grandparents’ care of them.

¶24 Third, the court concluded there was a bond between the children and the Jessica, but found, based on expert testimony, that Jessica’s depression was serious and the depth of problems associated with that impaired her ability to function. The record also showed the children’s ability to adjust when removed from their family home and that this apparently did not harm them.

¶25 Fourth, the court noted the children referred to their grandparents as “Green Bay mom and dad.” This, the court found, signified this is not the typical parent/child relationship.

¶26 Fifth, the court found the children had been separated from their family home for a considerable period of time; they had spent nearly half their lives outside the family home.

¶27 Sixth, the court concluded the children would enter a more stable and permanent family relationship if they were freed for adoption, as opposed to continuing under the jurisdiction of the juvenile court. Again, the court noted the report from the Department of Health and Family Services gave no indication the children were not likely to be adopted in the future.

¶28 Regarding other factors, the court found the children would be condemned to a life of uncertainty in foster care should parental rights not be terminated because 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. Moreover, the children's grandparents testified they were at a point in their lives where they were not able to care for the children. This, too, likely would lead to a foster home situation if parental rights were not terminated. Finally, given the expert testimony on Jessica's psychological condition, the court concluded it was not likely the children would be returned to the family home within a reasonable period of time.

¶29 The court stated nothing it had seen or heard would lead it to believe the conditions placed on Jessica would be met within one year. Accordingly, after weighing all the factors, the court concluded the children deserved a reasonable family life and was not satisfied on the basis of the entire record this was likely to occur in any reasonable time frame.

¶30 Jessica argues that testimony regarding her mental health issues was presented to the trial court, yet the County never offered her any services to address these issues. The record does not support her assertion.

¶31 One of the conditions placed on Jessica by the dispositional order was as follows:

Jessica shall participate in and successfully complete counseling services with Barb Quandt of Family Service Association or another therapist, if deemed appropriate. Throughout the counseling, Jessica shall discuss her concerns of depression and shall comply with, successfully complete, and follow through on all recommendations of a psychological or psychiatric evaluation, if deemed appropriate. Jessica shall address the following issues in counseling: her sexual abuse victimization, domestic violence issues, depression, and any other issues the Department, Jessica, or the therapist deem appropriate.

¶32 Jessica began counseling with Quandt but did not finish. According to Jessica, she stopped attending counseling sessions because her medical assistance would not pay for them and she could not afford them on her own. However, according to Joan Slempek, the child protection worker for Brown County assigned to the case, Jessica stopped her counseling sessions because she felt Quandt was not meeting her counseling needs. From Slempek's standpoint, Jessica did not want to work with Quandt anymore. Because of this, Slempek referred Jessica to the Brown County Mental Health Center for counseling, but Jessica did not show up for her appointment.

¶33 At the dispositional hearing, a psychologist testified Jessica had a lack of motivation for counseling. He diagnosed her with severe depression and post-traumatic disorder. In his opinion, antidepressant medication was necessary. Jessica had been prescribed medication, but was not taking any due to lack of money. Jessica testified at the dispositional hearing that she was not currently receiving treatment for depression. She said she contacted Brown County Mental Health Center to determine if her referral there was still valid. She was informed

it was not and no new referral was made because Jessica had not talked to Slemptes.

¶34 The trial court ultimately concluded that while it was possible for Jessica to overcome her mental health issues, this was not likely to happen. The court noted that Jessica needed to recognize her mental health problems and take the appropriate steps to correct them. The record supports the trial court's assessment. Jessica was presented with opportunities to address her mental health problems. The fact that she did not maximize the benefits from these opportunities is not the County's fault.

By the Court.—Orders affirmed.

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

