

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2005

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 No. 04-2405
STATE OF WISCONSIN**

Cir. Ct. No. 02TP000524

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

STEPHEN C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CARL ASHLEY, Judge.¹ *Affirmed.*

¹ Several other judges heard parts of this case. The Honorable Carl Ashley held the dispositional hearing and signed the order terminating Stephen C.'s parental rights.

¶1 CURLEY, J.² Stephen C. appeals from the order terminating his parental rights to his son, David, born May 29, 1995. On July 16, 2002, a petition was filed seeking the termination of Stephen C.'s parental rights to David, pursuant to WIS. STAT. § 48.415(6); however, a dispositional hearing was not held until April 9, 2004.³ Stephen C. argues that the trial court lost competency to proceed when the dispositional hearing was continued over Stephen C.'s objection. Alternatively, he argues that if the trial court had the authority to grant a continuance, there was no "good cause" shown for the continuance and the continuance was not "only for so long as necessary," as required by WIS. STAT. § 48.315(2). This court affirms.

I. BACKGROUND.

¶2 As noted, a petition was filed on July 16, 2002, seeking the termination of Stephen C.'s parental rights to David. On September 28, 1999, David was found to be a child in need of protection or services, pursuant to WIS. STAT. § 48.355. Consequently, he was removed from his parents' home and placed in a foster home. David has remained outside the care of his parents since September 27, 1999.

¶3 After the termination of parental rights proceedings were commenced, a hearing was held on August 7, 2002. This hearing was continued

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

³ The petition also sought to terminate the parental rights of David C.'s mother, but she is not a party to this appeal.

to September 17, 2002. At the September hearing, the case was scheduled for a contested fact-finding hearing on February 10, 2003, with a final pretrial hearing set for January 24, 2003. At the final pretrial, the State advised the court and Stephen C. that it was going to proceed with the fact-finding hearing, but notified the court that David may have to be moved from his current placement because of some licensing issues involving his prospective adoptive home.

¶4 At the fact-finding hearing held on February 10, 2003, Stephen C. stipulated that there were sufficient grounds for the State to bring the termination action. Stephen C. agreed with the following allegations listed in the termination petition:

B. Continuing CHIPS: David remains a child in need of protection or services, pursuant to Sec. 48.415(2), Wis. Stats. The dispositional orders, supra, contained numerous conditions of return of the children to the home, towards which end the BMCW has made reasonable efforts to provide appropriate services available to the father. Mr. [C] has failed to meet the conditions established for the return of the child to his home. Specifically: Mr. [C] has not cooperated with the BMCW, has not maintained a suitable residence, has not shown interest in his child, has not completed a psychological examination, has not undergone an AODA assessment, and has not shown that he can meet David's physical or emotional needs.

Consequently, the trial court found Stephen C. to be an unfit parent. The court then inquired as to whether the parties were ready to proceed to the dispositional phase. The State explained that it was not ready to proceed because of an "unusual licensing issue with the adoptive parents." As a result, the State requested that the time limits be tolled, pursuant to WIS. STAT. § 48.315. The guardian ad litem (GAL), David's mother, and Stephen C. all stipulated to extending the hearing beyond the forty-five day period required under WIS. STAT. § 48.422(2). The trial court then set the dispositional hearing for April 28, 2003.

¶5 On April 28, 2003, the State asked for another adjournment of thirty to forty-five days, indicating that it did not have a definite adoptive resource for David. The court again tolled the time limits and set a new date. Stephen C. advised the court that he had no objection to this particular adjournment, but would object to any future adjournments. On June 26, 2003, the adjourned date for the dispositional hearing, the matter was again called. The State advised the court that no adoptive resource had been found for David and the State asked for yet another adjournment. The GAL joined in the State's request. Stephen C. objected. The court granted the adjournment over Stephen C.'s objection. The court found good cause, stating that it was adjourning the matter because the State had no adoptive resource for David.

¶6 On the adjourned date of September 2, 2003, the matter was again adjourned after the State told the court that David's placement "fell apart." The GAL joined the State in its request for another adjournment. Stephen C. moved for a dismissal. The trial court took Stephen C.'s request for a dismissal under advisement, tolled the time limits, and set both a status date and a date for a dispositional hearing.

¶7 At the continued dispositional hearing, Stephen C. requested an adjournment due to the fact that David's older brother, a possible placement resource, was expected to graduate from a program at Fort McCoy in several days. This request was granted and the court set the matter for a status conference on January 28, 2004. At the status hearing, Stephen C. reminded the court that the dispositional hearing had been pending for almost one year. The court again tolled the time limits based on the record and the court's congested calendar. On April 9, 2004, a dispositional hearing was held, at which time the court found that it was in David's best interest for Stephen C.'s parental rights to be terminated.

II. ANALYSIS.

¶8 Stephen C. first argues that the trial court lost jurisdiction in this matter when it failed to hold a dispositional hearing on both June 26, 2003, and September 2, 2003, after he objected to an adjournment. He submits that WIS. STAT. § 48.424 “only allows a continuance upon agreement of the parties,” and “[t]here certainly was no agreement here.” Anticipating that the State may argue that WIS. STAT. § 48.315 permits a continuance, Stephen C. points out that § 48.315 permits a continuance only if there is “a showing of good cause,” and the continuance must be “only for so long as is necessary.” Stephen C. claims that no “good cause” was shown and the continuance was longer than necessary.

¶9 WISCONSIN STAT. § 48.424(4) provides that when grounds are found for the termination of a parent’s right to his or her child, the court “shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427”:

(4) If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427. The court may delay making the disposition and set a date for a dispositional hearing no later than 45 days after the fact-finding hearing if:

(a) All parties to the proceeding agree; or

(b) The court has not yet received a report to the court on the history of the child as provided in s. 48.425 from an agency enumerated in s. 48.069 (1) or (2) and the court now directs the agency to prepare this report to be considered before the court makes the disposition on the petition.

¶10 As discussed in *State v. April O.*, 2000 WI App 70, 233 Wis. 2d 663, 607 N.W.2d 927, the Children’s Code contains many mandatory time limits, and any relief from these time limits not listed in the controlling statute can only be found in WIS. STAT. § 48.315.

Wisconsin appellate courts have previously held that failure to comply with mandatory time limits under the Children’s Code may result in the loss of the circuit court’s competency to proceed. ... “The Children’s Code contains no provision for the waiver of time limits, and the only provisions for delays, continuances and extensions are set forth in § 48.315, STATS. That statute provides that time limits may be continued, but “only upon a showing of good cause in open court...” The general requirements of § 48.315(2) control all extensions of time deadlines under the Children’s Code.

April O., 233 Wis. 2d 663, ¶5 (citations and footnotes omitted). Thus, the time limits in WIS. STAT. § 48.424(4) are mandatory. *See id.*, ¶11. Only § 48.315 permits continuances, and then only under certain circumstances. Thus, in order to maintain jurisdiction in this matter, the trial court had to comply with the requirements of § 48.315 when it adjourned the dispositional hearing.

¶11 “Whether the circuit court complied with the time limits and granted a continuance pursuant to WIS. STAT. § 48.315(2), under the undisputed facts of this case, presents a legal question of statutory interpretation.” *April O.*, 233 Wis. 2d 663, ¶6. We review questions of law independently. *Id.*

¶12 WISCONSIN STAT. § 48.315 provides, in pertinent 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 or the unborn child and the unborn child’s expectant mother, including an examination under s. 48.295 or a hearing related to the mental condition

of the child, the child's parent, guardian or legal custodian or the expectant mother, prehearing motions, waiver motions and hearings on other matters.

(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.

(c) Any period of delay caused by the disqualification of a judge.

(d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that the evidence will be available at the later date, or to allow him or her additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case.

(e) Any period of delay resulting from the imposition of a consent decree.

(f) Any period of delay resulting from the absence or unavailability of the child or expectant mother.

(fm) Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under s. 48.365 due to the child having run away or otherwise having made himself or herself unavailable to receive that notice.

(g) A reasonable period of delay when the child is joined in a hearing with another child as to whom the time for a hearing has not expired under this section if there is good cause for not hearing the cases separately.

(h) Any period of delay resulting from the need to appoint a qualified interpreter.

....

(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.

¶13 On June 26, 2003, both the State and the GAL requested that the trial court toll the time limits and adjourn the dispositional hearing due to the lack of an adoptive placement. The trial court stated:

I understand the circumstances, it's quite clear on the record the reason this is being adjourned, if for no other reason than we currently do not have a solid adoptive resource and that certainly ought to be an issue on best interest of the child.

For those reasons I find good cause. Time limits are tolled pursuant to 48.315 to accommodate reassessing a proposed adoptive placement and rescheduling the matter.

At the September 2, 2003, hearing, the trial court was advised by the GAL that David's placement had "fallen apart," and the agency responsible for David was in the process of looking for a new treatment foster home for him. The GAL stated that it was her belief that the adjournment was in David's best interest and that good cause existed because of the recent change in David's placement, as the long-term foster parents' approval for adoption had been denied and the agency was looking for a new treatment foster home for him. As a result, the GAL joined in the State's request for an adjournment. The trial court tolled the time limits and remarked:

THE COURT: All right. The record should reflect that I had a rather lengthy ante room discussion with the attorneys and social workers involved in the case. And for those who are in the back of the courtroom who are also very interested in the welfare of this child, I want you to know that was of paramount concern and we were discussing it.

The Court based on everything it has heard today is going to take under advisement the request to dismiss the TPR and continue the matter....

....

THE COURT: I think both [Stephen C. and the mother] made their positions very clear that they wanted a dismissal earlier.... And again the Court is going to set this matter over.

As such, at both the June 26, 2003 hearing and the September 2, 2003 hearing, the GAL joined in the State's request for a continuance. WISCONSIN STAT. § 48.315(1)(b) permits any period of delay to be excluded from the time requirements if counsel for the child requests a continuance. That is what occurred here when the GAL joined in the State's request. Such a request falls squarely under § 48.315(1)(b), and the trial court did not lose jurisdiction over this matter by tolling the time limits.⁴

⁴ Although WIS. STAT. § 48.315(1)(b) refers specifically to a guardian ad litem only in connection with "unborn" children, and requires "consent of the child and his or her counsel" for children not in that category, for the purposes here, "counsel" is the equivalent of "guardian ad litem."

WISCONSIN STAT. § 48.235(1)(c) directs that the trial court, in every instance, "shall appoint a guardian ad litem for any child who is the subject of a proceeding to terminate parental rights, whether voluntary or involuntary[.]" This guardian ad litem "shall be an advocate for the best interests of the person or unborn child for whom the appointment is made." § 48.235(3)(a).

For many purposes, the Children's Code recognizes a distinction between a guardian ad litem and counsel. "Counsel" is "an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented." WIS. STAT. § 48.23(1g). This "counsel" must thus represent the desires of his or her client, and these wishes may not necessarily be the same as what the lawyer assesses are the client's best interests. *See* WIS. STAT. § 48.235(3)(a) ("If the guardian ad litem determines that the best interests of the person are substantially inconsistent with the wishes of that person, the guardian ad litem shall so inform the court and the court may appoint counsel to represent that person."). For an older child, then, there might be a divergence of responsibilities between that of the guardian ad litem and the wishes of that child. Here, however, David had no "wishes" beyond what the law determines is in his best interests. When that is true, "[t]he guardian ad litem shall function independently, *in the same manner as an attorney* for a party to the action." § 48.235(3)(a) (emphasis added). Thus, for a child who does not have separate adversary counsel because of their age and who is the subject of a petition to terminate a biological parent's parental rights, this court deems that the word "counsel" in WIS. STAT. § 48.315(1)(b) also encompasses a guardian ad litem appointed by the trial court pursuant to § 48.235(1)(c). This is consistent with the overarching focus of the Children's Code: the best interests of the children who fall within its purview. WIS. STAT. § 48.01(1); *see also* WIS. STAT. § 48.426(2) (termination of parental rights).

¶14 Next, Stephen C. claims that even if the trial court had the ability to toll the statute under WIS. STAT. § 48.315, it could only do so if “good cause” was found, and then “only for so long as necessary.” He submits that no “good cause” was shown and the adjournments were not “only for so long as necessary.”

¶15 On June 26, 2003, the trial court was notified that a problem had developed with David’s prospective adoptive parents. The parties were unsure whether David’s long-term foster parents would be permitted to adopt him. The State informed the court that:

The disposition I’m asking for sixty days. There has been, unfortunately, been a problem with the perspective [sic] adoptive family being given the go ahead to adopt. There had been an appeal to the Department of Health and Family Services. Best I can tell you that appeal stage is over.

I don’t know if there’s any more recourse the prospective adoptive parents have. I will speak to them about that after court. I may not be a hundred percent certain. That’s not law I generally delve into. I did in this case.

Certainly no argument can be made that learning of the refusal by the Department of Health and Family Services to permit the adoptive family to adopt David did not constitute “good cause.” Without having a prospective family to adopt David, David would have no family at all if the termination had proceeded. This would be contrary to David’s best interests. With respect to the length of the continuance, the State requested sixty days to explore a new adoptive placement for David. Given that the State was forced to find a new family with which to place David, but also to possibly adopt David, sixty days was a reasonable time frame. Thus, both “good cause” existed and the continuance was “only for so long as necessary.”

¶16 At the September 2, 2003 hearing, not surprisingly, the problem of finding a new adoptive placement for David was not completely resolved. The State advised the trial court that:

It is my understanding that now that is [sic] an internal appellate procedure or whatever is in place and has run its course and indeed that adoptive resource's approval for adoption has been denied. David was then moved to a new location, a new foster home. It was a potential adoptive resource. I believe that occurred as recently as last week.

Thus, the trial court was advised that a new placement had just been found, and David had only been placed there approximately one week earlier. The trial court's decision to grant the State and GAL's request for a continuance in order to evaluate options and potential placements for David constituted "good cause." Moreover, the delay of approximately two months was reasonable and "only for so long as necessary." By the adjourned date, David would have been with his new foster family for two months, the family would have some firm idea whether they would be willing to adopt David, and other options could have also been explored. Given the unusual circumstances surrounding the termination proceeding, this court is satisfied that "good cause" existed to permit the continuances and that the continuances were "only for so long as necessary." Accordingly, the order of the trial court is affirmed.

By the Court.—Order affirmed.

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

