

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2407

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF CHRISTA P.,
A CHILD UNDER THE AGE OF 18:**

MARATHON COUNTY,

Petitioner-Respondent,

v.

FAYE P.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Marathon County:
ANN WALSH BRADLEY, Judge, and ROBERT O. WEISEL, Reserve Judge.
Affirmed.

MYSE, J. Faye P. appeals a court order extending a previously entered CHIPS dispositional order and an order denying her motion to vacate that order. Faye P. contends that the extension of the dispositional order was made in violation of her right to counsel and, therefore, was invalid. Because this court concludes that Faye P. had waived her right to counsel, the orders are affirmed.

A dispositional order involving the placement of Christa P., the daughter of Faye P., outside of Faye P.'s home was scheduled to expire on October 16, 1994. Because Marathon County intended to request an extension of the dispositional order and there was insufficient time to schedule a hearing on this request before the expiration of the order, Marathon County requested a thirty-day extension of the order pursuant to § 48.365(6), STATS. The request was granted prior to the date of expiration and a hearing was scheduled for November 10, 1994, which was within the thirty-day extension that had been granted.

At the November 10 hearing Faye P. did not initially appear. Counsel for Marathon County indicated that Faye P. had actual knowledge of the scheduled hearing but was uncertain as to whether service of written notice of hearing and petition had been accomplished because Faye P. had moved a number of times over the past year. Marathon County presented evidence of Faye P.'s actual knowledge of the hearing, including testimony of a judicial assistant who discussed the proposed hearing with Faye P. and corporation counsel's own testimony concerning his phone conversation with Faye P. during which the hearing scheduled for November 10 was discussed.

While the hearing was in progress, the court received a phone call from Faye P. during which she declared a number of times that she did not know what to do and asked the court for advice as to how she was to proceed. The court advised that Faye P. contact a public defender for representation to which she responded that her eligibility for a public defender required she not be employed. Faye P. also expressed some concern that the lack of employment required to obtain a public defender would diminish her chances of being reunited with her daughter.

The court invited Faye P.'s comments on the telephone in regard to the proceedings but did not specifically advise Faye P. that she was entitled to be represented at the hearing by counsel. The court, however, repeated the advice that she contact the public defender's office. Ultimately, the court granted the County's petition to extend the CHIPS dispositional order for another year. The court advised Faye P. of the conditions that she must satisfy to secure the return of Christa and again recommended that Faye P. contact the public defender's office for representation.

Within one week of the dispositional hearing, the court received a request from an attorney in the public defender's office seeking to have the extension hearing reopened so that Faye P. would have an opportunity to appear personally at the hearing with the assistance of counsel. Ultimately, Faye P. filed a motion to vacate the extension order which the court set for hearing for December 9. Faye P. and counsel appeared at the hearing to vacate the extension order and challenged the CHIPS dispositional order on its merits. Faye P. testified and counsel addressed the court opposing the extension of the dispositional order. The court, however, declined to vacate the order extending the dispositional order or to modify the conditions for the return of the child to Faye P.'s home.

During the hearing, counsel acknowledged the appropriateness of the conditions established for the return of the child and indicated that in general Faye P. did not oppose the conditions enumerated. Counsel also indicated that Faye P. had sought the assistance of the public defender's office on the day prior to the scheduled November 10 hearing but that counsel did not discover the case assignment until after the hearing on that day. Faye P. subsequently submitted a post-judgment motion requesting that the extension of the CHIPS dispositional order be vacated based upon the court's failure to safeguard her right to counsel at the November 10 hearing. The motion was denied and this appeal ensued.

Faye P. contends that the dispositional order should be vacated because the court failed to afford her the right to appear with counsel at the November 10 hearing. She also asserts that the supplemental hearing held on December 9, at which time she appeared with counsel and addressed the merits of the request for the extension of the dispositional order, was held at a time when the court lacked competency to act because the hearing was scheduled beyond the thirty-day extension that had previously been granted. These claims present a question of law which this court addresses without deference to the trial court's determination. *In re Jason R.N.*, 201 Wis.2d 646, 650, 549 N.W.2d 752, 754 (Ct. App. 1996).

Faye P. first contends that the dispositional order following the November 10 hearing was void because the trial court failed to advise her of the right to be represented by counsel and that the hearing was held in violation of her right to counsel. It is clear that Faye was entitled to appear at the November

10 hearing and to be represented by counsel. Section 48.23(2), STATS. Rights no matter how firmly established, however, are subject to being waived. Faye P. does not contend that she did not have adequate notice of the hearing nor does she explain why she did not appear in person at the hearing or advise the court that she had sought the assistance of the public defender's office in advance of the hearing.

We acknowledge that a waiver of counsel must be knowing and voluntary. Section 43.23(2), STATS. Based on Faye P.'s actual notice of the hearing, her failure to retain an attorney or advise the court that she was going to retain one, her failure to request a continuance to obtain counsel, and her knowledge of the requirements for dispositional hearings from past experience, this court concludes that Faye P. voluntarily and knowingly waived her right to counsel. Even after Faye P. failed to appear personally and called in to the hearing, the court advised Faye P. to go to the public defender's office for representation several times. Faye P.'s response was either nothing or concern that she would have to give up her job to qualify for a public defender. Faye P.'s reluctance to give up her employment to obtain a public defender was a factor that she considered in determining whether to waive her right to counsel. We conclude that she voluntarily and knowingly waived her right to an attorney when she failed to obtain counsel for hearing scheduled with due notice of which she was aware.

Because Faye P. waived her right to counsel, the CHIPS order was validly extended for another year. The hearing on Faye P.'s motion to vacate is not under any of the time requirements as a hearing to extend a dispositional order. In holding the December hearing, the trial court, in fact, went out of its way to extend Faye the opportunity to address the merits of her claims.

Further, the court's ultimate willingness to hold a hearing on Faye P.'s motion to vacate was within the trial court's discretion. Her counsel had a full and fair opportunity to present evidence and make arguments as to the merits of the proposed extension. She can ask no more than the opportunity afforded her to address the merits of the petition. Indeed, the rule of law urged in this appeal would compel the courts to treat her non-appearance as a waiver and foreclose the opportunity to address the merits of the proceedings at some future date.

Faye argues, however, that the court was without competency to act at the hearing held on December 9 at which she was represented by counsel because that hearing was beyond the thirty-day extension. This argument misconceives the status of the case as of the hearing held on December 9. The hearing was not held in accordance with the thirty-day extension previously ordered by the court. Rather, the hearing was held when a valid order extending the CHIPS petition was in effect. While the hearing was held to determine whether that order should be vacated, the order was in full force and effect and remained so unless the court based upon the evidence presented by Faye P. at the hearing resulted in an order vacating the extension.

Faye P. does not contend that the court erred in its decision to refuse to vacate the previously ordered extension of the CHIPS dispositional order. In light of counsel's concession that the conditions for the return of Christa were reasonable, Faye P. cannot now be heard to claim the court's refusal to vacate was error. Faye P.'s contention that the court was without competency to act at the time of the December 9 hearing is predicated upon the theory that the previously entered order extending the CHIPS dispositional order was not in effect at the date of the hearing and that the supplemental hearing of December 9 was held pursuant to the thirty-day extension ordered on October 14, 1994. The premise of the theory is infirm. Because the premise of the theory is infirm, Faye P.'s claim must fail.

This court concludes that Faye P. waived her right to counsel and that the order extending the CHIPS disposition was validly entered. This court further concludes that the order extending the dispositional order which was in force on the date of the supplemental hearing was sufficient to give the court competency to act. The court had competency to either vacate the order previously entered or to refuse to vacate the order and allow the extension of the CHIPS dispositional order to continue. The court, in electing to allow the previously entered order extending the dispositional order to continue in effect, was fully supported by the evidence and was not erroneous.

By the Court. – Orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.