COURT OF APPEALS
DECISION
DATED AND RELEASED

December 22, 1995

NOTICE

No. 95-2941

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

IN THE INTEREST OF SARAH G.,
A PERSON UNDER THE AGE OF 18:

WAUSHARA COUNTY,

Petitioner-Respondent,

v.

SUSAN G.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed*.

VERGERONT, J.[1] Susan G., the mother of Sarah G., appeals from an order terminating her parental rights. The sole issue she raises on appeal is whether the trial court erroneously exercised its discretion in refusing to grant a

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS., and is governed by RULE 809.107, STATS.

continuance in the trial. We conclude the trial court did not erroneously exercise its discretion, and we affirm.

BACKGROUND

Sarah was born on April 3, 1993. Within a couple days after being discharged from the hospital, Sarah's maternal grandmother took Sarah home to care for her. Sarah was adjudged a child in need of protection or services on August 18, 1993, and was placed with her maternal grandmother. The petition leading to the CHIPS order alleged that due to Susan's mental condition, Susan may be unable to provide necessary care for her child so as to seriously endanger the physical health of the child. The court granted an extension of the dispositional order for one year on August 9, 1994.

On September 26, 1994, Waushara County filed a petition for termination of Susan's parental rights. This TPR petition alleged that Sarah had been adjudged to be in need of protection or services, that the Waushara County Department of Social Services (department) had made a diligent effort to provide the services ordered by the court and had provided services to Susan to help her meet the conditions set by the court for returning Sarah to her home, and that Susan had failed to make substantial progress toward meeting the conditions. Specific allegations in the petition included the following: (1) Susan had maintained contact with her psychiatrist by attending five of eight scheduled appointments, but her daily behavior remained erratic and irresponsible; (2) she had been taken into custody for an emergency mental health detention on June 16, 1994, and was released on June 27, 1994; (3) she had seen her psychotherapist by attending seven of eleven appointments; (4) she had not taken steps to undergo assessment, treatment or testing for possible chemical dependency as ordered by the court; (5) she had not maintained housing suitable for a child; and (6) she had refused to provide the department with an address, and was believed to be living in a car.

On the date of the filing of the petition, Susan was a patient at the Winnebago State Mental Health Facility. She was placed in emergency detention on September 13, 1994, after she struck her mother and, without permission, attempted to take Sarah away from her mother's custody. Sarah's placement was changed to a foster home, due in part, at least, to this incident.

At the initial appearance on October 18, 1994, Susan's counsel raised the issue of her competency, in terms of understanding the proceeding, and requested that an independent physician be appointed to evaluate her. The court adjourned the initial appearance and appointed Dr. Inam Haque to evaluate Susan and ordered that he answer the following questions:

1.Does Susan [G.] have the present mental capacity to understand the nature of legal proceedings concerning the potential termination of her parental rights as to Sarah [G.]?

2.Does Susan [G.] have the present mental capacity to make a knowing decision as to whether or not she desires to voluntarily terminate her parental rights as to Sarah [G.]?

3.Does Susan [G.] have the present mental capacity to assist her attorney in his representation of her in the termination of parental rights proceedings?

4.Does Susan [G.] have the present mental capacity to understand the legal process of a termination of parental rights which includes the following:

(a)her right to call witnesses;
(b)her right to have her attorney cross-examine witnesses;
(c)her right to substitution of the judge;
(d)her right to have a fact-finding hearing before a jury or a judge and the need for her to choose between a jury or judge?

On November 8, 1994, Dr. Haque submitted a letter to the court indicating that he had examined Susan and answering "no" to each of the questions.

At the adjourned initial appearance on February 27, 1995, Susan denied the allegations in the petition and requested a jury trial. Trial was scheduled for March 29 and 30, 1995. Although Susan's counsel referred to Dr. Haque's report at that time, no request for a continuance was made.

On March 13, 1995, Susan moved for a continuance of the termination proceedings until she either became competent to participate or it was determined that she was unlikely to become so. The motion was heard on March 15, 1995. At that hearing, Susan's counsel argued for a continuance to permit a determination as to whether Susan would become competent to participate in the proceedings and, if so, when. Her counsel stated that a report of her competency for a pending criminal proceeding had just been completed, and in that report Dr. Haque had opined that proceeding with this trial could cause her to decompensate. Her counsel did not know how long it would take to make such a determination, but suggested that a review conference be scheduled for forty-five days. Her counsel argued that it was his understanding that Susan had never been in long-term in-patient treatment before, and that since she was now for the first time, more time was needed to determine whether she might be able to become competent and, if so, when.

The trial court denied the motion for a continuance.[2] It concluded that it was important for Sarah to have a more permanent arrangement soon and that in view of Susan's psychiatric history, it was unlikely that deferring the matter "for 40 days or six months" was going to result in a different situation. The court recognized Susan's constitutional rights as a parent but felt it had to balance those rights against the interests of the child. The court noted that the legislature did not intend continuing parental incapacity to be a defense to termination of parental rights because that was a ground for termination under § 48.415(3), STATS. The court also noted that the question of Susan's likelihood of improving was an appropriate consideration at the second stage of the TPR proceedings and could be adequately addressed then.[3]

The question of a continuance was again taken up at a hearing on March 23, 1995. Susan's counsel had moved to supplement the record with a paragraph from the report of Dr. Haque dated March 3, 1995. The report was

---

[2] The court also declined to appoint a separate guardian ad litem for Susan. Susan petitioned this court for leave to file an interlocutory appeal of the order denying appointment of a separate guardian ad litem. Leave to appeal was denied. The denial of the appointment of a guardian ad litem is not an issue on this appeal.

[3] If there is a determination at the fact-finding hearing that grounds for termination exist, the court makes a discretionary decision at the dispositional stage as to whether termination is in the best interest of the child. Sections 48.426 and 48.427, STATS.; ***In re K.D.J.***, 163 Wis.2d 90, 103-05, 470 N.W.2d 914, 920 (1991).

an evaluation for purposes of Susan's competency to stand trial on charges of battery and criminal trespassing to a dwelling, which grew out of the incident in her mother's home. Dr. Haque stated that it was his opinion that Susan was suffering from psychosis, not otherwise specified, and that her psychiatric condition, at the present time, did not preclude her ability to understand the nature of the charges pending against her, the possible consequences arising from these charges, or her ability to assist her counsel in the preparation of her defense. The paragraph that Susan's counsel wanted included in the record related to the TPR proceeding reads as follows:

> The patient is aware of the fact that she has court proceedings pending for termination of parental rights for her 3-year-old daughter. In addition to the current charges, she feels that the hearing regarding her parental rights would be more overwhelming for her and does not wish to go in front of a jury. I feel it will be detrimental for her to go to a trial in front of a jury because it will create more anxiety for her, and she may decompensate since that trial is related to a more sensitive issue in her mind.

The court understood the purpose of supplementing the record was for the interlocutory appeal. It expressed a concern that the one paragraph from the March 3, 1995 report, to the extent it suggested a short-term problem, was contrary to the rest of Susan's psychiatric records, including the rest of the March 3 report, which referred to long-term mental illness and long-term drug and alcohol abuse. The court concluded that supplementation of the record should include all of Dr. Haque's report and the psychiatric reports that had been gathered.

The court then reconsidered the continuance request and again denied it, repeating and elaborating on its reasoning for the earlier denial.[4] The court issued a written decision containing its findings and conclusions.

---

[4] At this hearing, the court also reconsidered and again denied the motion for appointment of a separate guardian ad litem and denied Susan's counsel's motion to withdraw on the ground that he could not adequately represent her given her mental condition.

DISCUSSION

There are strict statutory time limits for TPR proceedings. A hearing must be held on the petition to terminate parental rights within thirty days of filing the petition, and the fact-finding hearing must be held within forty-five days of that hearing, unless all parties agree to a continuance. Section 48.422(1) and (2), STATS. Section 48.315(2), STATS., governs the granting of a continuance:

> 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.

Whether to grant or deny a continuance under § 48.315(2), STATS., is a discretionary decision made by the trial court. We affirm a trial court's discretionary determination if the court considered the relevant facts of record, applied the proper standard of law and, using a rational mental process, reached a conclusion that a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

Susan acknowledges that the matter of a continuance is within the court's discretion. She also acknowledges that the parent's interest must be balanced against the interest of the public in the prompt and efficient administration of justice, and against the child's interest. But Susan argues that because TPR proceedings implicate the fundamental constitutional rights of the parent, *see* ***In re D.L.S.***, 112 Wis.2d 180, 184, 332 N.W.2d 293, 296 (1983), a procedure similar to that used in criminal proceedings[5] should be followed by

[5] Section 971.14, STATS., requires an examination and evidentiary hearing if there is reason to doubt a defendant's competency to proceed. If the defendant is found incompetent but likely to become competent, if provided appropriate treatment, within either twelve months or the maximum sentence for the most serious offense for which the defendant is charged, whichever is less, the defendant is committed to an institution for treatment. Section 971.14(5). If it is unlikely the defendant will become competent within that time, proceedings are suspended and the defendant is released, subject to subsequent

the trial court when a parent has been determined mentally incompetent to participate in the TPR proceeding.[6] According to Susan, the procedure should involve a fact-finding hearing to determine whether she would regain competency and, if so, the time frame within which this might occur. Susan acknowledges that there is a greater interest in moving forward in TPR proceedings than in criminal proceedings because of the child's interest. Thus, she concedes, continuing mental incapacity is not a defense to termination of parental rights and, in fact, is a ground for termination under § 48.415(3), STATS.[7] But, in Susan's view, the trial court here abused its discretion because it engaged in the balancing before holding a fact-finding hearing.

Susan does not cite any authority for her argument that a fact-finding hearing is required to determine when and if a parent will regain competency to participate in a TPR proceeding. We accept, for purposes of discussion, the proposition that because of the parent's fundamental rights, before a trial court denies the request for a continuance by a parent who has been determined to be incompetent to participate in TPR proceedings, the court must determine whether and when the parent will become competent to participate in order to balance the parent's interest against the child's interest and the interest of the public. However, we are not persuaded that this must be done at a separate fact-finding hearing. We conclude that the trial court's determination here that there was no reasonable indication that Susan's mental condition was going to stabilize in the foreseeable near future was sufficient to fulfill this condition. We also conclude that this determination is supported by the record.

(..continued)
competency determinations and other restrictions, or may be committed under ch. 51, STATS. Section 971.14(4)(d) and (6)(b).

[6] Susan uses the term "mentally incompetent to participate in the proceedings" to refer to Dr. Haque's November 1994 report. We adopt the same term, and distinguish this from a determination of incompetency under ch. 880, STATS. We also note that Susan was determined competent to participate in criminal proceedings on March 3, 1995.

[7] Susan states that she does not suggest this procedure be applied in TPR cases based on continuing parental disability under § 48.415(3), STATS. We do not understand this. If her position is that this procedure is constitutionally mandated, we do not understand why it would vary depending on the ground of termination alleged.

The trial court had before it on March 23, 1995, six separate psychiatric evaluations of Susan. Dr. Perlman and Dr. Alba had each evaluated Susan once, and Dr. Patel and Dr. Haque had each evaluated Susan twice. Each of these four psychiatrists had reviewed Susan's psychiatric records. Three of the reports were made in March 1995. The conclusion of all of them was that Susan's mental illness was chronic and severe. There is nothing in their reports to suggest that this would change in the near future. The court was presented with no evidence that an adjournment--for forty-five days, or any particular length of time--would result in a situation different from the one existing on March 23, 1995.

Susan emphasizes Dr. Haque's statement in the March 3, 1995 report that she might decompensate if she went before a jury in the TPR proceeding. However, even within Susan's own analytical framework, this favors a continuance only if there is evidence that her ability to cope with the TPR proceeding will improve within some defined and reasonable time period. There was no evidence of that in the record before the trial court on March 23, 1995.

The court also found that Susan had not been found mentally incompetent--that is, incompetent under ch. 880, STATS.--and was represented by very experienced trial counsel who was obligated to vigorously and zealously contest the TPR proceedings on her behalf.

The court made these findings regarding Sarah. She was approaching two years of age. She had recently been removed from the care of her grandmother as a result of Susan's behavior and placed in foster care. Her best interests would be adversely affected if planning for her were substantially delayed. The court noted that "a year or two in this child's life at this time is highly critical." All of these findings are supported by the record.

The court then engaged in a balancing process "between the child's interest in healthy development and the mother's constitutional rights as a parent" and concluded that "the interests of justice would be best served by proceeding now to the trial which was scheduled months ago."

The proceedings had already been substantially delayed beyond the statutory time limits. The court applied the proper legal standard to the

facts of record and engaged in a reasoning process leading to a result that a reasonable judge could reach. We therefore affirm the denial of Susan's request for a continuance.

By the Court.—Order affirmed.

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