

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-2728
00-2729
00-2730
00-2731

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**IN THE INTEREST OF JEROME S.,
A PERSON UNDER THE AGE OF 18:**

DUNN COUNTY,

PETITIONER-RESPONDENT,

v.

KELLY D.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Reversed and causes remanded for further proceedings.*

¶1 CANE, C.J.¹ Kelly D. appeals from dispositional orders and revised dispositional orders finding that her four children are in need of protection and services (CHIPS) under WIS. STAT. § 48.13. Kelly argues that the orders should be vacated because the trial court erroneously vacated its own order granting her request for substitution and continued to preside over the cases. In the alternative, she argues that the ultimate disposition, placing the children with their father, is not supported by the trial court's findings. This court concludes that the trial court lacked jurisdiction to vacate its own substitution order and, therefore, reverses the dispositional orders and remands for further proceedings.

FACTS

¶2 Kelly and her ex-husband, L.B., have four children who are the subject of the CHIPS orders in this case. At the plea hearing on September 13, 1999, Kelly appeared without counsel. She told the trial court, the Hon. William Stewart, that she had an attorney who could not attend the hearing because of a scheduling conflict. L.B. appeared with counsel.

¶3 Noting that the matter was scheduled so that the parties could enter pleas, the trial court asked whether Kelly admitted or denied the allegations in the petitions. Although Kelly indicated she was unsure how to answer the court's question, she said the allegations were true and the trial court accordingly entered her plea as an admission. It is undisputed that at no time before or after this

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

exchange did the trial court inform Kelly or L.B. of their rights to request a jury trial and a substitution of judge. *See* WIS. STAT. § 48.30(2).²

¶4 L.B. entered pleas contesting the allegations. The trial court then addressed the guardian ad litem's concerns that the children had been transferred to different foster homes without proper notice. Next, a social worker appearing on behalf of the county addressed the court.

[SOCIAL WORKER]: ... [Kelly] has a question – a statement.

[KELLY]: I'd like to –

THE COURT: We – we started late. We're done late. I have three more matters. I don't have time to take it up right now.

[SOCIAL WORKER]: She wants to request a different judge. She's requesting a different judge.

[GUARDIAN AD LITEM]: She's represented by counsel.

THE COURT: That's right. She's indicated she's represented by counsel. Her counsel knows how to go about doing that. That's the end of this matter.

The proceedings thereafter concluded.

² WISCONSIN STAT. § 48.30(2) provides:

At the commencement of the hearing under this section the child and the parent, guardian or legal custodian, the child expectant mother, her parent, guardian or legal custodian and the unborn child through the unborn child's guardian ad litem or the adult expectant mother and the unborn child through the unborn child's guardian ad litem, shall be advised of their rights as specified in s. 48.243 and shall be informed that a request for a jury trial or for a substitution of judge under s. 48.29 must be made before the end of the plea hearing or be waived. Nonpetitioning parties, including the child, shall be granted a continuance of the plea hearing if they wish to consult with an attorney on the request for a jury trial or substitution of a judge.

¶5 Later that same day, counsel for Kelly faxed the clerk of court a written request for substitution. On September 14, the trial court approved the substitution request. The chief judge reassigned the case to the Hon. Rod Smeltzer on September 20. On September 27, L.B. filed a request to substitute a new judge for Judge Smeltzer.

¶6 Three days later, Judge Stewart issued a written order vacating the substitution and the subsequent assignment to Judge Smeltzer. The order stated that the basis for vacating the substitution was that Kelly's request for substitution was not in conformity with the substitution statute, WIS. STAT. § 48.29(1).³ The order also referenced a written objection to the substitution from L.B.⁴

¶7 At the next two court appearances, Kelly objected to vacation of the substitution order. The trial court noted the objection, but ordered that the cases proceed in its court. Ultimately, the court decided that the children should be placed with their father. This appeal followed.

¶8 Kelly argues that the trial court erred when it failed to inform her of her right to substitution at the plea hearing and when it granted and then vacated the order for substitution. She contends that this error was prejudicial because of

³ WISCONSIN STAT. § 48.29(1) provides in relevant part:

The ... child's parent ... either before or during the plea hearing, may file a written request with the clerk of the court or other person acting as the clerk for a substitution of the judge assigned to the proceeding. Upon filing the written request, the filing party shall immediately mail or deliver a copy of the request to the judge named in the request.

⁴ It is unclear when and how L.B. objected to the substitution. The only written document in the record is L.B.'s own request to substitute a new judge for the newly-appointed Judge Smeltzer. There is no document suggesting L.B. objected to Kelly's substitution request.

the appearance of bias. Kelly asks this court to vacate the dispositional orders and remand for further proceedings. In the alternative, she argues that the placement decision is unsupported by the record and should be reversed.

¶9 The parties disagree whether the request for substitution was timely filed. However, this court need not decide that issue, because regardless whether the substitution was timely filed, once the trial court granted the substitution, it lost jurisdiction to vacate the substitution order. Accordingly, the proceedings after the plea hearing are void, including the final dispositional orders. The orders are reversed and the cases remanded for all further proceedings subsequent to the plea hearing.⁵

DISCUSSION

¶10 Resolution of this appeal requires interpretation of WIS. STAT. § 48.29, a question of law this court reviews de novo. *See State v. Kywanda F.*, 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996). Section 48.29(1m) provides in relevant part:

When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge under s. 751.03.

⁵ Because this court grants Kelly's request for reversal of the dispositional orders, it does not consider her alternative argument concerning the actual placement decision. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶11 Kelly argues that pursuant to WIS. STAT. § 48.29(1m), once the trial court found her request for substitution to be timely and in proper form, as evidenced by the signed application for judicial assignment, the court had no further jurisdiction. “A request for judicial assignment was made, a new Judge was assigned, and a hearing was noticed in the new Judge’s Court. Thus, Judge Stewart lacked any authority to proceed on the case and his actions are all void.” This court agrees.

¶12 Pursuant to WIS. STAT. § 48.29(1m), the judge who is the subject of the request for substitution loses jurisdiction once the request is granted. Without deciding whether L.B. could have successfully objected to the substitution using an alternative procedure (an issue not briefed by the parties), this court concludes that the trial court lacked authority to issue an order vacating the order for substitution after it had already been granted. The court lost jurisdiction to proceed and, therefore, its subsequent dispositional orders are void. This court reverses those orders and remands the cases for all proceedings subsequent to the plea hearing on the CHIPS petitions.⁶

By the Court.—Orders reversed and causes remanded for further proceedings.

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

⁶ Because this court grants a reversal on the basis that the trial court lacked authority to proceed after the substitution request had been accepted, it is not necessary to address the remaining issues.

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