COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1856

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

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRIAN C.,

RESPONDENT-APPELLANT,

SHELLY C.,

RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 BROWN, J.[1] This is an appeal from an order terminating the parental rights of Brian C. to his natural daughter, Nicole M.C. The sole issue is whether the trial court lost competency to proceed when it failed to hold the fact-finding hearing within the mandatory 45-day time limit. We hold that there was good cause for adjourning the fact-finding hearing past the 45-day limit and affirm.

BACKGROUND

¶2 On September 6, 2000, the State filed a Petition for Termination of the Parental Rights of Brian to his biological daughter Nicole. An initial appearance hearing was scheduled for October 6. The biological mother, Shelly C., was present at this hearing; however, her attorney was not. Brian was present by telephone, as he was incarcerated at the time. His attorney was also present. The guardian ad litem was not present due to vacation. No pleas were taken at this hearing due to the absence of the parties' representatives. The attorney for Brian explained to the court that he had just been appointed to the case and needed time to prepare. He did not object to the adjournment. Brian also did not object. In fact, he had filed a pro se motion asking the court to extend the initial hearing in order to allow him time to prepare with his attorney. The adjournment was granted.

¶3 The initial appearance hearing was October 19. Through his attorney, Brian acknowledged receipt of the petition, waived reading, entered a denial, and requested a jury trial. The court ordered that a pretrial and a jury trial be scheduled within 45 days of that date, November 27 to be exact.

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

¶4 A pretrial hearing was held on November 20. The State had previously filed a motion for adjournment because its expert witness, a clinical psychologist, was unavailable for trial on November 27. His evaluations had been ordered as a condition of return and the State intended to call him as an expert witness. None of the attorneys objected to the motion. The court then personally addressed Brian and confirmed that he understood the request for the adjournment, and that the adjournment would cause time limits established by law to be extended. Brian stated that he was willing to extend the time limits. The next date that everyone was available, due to the holidays, was January 22, 2001.

¶5 Another pretrial hearing was held on January 8, 2001. At this hearing, the attorney for Shelly indicated that he was moving to withdraw as counsel because he had an ethical conflict. Brian was not present at this hearing. No objections were made to this motion. Because of this development, it was agreed that another adjournment was necessary.

¶6 A status conference was held on January 22. Shelly had hired a new attorney. The State informed the court that the next available date for all parties was March 19. The court expressed a conflict with that date and the State provided an alternate date of April 16. That date was not acceptable to the court. The State then requested a date before the month of April. After much discussion of the calendars of all parties, the jury trial was scheduled for February 26, 2001.

¶7 At the February 26 jury trial, Brian pled no contest to the Petition for Termination of Parental Rights. The court found that the plea was voluntarily, freely, and intelligently entered and accepted the plea. Brian was then excused from the rest of the jury trial.

THE LAW

¶8 Brian now argues that the trial court lost competency to proceed when it failed to hold the fact-finding hearing within 45 days of the initial hearing. There was in fact a 143-day period between the two. The statute provides that "[i]f the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition …." WIS. STAT. § 48.422(2). Wisconsin appellate courts have held that these time limits are mandatory and that failure to comply results in the loss of the circuit court's competency to proceed. ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927.

¶9 However, WIS. STAT. § 48.315 provides exceptions to the rule. Of particular relevance to the case at hand, § 48.315(2) establishes that the 45-day time limit may be extended "upon a showing of good cause … 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."

¶10 Whether the trial court complied with the required time limits presents a legal question of statutory interpretation. ***Jason B. v. State***, 176 Wis. 2d 400, 407, 500 N.W.2d 384 (Ct. App. 1993). We review questions of law independently. ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 645, 469 N.W.2d 845 (1991).

DISCUSSION

¶11 Brian first contends that there was not good cause for the adjournment of the October 6, 2000 hearing. Brian himself filed a pro se motion asking for a continuance in order to have time to prepare with his attorney who

had been appointed only a few days earlier. WISCONSIN STAT. § 48.422(5) states: "Any nonpetitioning party, including a child, shall be granted a continuance of the hearing for the purpose of consulting with an attorney on the request for a jury trial or concerning a request for the substitution of a judge." The October 6 hearing would have been the appropriate time to request a jury trial. Sec. 48.422(4). Because the statute requires an adjournment when a nonpetitioning party asks for one before a request for a jury trial is made, good cause existed. Case law supports our interpretation. A continuance to insure that an objecting parent has counsel and is able to properly exercise his or her rights to a jury trial is for good cause. *See* ***M.W. and I.W. v. Monroe County Dep't of Human Servs.***, 116 Wis. 2d 432, 439-40, 342 N.W.2d 410 (1984).

¶12 Moreover, since Brian himself asked for the adjournment, he cannot now argue that there was not good cause for it. This court recognizes the doctrine of judicial estoppel. The supreme court has held that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Thus, while time limits in TPR cases are not waivable, the doctrine of judicial estoppel is a species apart from waiver. Therefore, although there is ample reason why good cause exists for us to reject Brian's argument, this alternative ground is just as viable.

¶13 Brian next argues that while there was good cause for the adjournments of the November 27, 2000 and the January 22, 2001 hearings, the length of the delay was too long. The record contains references to the conversations among the parties' representatives in order to find a date that was

available for all of the parties. The trial court went into detail with Brian at the November 27, 2000 hearing in order to make sure that he understood the length of the delay, and he gave consent to this delay after hearing that January 22, 2001, was indeed the next available date for all of the parties.

¶14 At the January 22, 2001 hearing, Brian again did not object to the adjournment. The record shows extensive discussion to schedule the fact-finding hearing as early as possible. The State insisted on it. The court mentioned dates in March and April which were not available to all parties, and the court then scheduled the hearing for the earliest possible date that everyone was available, February 26, 2001. Brian did not ask the court to more fully explain the reasons why the hearing was not scheduled until February 26 and cannot now complain that the record is insufficient to support the court's conclusion that the hearing should be held on February 26. The record shows the extensive conversations among all of the parties' representatives and that February 26 was indeed the earliest available date.

¶15 Brian argues that this adjournment was the result of "court congestion" but there was no proof submitted that the calendar was indeed congested. Brian's premise is wrong. The adjournment was made to accommodate the schedules of everyone involved, not just the court. It is important that lawyers have a block of time in their calendars to give serious thought in preparing their cases for trial. Good cause exists when a court accommodates a lawyer's schedule for this purpose.

CONCLUSION

¶16 Because good cause was shown for the October 6, 2000 adjournment, and the record shows that the length of delay due to the November

27 and January 22 adjournments was only as long as necessary, the decision of the trial court is affirmed. We reiterate that Brian himself asked for the October 6, 2000 adjournment. We further reiterate that the record shows how all parties were attempting to work with each other's schedules to obtain dates as early as possible. 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.