COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2004

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 Nos. 04-2330
04-2331

Cir. Ct. Nos. 03TP000487
03TP000488

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 04-2330
CIR. CT. NO. 03TP000487

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MORIAH K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT K.,

RESPONDENT-APPELLANT.

NO. 04-2331
CIR. CT. NO. 03TP000488

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRIAR K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 FINE, J. Robert K. appeals orders terminating his parental rights to Moriah and Briar, twins born on June 22, 2001. The petition for termination of parental rights was filed on July 17, 2003, and alleged that the children were in continuing need of protection or services, and that Robert K. failed to assume his parental responsibilities for them. *See* WIS. STAT. § 48.415(2) & (6). The fact-finding hearing before a jury started on March 8, 2004. The jury found that the State had proven the grounds for termination in connection with each of the children. The trial court then found that termination of Robert K.'s parental rights to the children was in their best interests, and entered its orders on April 28, 2004. The only issue Robert K. raises on this appeal is his contention that the trial court lost competency to adjudicate his parental rights because the fact-finding hearing was held more than forty-five days after the plea hearing, and that the delay was not supported by sufficient good cause. We affirm.

¶2 WISCONSIN STAT. § 48.422(1) requires that a plea hearing on a petition to terminate parental rights be held "within 30 days after the petition is filed" to ascertain "whether any party wishes to contest the petition." The plea hearing was held on August 8, 2003, and was adjourned to September 19, 2003. Robert K. does not contend that the adjournment of the August 8 hearing was

improper, and thus this is not an issue on this appeal. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not made are waived). He does, however, argue that the jury-trial date of March 8, 2004, set at the September 19 hearing, was beyond the forty-five days permitted by WIS. STAT. § 48.422(2) ("[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, unless all of the necessary parties agree to commence with the hearing on the merits immediately"), and that this deprived the trial court of competency to hold the fact-finding hearing, *see* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 668–669, 607 N.W.2d 927, 928–929 (trial court loses competency when it does not comply with mandatory time limits). We disagree.

¶3 Application of statutes is a legal issue subject to our *de novo* review. ***Id.***, 2000 WI App 70, ¶6, 233 Wis. 2d at 669, 607 N.W.2d at 929. Time limits in the Children's Code, WIS. STAT. ch. 48, are subject to various exceptions. As material here, WIS. STAT. § 48.315(1)(b) provides that "time periods shall be excluded in computing time requirements within this chapter," for 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." In addition to the delay allowed by § 48.315(1)(b), WIS. STAT. § 48.315(2) permits continuances if there is "good cause":

> 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.

Robert K. did not object to the March 8, 2004, trial date. Nevertheless, he argues on appeal that there was not "good cause" for delaying the trial until then because

the delay was caused by the trial court's schedule and by the schedules of busy lawyers, all of which could not accommodate a trial date earlier than March 8, 2004. We need not reach this issue, however, because the children's guardian *ad litem* consented to the March 8, 2004, trial date. Our analysis has two subparts.

1.

¶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*."

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

¶6 For many purposes, the 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 older children, then, there might be a divergence of responsibilities between that of the guardian *ad litem* and the wishes of those children. Children of Moriah and

Briar's age, however, can have no "wishes" beyond what the law determines is in their 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 children who do not have separate adversary counsel because of their age and who are the subject of a petition to terminate a biological parent's parental rights, we deem that the word "counsel" in WIS. STAT. § 48.315(1)(b) also encompasses a guardian *ad litem* appointed by the trial court pursuant to WIS. STAT. § 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). Thus, contrary to what Robert K. argues on appeal, it makes perfect sense to give to the guardian *ad litem* the power to either consent or object to the trial court's setting of a trial date that is beyond the forty-five-day period. Accordingly, if Moriah and Briar's guardian *ad litem* consented to the delay in setting the fact-finding hearing, the extra days resulting from the delay are excluded by virtue of § 48.315(1)(b) from the forty-five-day period mandated by WIS. STAT. § 48.422(2).

2.

¶7 When applying statutes, we adhere to the following principle: "All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." WIS. STAT. § 990.01(1). The word "consent" is not a "technical" word. We thus give it its "common and approved usage," which we can glean from a recognized dictionary. ***State v. Seigel***, 163 Wis. 2d 871, 886, 472 N.W.2d 584, 590 (Ct. App. 1991). The common meaning of "consent" when used as a noun (as in the phrase "with the

consent") is: "compliance or approval esp. of what is done or proposed by another**:** ACQUIESENCE, PERMISSION <to do something without ~>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1993).

¶8 Moriah and Briar's guardian *ad litem* appeared at the September 19, 2003, hearing by telephone because he was out of town. He did not object to the March 8, 2004, hearing date and thus, for purposes of WIS. STAT. § 48.315(1)(b), "consented." Robert K. argues, however, that mere acquiescence cannot be "consent" under the statute. We disagree. As we have seen, acquiescence is "consent." Moreover, although Robert K.'s agreement to the trial date cannot under ***April O.*** be considered a "waiver" of his right to complain on appeal, ***id.***, 2000 WI App 70, ¶5, 233 Wis. 2d at 668, 607 N.W.2d at 928–929, his agreement reflects the reasonableness of the guardian *ad litem*'s consent.

By the Court.—Orders affirmed.

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