

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2005

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 No. 2005AP1612

Cir. Ct. No. 2004TP85

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO CHRISTOPHER S., A
PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

GARY S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Gary S. appeals an order terminating his parental rights to his son, Christopher S. Gary argues there was insufficient evidence for the jury to find that the Brown County Department of Human Services exercised reasonable efforts to provide court-ordered services. Gary also claims the court lost competency to proceed when it granted a continuance and held the fact-finding hearing after the forty-five day time limit provided by statute. This court affirms the order.

BACKGROUND

¶2 On January 9, 2003, Christopher was found to be a child in need of protection or services (CHIPS). On October 5, 2004, the Brown County Department of Human Services filed a petition seeking termination of Gary's parental rights. A plea hearing was held on December 3, where the fact-finding hearing was tentatively scheduled for January 11, 2005. At the plea hearing, the parties discussed whether the fact-finding hearing could be postponed and whether the statutory requirement that the hearing be held within forty-five days of the plea hearing could be waived. The court then set an alternate hearing date of March 8, and the Department agreed to research the waiver issue. By letter, the Department's counsel indicated that the time period could not be waived.

¶3 In a written decision and order filed January 4, 2005, the court granted a continuance with the guardian ad litem's consent, pursuant to WIS. STAT. § 48.315(1)(b). The court also found that good cause for the continuance

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

existed, pursuant to § 48.315(2). This finding of good cause was premised on the Department's concern about having sufficient information about Christopher's adoptability, which would be needed for disposition if Gary were found to be an unfit parent.

¶4 The fact-finding hearing was held on March 8, and the jury found that grounds existed to terminate Gary's parental rights. The court then found Gary unfit as a parent. At the dispositional hearing on April 1, the court weighed the relevant factors and terminated Gary's parental rights.

DISCUSSION

¶5 Gary's first claim is that there was insufficient evidence to support the jury's finding that the Department exercised reasonable efforts to provide court-ordered services to Gary. Gary does not attempt to quantify the testimony at trial regarding the Department's efforts, but instead argues that the CHIPS dispositional order failed to order any services to be performed by the Department. He points to the CHIPS dispositional order form that, at line 6 of a section entitled "Court Orders," prompts for "Services to be provided to child and family."² That line was left blank. With no services ordered, Gary argues, a jury could not reasonably find that the Department exercised reasonable efforts to provide them.

¶6 The Department contends that services were ordered by virtue of the conditions imposed on Gary. Most of those conditions required Gary to perform tasks in conjunction with the Department. Therefore, the Department argues that

² There were actually two CHIPS dispositional orders regarding Gary. There was an original and a revised order, which added conditions for Gary to follow. For simplification purposes, this court will refer to the two orders as one.

it was indirectly ordered to aid Gary in complying with the court's conditions. After reviewing the conditions and the services contained within them, this court agrees with the Department.

¶7 This court will affirm a jury's findings unless unsupported by credible evidence. *State v. Quinsanna D.*, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. Here, the jury found that the Department made reasonable efforts to provide court-ordered services. Because the existence of court-ordered services is a prerequisite to the jury's finding, this court must interpret the CHIPS order to determine whether such services were, in fact, ordered. Construction of an order is conducted in the same manner as other written instruments, resulting in a de novo review. *See Wright v. Wright*, 92 Wis. 2d 246, 255, 284 N.W.2d 894 (1979).

¶8 The CHIPS dispositional order imposed ten conditions on Gary for the safe return of Christopher to Gary's home. Most of these conditions, as quoted below, involved the Department:

1. Gary shall cooperate with the Brown County Human Services Department and the assigned social workers, meet for all scheduled appointments, allowing access to monitor the conditions and safety, follow all recommendations, and execute all necessary releases of information requested. Gary shall inform the Department of any changes in address, phone number, and employment within 72 hours of that change.

....

3. Gary shall cooperate with the visitation schedule and recommendations regarding supervised and unsupervised contact, as arranged through the Brown County Human Services Department. Gary shall consistently attend all visitations. Gary shall cooperate fully and in no way interfere with the child's placement.

4. Gary shall participate in budget counseling, as arranged by the Brown County Human Services Department. Gary shall demonstrate the ability to financially provide for his own needs and the needs of his child.
5. Gary shall obtain and maintain suitable housing for a minimum of three months prior to the return of the child to his care. Gary shall have all the necessary supplies to meet the child's needs. This environment shall be free of alcohol, drugs, and violence. The conditions provided must be safe and sanitary. Gary shall have no one residing at this residence without prior approval of the Department.
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8. Gary shall provide adequate, consistent care and supervision of his child while in his care. This plan would need to be approved by the Brown County Human Services Department.
9. Gary shall enroll in and successfully complete a parenting program to be arranged and/or approved by the Brown County Human Services Department. Gary shall demonstrate a desire and ability to parent his child, utilizing appropriate parenting skills.
10. Gary shall participate in a psychological evaluation performed by a psychological [sic] approved by the Department. Gary shall follow all of the recommendations of this evaluation.

¶9 Despite Gary's arguments to the contrary, this portion of the order requires the Department to aid Gary in complying with these conditions. The fact that these services were not referenced in the dispositional order form does not mean that no services were ordered.³ This court chooses not to overlook the

³ While the failure to reference the ordered services on the form does not invalidate the jury's findings in this case, this court notes that by referring to the services contained within the conditions, or at least checking the "see attached" box on the dispositional order form, courts will avoid possible confusion about what is expected from the Department. Further, such a practice ensures that courts do not overlook ordering such services.

mandatory role of the Department within those conditions and is therefore satisfied that services were ordered.⁴

¶10 Gary's second claim is that the circuit court lost competence when it scheduled the fact-finding hearing for a date occurring after the forty-five day time limit. Gary argues that the court's continuance, granted pursuant to WIS. STAT. § 48.315, did not satisfy that statute's requirements. First, he contends that the guardian ad litem was not Christopher's counsel under WIS. STAT. § 48.315(1)(b), and, therefore, the guardian ad litem could not consent to a continuance under that section. Gary also contends that no good cause existed for a continuance, as required by WIS. STAT. § 48.315(2).

¶11 In response to Gary's argument that counsel, under WIS. STAT. § 48.315(1)(b), does not include a guardian ad litem, the Department cites *Quinsanna D.* In *Quinsanna D.*, our analysis treated a guardian ad litem as counsel for the purposes of § 48.315(1)(b). *Id.*, ¶41. We acknowledge, however, that *Quinsanna D.* did not respond to the State's argument regarding this application of § 48.315(1)(b) and, as a result, there was no discussion of why a guardian ad litem was able to consent as the child's counsel in that case. *Id.* Nonetheless, we believe our application of the statute in *Quinsanna D.* was correct.

¶12 The Children's Code contains no provision for the waiver of time limits. See *Waukesha County v. Darlene R.*, 201 Wis. 2d 633, 640, 549 N.W.2d

⁴ This court notes that the issue of whether services were ordered was first raised on appeal. At the fact-finding hearing, no one argued that services were not ordered, and the parties' "reasonable efforts" arguments focused on the services contained within the conditions imposed on Gary.

489 (Ct. App. 1996). The only provisions for delays, continuances, and extensions are found in WIS. STAT. § 48.315. See *Darlene R.*, 201 Wis. 2d at 640. Section 48.315 provides in relevant part:

Delays, continuances and exceptions. (1) The following time periods shall be excluded in computing time requirements within this chapter:

....

(b) Any period of 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.

....

(2) 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.

¶13 Gary’s argument is essentially that a child’s counsel and guardian ad litem are not synonymous. According to Gary, “counsel” in WIS. STAT. § 48.315(1)(b) means adversary counsel. In support of this contention, Gary quotes WIS. STAT. § 48.23(1g), in a section entitled “right to counsel,” which states:

In this section, “counsel” means an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented, and who may not act as guardian ad litem or court-appointed special advocate for any party in the same proceeding.

This court notes that this definition of “counsel” applies only to use of that term “[i]n this section,” meaning § 48.23.

¶14 What Gary fails to recognize is the effect of WIS. STAT. § 48.23(3m), which applies to children in need of protection or services. That statute states, “[t]he court shall appoint counsel for any child alleged to be in need of protection or services ... except that if the child is less than 12 years of age the court may appoint a guardian ad litem *instead* of counsel ...” (Emphasis added). Thus, the statute defines situations in which a child might not be represented by “counsel,” as defined in § 48.23(1g).

¶15 As a result, this court concludes that where a guardian ad litem is appointed instead of adversary counsel, pursuant to WIS. STAT. § 48.23(3m), the guardian ad litem can consent as counsel under WIS. STAT. § 48.315(1)(b). When interpreting § 48.315(1)(b), it would be inappropriate to limit the term “counsel” to meaning “adversary counsel.” Such an interpretation would permit children with adversary counsel to request or consent to a continuance, but would preclude younger children, who may have a guardian ad litem instead of adversary counsel under § 48.23(3m), from doing the same. With no compelling justification for such a result, this court rejects Gary’s argument that the term “counsel” in § 48.315(1)(b) always excludes guardians ad litem. In this case, Christopher was under twelve years old when his guardian ad litem was appointed, and the court did not appoint adversary counsel. *See* WIS. STAT. § 48.23(3m). In the absence of adversary counsel, Christopher’s guardian ad litem was able to consent to a continuance on Christopher’s behalf.

¶16 Gary next argues that no good cause existed for granting a continuance, as required by WIS. STAT. § 48.315(2).⁵ In its written order, the circuit court referenced discussions held on the record at an initial appearance and found that the Department needed more time to investigate adoptability before disposition. The court acknowledged that disposition is separate from the fact-finding hearing, but noted that courts are statutorily required to proceed immediately to disposition if grounds are found to terminate a parent's rights, unless a statutory exception was satisfied. Therefore, the court found that the need to investigate adoptability constituted good cause for granting a continuance.

¶17 To determine whether good cause existed for a continuance, this court must search the record to determine whether such cause was shown in the manner required by statute. *See* WIS. STAT. § 48.315(2); *Quinsanna D.*, 259 Wis. 2d 429, ¶38. In this case, the record supports a finding of good cause.

¶18 Gary challenges the court's reliance on the Department's desire to investigate Christopher's adoptability because that issue relates to disposition, which occurs only after the fact-finding hearing. However, this distinction between fact-finding and disposition does not prevent the dispositional issue from providing good cause in this case. As the circuit court correctly noted, after a fact-finding hearing determining whether grounds exist to terminate a parent's rights,

⁵ Coincidentally, on the same day the court signed the order at issue in this case, Gary's attorney signed a motion requesting a continuance and stating multiple grounds as good cause, including the fact that Gary lived in Indiana and did not own a car, therefore requiring time for him to make arrangements to appear for the termination proceedings. Because Gary's motion was not filed until after the court granted a continuance on other grounds, no hearing was held on Gary's motion.

courts are required to proceed immediately to disposition, unless a statutory exception applies. *See* WIS. STAT. § 48.424(4).

¶19 With the fact-finding and dispositional phases conjoined in this manner, if additional time is legitimately needed to prepare for the dispositional phase, a court cannot ensure such time is granted unless it continues the fact-finding phase as well. In that context, this court concludes that the circuit court properly considered the need to investigate the dispositional issue when continuing the fact-finding phase of Gary's termination proceedings.

By the Court.—Order affirmed.

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

