

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 4, 2007**

David R. Schanker  
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. 2007AP1760**

**Cir. Ct. No. 2006TP15**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMILY L.R., A PERSON  
UNDER THE AGE OF 18:**

**KIMBERLY R. P.,**

**PETITIONER-RESPONDENT,**

**v.**

**WESLEY R. W.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Wood County:  
FREDERIC FLEISHAUER, Judge. *Reversed.*

¶1 HIGGINBOTHAM, P.J.<sup>1</sup> Wesley R.W. appeals an order terminating his parental rights to Emily L.R. Wesley argues the circuit court lost competency to adjudicate the termination of parental rights (TPR) petition prior to the initial hearing because it failed to conduct the hearing within thirty days after the petition was filed, as required by WIS. STAT. § 48.422(1), or to properly delay the hearing by issuing a continuance upon a showing of good cause in open court or during a telephone conference on the record, pursuant to WIS. STAT. § 48.315(2).<sup>2</sup> Wesley further argues that if competency was not already lost prior to the initial hearing, the court lost competency prior to the start of the fact-finding hearing because it failed to conduct the fact-finding hearing within forty-five days of the initial hearing without granting a continuance meeting the requirements of § 48.422(2). We agree with Wesley that the circuit court lost competency to adjudicate the petition prior to the initial hearing. We therefore reverse the order of the circuit court.

### **Background**

¶2 The facts pertinent to this appeal are undisputed. On August 16, 2006, Kimberly R.P. filed a petition to terminate the parental rights of Wesley R.W. to their biological daughter, Emily L.R. The petition alleged as grounds for termination that Wesley had failed to assume parental responsibility under WIS. STAT. § 48.415(6).

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. § 48.315(2) provides, in pertinent part: “A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference ... on the record ....”

¶3 On August 24, 2006, Wesley appeared pro se before Wood County Circuit Court Judge James Mason. After Judge Mason informed Wesley of his rights in the TPR proceeding, Wesley requested a lawyer, a jury trial and a new judge. Judge Mason adjourned the initial hearing until September 12, 2006. On September 12, Wesley's appointed counsel filed a motion for substitution of judge on Wesley's behalf. Later that day, Wesley appeared in person and with appointed counsel before Judge Mason. Judge Mason, noting that Wesley had filed a motion for judicial substitution, declared, "There is nothing else that I should undertake to do in this case."

¶4 In an October 2, 2006 written order, the case was assigned to Judge Frederic Fleishauer. On October 9, 2006, the parties were notified of the assignment of Judge Fleishauer and of a telephone conference scheduled for October 19, 2006. A printout of the court events for the case submitted with the Transmittal of Notice of Appeal contains a docket entry for October 19, 2006, which reads "Telephone conference" and "No minutes or clerk needed, but matter was set for initial appearance—see Notice of Hearing." This is the only documentation of the October 19 telephone conference contained in the record.

¶5 On October 23, 2006, a notice of hearing was filed for an adjourned initial appearance to be held November 2, 2006. Wesley and his counsel appeared by telephone for an initial hearing before Judge Fleishauer on November 2, 2006. At the hearing, Wesley reiterated his request for a jury trial. Judge Fleishauer scheduled the fact-finding hearing for January 16, 2007.

¶6 The fact-finding hearing commenced on February 26, 2007. There is nothing in the record to indicate why the hearing started on February 26 rather than January 16. On March 7, 2007, a jury unanimously found that Wesley had

failed to assume parental responsibility over Emily. At the conclusion of a dispositional hearing on April 9, 2007, the circuit court determined that termination of Wesley's parental rights was in Emily's best interests. Wesley's parental rights were terminated by an April 9, 2007 written order. Wesley appeals.

### Discussion

¶7 Wesley contends the circuit court lost competency to adjudicate the TPR petition prior to the initial hearing because the court failed to conduct the initial hearing within thirty days after the petition was filed, as mandated by WIS. STAT. § 48.422(1), or to issue a continuance meeting the requirements of WIS. STAT. § 48.315(2). Whether, on the undisputed facts of this case, the circuit court complied with the time limits of WIS. STAT. § 48.422 and granted a continuance in compliance with the requirements of WIS. STAT. § 48.315 is a question of law that we review independently. See *State v. April O.*, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927

¶8 A circuit court to which a TPR petition is assigned must hold a hearing on the petition within thirty days. WIS. STAT. § 48.422(1).<sup>3</sup> If the petition is contested, the circuit court “shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition ....” Section 48.422(2). When computing these time requirements, certain time periods are excluded, including any period of delay caused by the disqualification of a judge or a continuance granted at the request of or with the consent of the child and his or her counsel.

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<sup>3</sup> WISCONSIN STAT. § 48.422(1) provides, in relevant part: “The hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed.”

*See* WIS. STAT. § 48.315(1)(b) and (c).<sup>4</sup> “A continuance shall be granted only

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<sup>4</sup> WISCONSIN STAT. § 48.315(1) provides in full:

(1) The following time periods shall be excluded in computing time requirements within this chapter:

(a) Any period of delay resulting from other legal actions concerning the child or the unborn child and the unborn child's expectant mother, including an examination under s. 48.295 or a hearing related to the mental condition of the child, the child's parent, guardian or legal custodian or the expectant mother, pre-hearing motions, waiver motions and hearings on other matters.

(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.

(c) Any period of delay caused by the disqualification of a judge.

(d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that the evidence will be available at the later date, or to allow him or her additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case.

(e) Any period of delay resulting from the imposition of a consent decree.

(f) Any period of delay resulting from the absence or unavailability of the child or expectant mother.

(fm) Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under s. 48.365 due to the child having run away or otherwise having made himself or herself unavailable to receive that notice.

(g) A reasonable period of delay when the child is joined in a hearing with another child as to whom the time for a hearing has not expired under this section if there is good cause for not hearing the cases separately.

(continued)

upon a showing of good cause in open court or during a telephone conference ... on the record and only for so long as is necessary,” taking into account the request or consent of the parties and the public interest in the prompt disposition of cases. Section 48.315(2). Failure to comply with mandatory time limits under ch. 48 may result in the loss of a circuit court’s competency to proceed. *April O.*, 233 Wis. 2d 663, ¶5. “The general requirements of § 48.315(2) control all extensions of time deadlines under the Children’s Code.” *Id.*

¶9 Wesley notes that Judge Fleishauer was assigned to the case on October 2, and the initial hearing occurred on November 2, which, by his calculations, was one day after the thirty-day time period expired. He argues that, even if the circuit court issued a continuance delaying the initial hearing, the continuance did not toll the thirty-day period because it was not issued either “in open court or during a telephone conference ... on the record,” as required by WIS. STAT. § 48.315(2). Wesley contends that the failure to hold the initial hearing within the thirty-day time period resulted in the circuit court losing competency to adjudicate the petition, citing *April O.* and *Sheboygan Co. Dep’t of Soc. Servs. v. Matthew S.*, 2005 WI 84, ¶24, 282 Wis. 2d 150, 698 N.W.2d 631.

¶10 Kimberly argues that whether the circuit court lost competency prior to the initial hearing depends on whether the child’s counsel consented to a continuance that resulted in the hearings being held after the statutory time limits under WIS. STAT. § 48.315(1)(b). Kimberly contends that counsel’s consent may be inferred from the court events printout which indicates that a telephone

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(h) Any period of delay resulting from the need to appoint a qualified interpreter.

conference was held on October 19 at which the “matter was set for an initial appearance.” She suggests that any failure of the circuit court to issue the continuance in the manner prescribed in § 48.315(2) may be remedied by a remand to the circuit court for an evidentiary hearing to determine whether counsel for the child consented to a continuance. Kimberly is mistaken.

¶11 In *April O.*, we held that a circuit court that rescheduled an initial hearing more than thirty days after the filing of a TPR petition without issuing a continuance on the record lost competency to adjudicate the petition on the thirty-first day after the petition was filed. See *April O.*, 233 Wis. 2d 663, ¶10. We concluded that an effort to remedy the circuit court’s failure to hold the initial hearing within thirty days or to issue a continuance with an after-the-fact determination that good cause existed to postpone the initial hearing could not restore the competency of the court to proceed on the petition. *Id.* “Once a court has lost competency it cannot, in a later proceeding, find good cause for a delay and thereby restore competency.” *Id.*

¶12 In requesting a remand for an evidentiary hearing to determine whether the child’s counsel consented to a continuance, Kimberly seeks exactly this—a restoration of the circuit court’s competency. Here, it is undisputed that the circuit court held the hearing after the thirty day statutory period expired, and did not issue a continuance delaying the proceeding based on good cause and in court or during a telephone conference on the record pursuant to WIS. STAT. § 48.315(2). The circuit court thus lost competency to adjudicate the petition prior

to the November 2 initial hearing.<sup>5</sup> Regardless of whether the child’s counsel consented to a continuance on October 19, there is nothing in the record indicating that the circuit court granted a continuance in open court or during a telephone conference on the record. We therefore reject Kimberly’s request for an evidentiary hearing to remedy the circuit court’s failure to follow the mandates of WIS. STAT. §§ 48.422(1) and 48.315(2).

¶13 Moreover, even if the circuit court had met the requirements of WIS. STAT. §§ 48.422(1) and 48.315(2) and not lost competency prior to the initial hearing, it would have lost competency prior to the start of the fact-finding hearing because the circuit court rescheduled the fact-finding hearing more than forty-five days after the initial hearing, as required by § 48.422(2), without issuing a continuance meeting the requirements of § 48.315(2). As Wesley notes, at the close of the November 2 initial hearing, the circuit court scheduled the fact-finding hearing for January 16, noting that its calendar was very busy. Then, without an on-the-record explanation, the hearing was inexplicably rescheduled for February 26. The circuit court’s failure to issue a continuance for good cause in open court or during a telephone conference on the record delaying the fact-finding hearing would have resulted in the circuit court losing competence on

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<sup>5</sup> Wesley asserts that the circuit court lost competency on November 2. Based on our reading of WIS. STAT. § 48.315(1)(c), we calculate that the court actually lost competency more than a week earlier. Section 48.315(1)(c) excludes “[a]ny period of delay caused by the disqualification of a judge” in computing time requirements within Chapter 48. Here, the “period of delay” was from August 24, the date at which Wesley first indicated he wanted a new judge, to October 2, the date Judge Fleischauer was assigned to the case. The seven days between August 24 and August 16, the date the petition was filed, are counted toward the thirty-day time limit. Thus, we calculate that the court lost competency on October 26, not November 2, as Wesley contends. Regardless, the circuit court lacked competency to adjudicate the petition before the circuit court commenced the initial hearing.



January 17, had the court not already lost competence prior to the November 2 initial hearing.

¶14 For the reasons stated above, we conclude that the circuit court lost competency to adjudicate the TPR petition prior to the initial hearing because it did not hold the hearing within thirty days of the filing of the petition pursuant to WIS. STAT. § 48.422(1), or properly delay the hearing by issuing a continuance upon a showing of good cause in open court or during a telephone conference on the record pursuant to WIS. STAT. § 48.315(2). Accordingly, we reverse the order terminating Wesley's parental rights to Emily L.R.

*By the Court.*—Order reversed.

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

