

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 5, 2017**

Diane M. Fremgen  
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. 2017AP1217  
2017AP1218  
2017AP1219**

**Cir. Ct. Nos. 2015TP65  
2015TP66  
2015TP67**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**No. 2017AP1217**

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

**M. R. B.,**

**PETITIONER-RESPONDENT,**

**v.**

**S. S.,**

**RESPONDENT-APPELLANT.**

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**No. 2017AP1218**

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

**M. R. B.,**

**PETITIONER-RESPONDENT,**

**v.**

**S. S.,**

**RESPONDENT-APPELLANT.**

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**No. 2017AP1219**

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

**M. R. B.,**

**PETITIONER-RESPONDENT,**

**v.**

**S. S.,**

**RESPONDENT-APPELLANT.**

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APPEALS from orders of the circuit court for Rock County:  
RICHARD A. BATES, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.<sup>1</sup> S.S. appeals the circuit court's orders terminating his parental rights to his children A.S., A.S., and A.S. S.S. argues that the circuit court lost competency to proceed by failing to hold a dispositional hearing within the statutorily required time lines; that the court erred in denying S.S. a continuance to obtain counsel and participate meaningfully in the dispositional phase of the proceedings; and that the court erroneously exercised its discretion when making the decision to terminate S.S.'s parental rights. For the reasons that follow, I affirm.

### ***Background***

¶2 On October 7, 2015, the children's mother, M.R.B., petitioned to terminate S.S.'s parental rights to each of the three children. M.R.B. alleged facts that, if true, supported the abandonment and failure-to-assume-parental-responsibility grounds for termination. *See* WIS. STAT. § 48.415(1) and (6). M.R.B. further alleged that her husband would be filing a petition to adopt the children.

¶3 On November 4, 2015, the circuit court held the initial hearing on M.R.B.'s petitions. S.S. did not appear in person or by counsel.

¶4 The court found S.S. in default and took testimony in support of the grounds alleged. The court, however, delayed holding a dispositional hearing and entering a final order. The court noted that there was a December 23, 2015

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

hearing scheduled on the parallel adoption proceedings, and indicated that the court could enter a final order in the termination proceedings at that time.

¶5 As far as the record discloses, December 23, 2015, came and went with no further circuit court action and no appearance by S.S. No further hearing was held until February 28, 2017, over 15 months after the default finding.<sup>2</sup>

¶6 S.S. appeared in the termination proceedings for the first time at the February 28, 2017 hearing. He asserted that he had not been properly served in the termination proceedings, stated that he wished to contest termination, and requested a continuance so that he could have an attorney present to assist him.

¶7 The circuit court concluded that S.S. was properly served and denied S.S.'s request for a continuance. The court then proceeded to terminate S.S.'s parental rights.

¶8 S.S., now represented by counsel, appeals.

### *Discussion*

#### *Circuit Court's Competency To Proceed*

¶9 S.S. argues that the circuit court lost competency to proceed by failing to hold the dispositional hearing within the statutorily required time lines. S.S. fails, however, to provide an explanation as to why WIS. STAT. § 48.315(3) does not dispose of this argument. So far as I can tell, it does. That statute

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<sup>2</sup> The only indication in the record as to the reason for this delay is a letter from M.R.B. stating that, despite several reminders from M.R.B., Lutheran Social Services was uncharacteristically slow in conducting the court-ordered adoption study.

provides: “Failure by the court ... to act within any time period specified in this chapter does not deprive the court of ... subject matter jurisdiction or of competency to exercise that jurisdiction.” *Id.*

¶10 S.S.’s reliance on *State v. April O.*, 2000 WI App 70, 233 Wis. 2d 663, 607 N.W.2d 927, is misplaced. *April O.* states that “appellate courts have previously held that failure to comply with mandatory time limits under the Children’s Code may result in the loss of the circuit court’s competency to proceed.” *Id.*, ¶5. But *April O.* was decided before the legislature changed the statute to include the language quoted in ¶9, above. See 2007 Wis. Act 199, § 15; *April O.*, 233 Wis. 2d 663, ¶1 n.2 (citing the 1997-98 statutes).

*Circuit Court’s Denial of S.S.’s Request for a Continuance*

¶11 S.S. argues that the circuit court erred in denying S.S. a continuance so that S.S. could obtain counsel and participate meaningfully in the dispositional phase of the proceedings. S.S. correctly notes that parents in contested termination proceedings have a right to present evidence and be heard during the dispositional phase. See *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶21 & n.9, 246 Wis. 2d 1, 629 N.W.2d 768. However, S.S. appears to assume, without citation to supporting authority, that parents can never waive or forfeit this right regardless of any default finding, the passage of significant time without any appearance by the parent, or other circumstances. I decline to make the same assumption in the absence of developed argument or authority from S.S.

¶12 Here, there are several circumstances that seemingly support the circuit court’s decision to deny the requested continuance. Those circumstances included that:

- The court found S.S. in default on November 4, 2015, for failing to appear in the termination proceedings;
- S.S. did not appear in the termination proceedings until February 28, 2017, more than 15 months after the default finding;
- When S.S. finally did appear in the termination proceedings, he claimed that he had not been properly served with M.R.B.'s petitions to terminate S.S.'s parental rights; and
- The court concluded that the service on S.S. complied with the applicable service requirements.

¶13 Absent citation to supporting authority or argument addressing these circumstances, I decline to reverse based on the circuit court's refusal to grant S.S. a continuance. I note that S.S. does not now challenge that service was proper or that he was properly found in default.

*Circuit Court's Exercise of Discretion When Making  
the Decision to Terminate S.S.'s Parental Rights*

¶14 S.S. argues that the circuit court erroneously exercised its discretion when making the decision to terminate S.S.'s parental rights. I reject this argument for the reasons below.

¶15 In making a decision whether to terminate parental rights, the circuit court must give paramount consideration to the best interests of the child. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152-53, 551 N.W.2d 855 (Ct. App. 1996). The court considers the following statutory factors:

“(a) The likelihood of the child's adoption after termination.

“(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

“(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to sever these relationships.

“(d) The wishes of the child.

“(e) The duration of the separation of the parent from the child.

“(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.”

*Id.* at 153-54 (quoting WIS. STAT. § 48.426(3)).

¶16 S.S. argues that the record was inadequate for the circuit court to determine whether the termination of his parental rights was in the children’s best interests. I am not persuaded.

¶17 It is true, as S.S. points out, that the circuit court did not take evidence during the dispositional hearing. The court did, however, hear evidence relevant to disposition during the fact-finding phase, and the court took judicial notice of the parallel adoption proceedings over which the court was also presiding. It is apparent that the court considered the information from *those* proceedings in applying the required statutory factors and in concluding that termination of S.S.’s parental rights was in the children’s best interests. S.S. does not argue that the court erred in taking judicial notice of the adoption proceedings. Nor, as far as I can tell, does S.S. argue that the record in the adoption proceedings, when combined with the evidence in the termination proceedings, was inadequate to support termination. Thus, I reject S.S.’s claim that the record was inadequate to support the circuit court’s termination decision.

¶18 S.S. argues that the circuit court erred at the dispositional hearing by referring to a guardian ad litem (GAL) recommendation that did not exist. S.S. asserts that the GAL never made a recommendation in the termination proceedings. In context, however, the more logical reading of the court's comment is that it is a reference to a GAL recommendation in the parallel adoption proceedings.

¶19 In his reply brief, S.S. appears to make a different argument relating to the GAL, namely, that the circuit court erred by terminating S.S.'s parental rights to the children without a GAL recommendation as required by WIS. STAT. § 48.235(3)(b)2. I decline to address this argument because it comes too late. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court of appeals generally does not address arguments raised for the first time in a reply brief).

### ***Conclusion***

¶20 For the reasons stated, I affirm the circuit court's orders terminating S.S.'s parental rights to his children A.S., A.S., and A.S.

*By the Court.*—Orders affirmed.

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



