COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-1548
02-1549
02-1550
02-1551
02-1552

Cir. Ct. Nos. 01 TP 126
01 TP 127
01 TP 128
01 TP 129
01 TP 130

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

NO. 02-1548
CIR. CT. NO. 01 TP 126

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKIE C.,

RESPONDENT-APPELLANT.

NO. 02-1549
CIR. CT. NO. 01 TP 127

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKIE C.,

RESPONDENT-APPELLANT.

NO. 02-1550
CIR. CT. NO. 01-TP 128

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKIE C.,

RESPONDENT-APPELLANT.

NO. 02-1551
CIR. CT. NO. 01 TP 129

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKIE C.,

RESPONDENT-APPELLANT.

NO. 02-1552
CIR. CT. NO. 01 TP 130

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKIE C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 SCHUDSON, J.[1] Jackie C. appeals from the circuit court order terminating his parental rights to his children, Jackie, Osha, Tavii, Adonis, and Bedown. He argues that the court violated WIS. STAT. § 48.422(3) (1999-2000) by failing to take testimony at the termination hearing and erred in denying his

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

post-termination motion to withdraw his waiver of the fact-finding hearing. This court affirms.

¶2 The facts relevant to resolution of this appeal are undisputed. In March 2001, the State filed a petition to terminate Jackie C.'s parental rights to five of his children, alleging that Jackie C. had committed a serious felony—first-degree reckless homicide, in violation of WIS. STAT. § 940.02(1)—against another of his children, two-year-old Tyleesha. *See* WIS. STAT. § 48.415(9m).[2] On September 4, 2001, at the time set for jury trial on the petition, Jackie C. waived his right to a fact-finding hearing on the grounds for termination, while preserving his right to challenge termination in the dispositional phase. Upon accepting Jackie C.'s waiver, the court did not take testimony. Instead, without objection, it took judicial notice of facts including: (1) Tyleesha was a child of Jackie C. and the sibling of the five children who were the subjects of the termination petition; and (2) Jackie C. was convicted of first-degree reckless homicide for the killing of

[2] WISCONSIN STAT. § 48.415(9m) provides that grounds for involuntary termination of parental rights may include:

> COMMISSION OF A SERIOUS FELONY AGAINST ONE OF THE PERSON'S CHILDREN. (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction.
>
> (b) In this subsection, "serious felony" means any of the following:
>
> 1. The commission of … a violation of s. … 940.02 ….

Tyleesha, thus establishing the grounds for termination under WIS. STAT. § 48.415(9m).

¶3 A few months later, at the dispositional hearing, the prosecutor brought to the court's attention "information that [she] had regarding the possibility that [Jackie C.] was not the biological father of Tyleesha." The court responded, in part, by recalling that Jackie C., at a previous hearing, "was rather adamant in his position that there is no reason or basis to question his paternity of Tyleesha, that there was no reason or basis to attack the presumption of the paternity, and that he had no desire to pursue whatever legal alternatives he might have to challenging that presumption." The court then discussed the matter with counsel for Jackie C., leading to the following colloquy:

> [COUNSEL]: Your Honor, I have had another discussion with my client. And [Jackie C.], is it your position today that Tyleesha was your child?
>
> [JACKIE C.]: Yes.
>
> ….
>
> [THE COURT]: And he has no desire at this point to pursue any legal alternative to attack the presumption of paternity even having heard what [counsel for Tyleesha's mother] said [about his incarceration at the time of conception of Tyleesha]?
>
> [COUNSEL]: What the Judge is asking, knowing that there has been a question raised[,] you have a potential to say, ["E]ven though I've been believed to be the father all of this time and presumed to be the father, because [Tyleesha's mother] and I were married all of this time when the child was born, even though I was in prison[,"] and that it would be very difficult to say that you are not the dad because of the presumption, particularly where Tyleesha is no longer with us, that you would have the ability to raise a challenge to say[, "]I was mistaken, my belief that Tyleesha was my child.["] You would have

> ability to ask the Court to … make a determination based upon … when Tyleesha could have been conceived?
>
> …. whether it was physically impossible or not for that to be your child, you would raise that with the Court?
>
> What the Judge is asking you, your intention at all to bring into any doubt on your end whether that was your child or not?
>
> [JACKIE C.]: No.

At the hearing on his post-termination motion, however, Jackie C. variously testified that he no longer believed that he was Tyleesha's biological father, or that he did not know whether he was her biological father.

¶4 In its written decision denying Jackie C.'s post-termination motion, the circuit court concluded that testimony was not required because "judicially noticed facts are the functional equivalent in all respects of facts established through oral testimony." The court observed, "Putting a social worker on the stand to offer oral testimony, the sole purpose of which would be to offer documents of which this court properly took judicial notice, would be a 'waste of time [and] needless presentation of cumulative evidence'" under WIS. STAT. § 904.03.[3] The court also wrote:

[3] WISCONSIN STAT. § 904.03 states:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> [Jackie C.] was clearly and unequivocally offered the opportunity to pursue the alternative of attempting to rebut the presumption that he was Tyle[e]sha's father. He personally indicated that he did not wish to bring into question his parentage of Tyle[e]sha. His lawyer, on his behalf, asserted that he did not wish to challenge his paternity status. His lawyer asserted [Jackie C.'s] belief that he was Tyle[e]sha's father. I specifically found that [Jackie C.] declined to pursue the alternative of attempting to rebut the presumption.

(Citations omitted.)

¶5 On appeal, Jackie C. does not claim that his waiver of a fact-finding hearing was uninformed or involuntary. And on appeal, he does not unequivocally claim that he was not the biological father of Tyleesha. He argues, however, that the circuit court violated WIS. STAT. § 48.422(3) by conducting the termination hearing without taking testimony in support of the petition and that the court's failure to do so was prejudicial because his fatherhood of Tylesha is "in serious doubt." The State responds that the court's failure to take testimony did not prejudice Jackie C. The State is correct.

¶6 WISCONSIN STAT. § 48.422(3) provides, "If the petition [to terminate parental rights] is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required by sub. (7)." Under WIS. STAT. § 48.422(7), a court, when accepting an admission of the allegations in a termination petition, must, among other things, "make such inquiries as satisfactorily establish a factual basis for the admission."

¶7 Here, the circuit court correctly concluded that judicially-noticed facts are the "functional equivalent in all respects of facts established through oral testimony." After all, evidence consists not only of testimony and exhibits, but

also of stipulations and "any facts … which [a trial court] direct[s a jury] to find." *See* WIS JI—CIVIL 100. Thus, where, as in this case, proof of certain stipulated facts—birth, paternity, judgment of criminal conviction—can be more definitively and efficiently established by documentation than through testimony, a court correctly relies on judicial notice to "satisfactorily establish a factual basis for the admission." *See* WIS. STAT. § 48.422(7).

¶8 Further, even assuming that Jackie C.'s argument has some theoretical legal merit, it fails because Jackie C. has not shown that he was prejudiced by the court's failure to take testimony. In ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, a termination case presenting somewhat similar facts, the supreme court concluded that although the legislature, by enacting WIS. STAT. § 48.422(3), "intended the circuit court to hear testimony in support of the allegations because testimony safeguards accurate fact-finding and protects the parents," ***id.*** at ¶56, and although the court erred in judicially noticing facts contained in termination reports that were "subject to reasonable dispute," ***id.*** at ¶53, reversal of a termination was not appropriate where the parent "was not prejudiced by the circuit court's failure to comply with the statute." ***Id.*** at ¶57.

¶9 In the instant case, the fact of Jackie C.'s paternity was not "subject to reasonable dispute" at the termination hearing and, when the prosecutor subsequently brought her concerns to the court's attention, Jackie C. still insisted that he was Tyleesha's father. Further, the circuit court concluded, even when Jackie C. finally challenged the fact of his paternity, he failed to present evidence to defeat the presumption of his paternity established by his marriage to

Tyleesha's mother at the time of Tyleesha's conception and birth. *See* WIS. STAT. § 891.41(1)(a).[4] Thus, as the State argues, "[w]ithout providing evidence that would overcome the presumption established by [WIS. STAT. §] 891.41(1)(a), [Jackie C.] cannot claim that he is prejudiced by the Trial Court's failure to take testimony as to grounds."

By the Court.—Order affirmed.

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

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[4] WISCONSIN STAT. § 891.41(1)(a) provides, "A man is presumed to be the natural father of a child if … [h]e and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties."

On appeal, Jackie C. refers to the post-termination-hearing record of his wife's testimony (from the related criminal court proceedings), and his own testimony (from the post-termination hearing), stating that he was not Tyleesha's biological father. He does not, however, develop any argument challenging the circuit court's conclusion that, particularly in light of the their earlier stipulations to the fact of his paternity, their testimony was insufficient to defeat the presumption. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument).