COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

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 No. 2012AP780 **Cir. Ct. No. 2011TP26**

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

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

NICOLE P.,

PETITIONER-RESPONDENT,

V.

MICHAEL P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Michael P. appeals an order terminating his parental rights to his son, Bane P., and an order denying his request to withdraw his admission to grounds for termination. Michael argues he is entitled to withdraw his admission because it was not knowingly, voluntarily, and intelligently entered. We disagree and affirm.

BACKGROUND

¶2 Nicole P. petitioned to terminate Michael's parental rights to Bane. As grounds for termination, Nicole alleged that Michael abandoned Bane and that Michael failed to assume parental responsibility. *See* WIS. STAT. § 48.415(1), (6). Michael contested the petition and a fact-finding hearing was scheduled. On the hearing date, Michael's counsel advised the court that Michael wanted to admit to the abandonment ground.[2] Counsel submitted a "waiver of jury trial admission of grounds" form and advised the court he had reviewed the abandonment jury instruction, WIS JI—CHILDREN 314, with Michael. Counsel also advised the court that the dispositional hearing would be contested.

¶3 The court called Michael to the witness stand and invited the parties to question him about his admission. Michael's attorney questioned Michael about his age, his completion of high school, and certain mental health medications Michael had consumed within the last twenty-four hours. Michael agreed that he filled out the plea form with counsel, that he initialed each line, and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The record is unclear as to the disposition of the failure-to-assume-parental-responsibility ground. In any event, an admission to a single ground, e.g., abandonment, establishes there are grounds to terminate a parent's parental rights. *See* WIS. STAT. § 48.415.

that he understood the phrases and sentences used on the form. He also indicated he understood he was giving up his right to a jury trial and his right to have Nicole convince the jurors by clear and convincing evidence that he abandoned Bane. Michael believed Nicole would be able to show that, although he knew where Bane was located, he failed to communicate with Bane for a period of six months or more.

¶4 Michael understood that, after this hearing, he would no longer be able to contest the underlying facts. He agreed that the dispositional hearing would be before a judge without a jury, that the purpose of the hearing would be "to decide if it's in Bane's best interest that [Michael] would stay his father," and that "after today, our focus is going to shift from [him] to Bane."

¶5 On cross-examination, Michael testified he reviewed the abandonment jury instruction with his attorney, his attorney discussed defenses to the abandonment ground with him, and he was unable to establish any defense to abandonment. The court asked Michael if there was anything Michael did not understand, if he had any questions, and if he wanted to add anything to his testimony. Michael responded negatively to each question.

¶6 Nicole then requested that, although Michael admitted grounds existed to terminate his parental rights, the court delay its finding that Michael was an unfit parent until the beginning of the dispositional hearing. Nicole explained that the court's unfitness finding would be unnecessary if Michael voluntarily agreed to terminate his parental rights at the dispositional hearing. After discussing Nicole's request with Michael, Michael's counsel advised the court that Michael agreed to delay the finding of unfitness.

¶7 The court then addressed Michael's counsel, asking him if he believed Michael's admission was knowing and voluntary. Counsel responded affirmatively and advised the court that he had three or four conversations with Michael about this decision and believed Michael understood the implications. The court accepted Michael's admission to the abandonment ground, concluding it was knowing, voluntary, and intelligent. It withheld its unfitness finding until the dispositional hearing. The court subsequently held a three-day dispositional hearing, and, at the end of the hearing, terminated Michael's parental rights to Bane.

¶8 Michael filed a postdisposition motion, arguing his admission to the abandonment ground was not knowing, voluntary, or intelligent and, as a result, he was entitled to withdraw his plea. Specifically, Michael asserted the court's colloquy was insufficient because it failed to inform him that: (1) if the court accepted his admission it would find him to be an unfit parent whose rights could be terminated following the dispositional hearing; (2) the sole focus at the dispositional hearing would be Bane's best interest; and (3) if Nicole prevailed at the dispositional hearing, all of Michael's parental rights to Bane would be permanently extinguished. Michael contended he did not understand these concepts when he entered his admission.

¶9 The court held an evidentiary hearing. At the hearing, Nicole called Michael as a witness and questioned him about the "waiver of jury trial admission of grounds" form he completed. Specifically, Nicole directed Michael to four initialed statements on the form:

> 10. If the Court accepts my stipulation I realize I will be found to be "an unfit parent" and that finding is the same as if I had been found unfit after a trial.… [Michael's initials].

> 11. I understand that a "Disposition Hearing" will take place in Court. At that hearing, a Judge will listen to testimony and decide if it is in my child's best interest to terminate my parental rights.… [Michael's initials].
>
> 12. I understand that the Judge at the disposition hearing may or may not terminate my parental rights.… [Michael's initials].
>
> ....
>
> 16. I have read & understand this entire document.… [Michael's initials].

Michael agreed that his initials after each statement indicated he understood the statement. He testified that, although he thought he understood those statements when he initialed them, he has since realized that he did not understand them. On cross-examination, Michael testified that he did not know that his parental rights could be terminated only if the court first found him "unfit," that the dispositional hearing would be solely focused on Bane and that, if he lost at the dispositional hearing, his parental rights to Bane would be permanently extinguished. Michael testified he only entered an admission to the abandonment ground because he believed Nicole would have been able to prove that ground at trial.

¶10 Nicole called Michael's trial counsel as a witness and he was questioned by both parties. At the end of his testimony, the court asked trial counsel:

> Do I understand your responses correctly to be that those topics that you were asked about by [Nicole], and really, by [Michael] as well, that you had discussed each of those issues, that is, the issue of … being an unfit parent, the issue of the shift to then focus at a dispositional hearing to the best interests of the child, and the issue with respect to … the potential for having all of his rights extinguished at the dispositional phase, is it your testimony that you believe you had discussed all of those topics with him, whether at the time you physically filled out the form or at some other time?

Michael's trial counsel testified affirmatively.

¶11 The court denied Michael's postdisposition motion, finding "there is more than ample evidence that is clear and convincing in nature which establishes that the position taken by Michael was … always voluntary [and] knowing ...." The court found Michael's testimony from the plea hearing combined with the plea form and his trial counsel's postdisposition testimony established Michael's admission was knowing, voluntary, and intelligent. The court reasoned that to find Michael's admission was not knowing, voluntary or intelligent, it would have to reject all the representations of understanding Michael made at the plea hearing, the initialed and signed plea form, and Michael's trial counsel's postdisposition testimony that "he explained these concepts to [Michael]." Michael appeals.

DISCUSSION

¶12 If a parent wishes to admit to grounds for termination, the "circuit court must engage the parent in a colloquy to ensure that the plea is knowing, voluntary and intelligent." ***Brown Cnty. DHS v. Brenda B.***, 2011 WI 6, ¶36, 331 Wis. 2d 310, 795 N.W.2d 730. "This colloquy is governed by the requirements of WIS. STAT. § 48.422(7) and notions of due process."[3] ***Id.*** The parent must

[3] WISCONSIN STAT. § 48.422(7) provides:

> Before accepting an admission of the alleged facts in a petition, the court shall:
>
> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

(continued)

"understand that the power of the State may be employed to permanently extinguish any legal recognition of the rights and obligations existing between parent and child." ***Id.***, ¶41.

> It is likewise essential for parents to understand that they are agreeing to waive the protections which safeguard parental rights from permanent extinguishment by the State. The parent must be informed that there are a number of procedural trial rights put in place to prevent parental rights from being terminated without cause, … and that these rights are waived with the court's acceptance of the plea.
>
> It is important that the parent understand that by pleading no contest to a ground for termination, the parent is waiving the right to make the petitioner prove unfitness by clear and convincing evidence, and that acceptance of the plea will result in a finding that the parent is unfit….
>
> Finally, the parent must be informed that by pleading no contest to grounds for termination, the parent has waived a fact-finding hearing during the phase of the proceedings in which the parent's rights receive the utmost protection under the Constitution. Should a parent wish to contest termination after he or she is found to be unfit, that parent is left with the sole issue of whether termination of parental rights is in the best interests of the child. Once the parent is found to be unfit, it is the court's determination about what is best for the child rather than any concern about protecting the parent's right that drives the outcome.

Id., ¶¶42-44 (citations omitted).

> (bm) Establish whether a proposed adoptive parent of the child has been identified….
>
> (br) Establish whether any person has coerced a birth parent or any alleged or presumed father of the child in violation of s. 48.63(3)(b)5….
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

¶13 If "a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies."[4] ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. First, "the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing." ***Id.*** If the parent makes a prima facie showing, the parent is entitled to an evidentiary hearing where "the burden then shifts to [the petitioner] to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition." ***Id.***

¶14 Here, because the circuit court held an evidentiary hearing, we assume without deciding that Michael made a prima facie showing that the plea colloquy was deficient and that, at the hearing, Nicole had the burden of proving by clear and convincing evidence that Michael's admission was knowing, voluntary, and intelligent. Whether Nicole established Michael knowingly, voluntarily, and intelligently admitted that grounds existed to terminate his parental rights raises a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). We review constitutional questions independent of the circuit court. ***Id.*** But "[w]e will uphold the circuit court's findings of evidentiary or historical facts unless the findings are 'contrary to the great weight and clear preponderance of the evidence.'" ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶28, 293 Wis. 2d 530, 716 N.W.2d 845 (quoting ***Bangert***, 131 Wis. 2d at 283-84).

[4] ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986).

¶15 Michael argues he is entitled to withdraw his admission because the circuit court record does not establish he understood three concepts. First, he asserts he did not understand "the full meaning and significance of being found to be an unfit parent"—specifically, that the court could only terminate his parental rights if it made an unfitness determination. Second, he contends he did not know the sole focus of the "dispositional hearing would be Bane's best interests, without any concern whatsoever for his own interests in retaining parental rights." Third, he argues he did not understand that, at the dispositional hearing, the circuit court could "permanently extinguish any legal recognition of each and every single conceivable parental right … between him and his son Bane."

¶16 We conclude Michael is not entitled to withdraw his admission because Nicole met her burden of proving he knowingly, voluntarily, and intelligently admitted to the abandonment ground. First, the plea form established that Michael knew that, upon his admission, the court was going to find him unfit, a dispositional hearing would occur, and the judge at the dispositional hearing would determine whether it was in Bane's best interest to terminate Michael's parental rights. Michael also knew that his parental rights "may or may not" be terminated at the dispositional hearing. At the plea hearing, Michael testified that he understood everything in the form, that he understood the focus of the next hearing would "shift from [him] to Bane," and that he knew the purpose of the hearing would be "to decide if it's in Bane's best interest that [Michael] would stay his father."

¶17 Further, Michael's trial counsel represented to the court at the plea hearing that he had three or four conversations with Michael about his admission and believed Michael understood the implications. Then, at the postdisposition hearing, trial counsel testified that he discussed with Michael the concepts of

unfitness, best interests of the child, and parental rights termination. The circuit court was free to accept counsel's testimony and did in fact rely on it when determining Michael knowingly, voluntarily, and intelligently entered his admission. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 ("When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony."). The court was also free to reject Michael's purported lack of understanding, finding it "self-serving" and contrary to the other evidence. *See* ***id.***

By the Court.—Orders affirmed.

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