

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

Nos. 98-2107
98-2108

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

No. 98-2107

IN RE THE TERMINATION OF PARENTAL RIGHTS OF
AMBER H., A PERSON UNDER THE AGE OF 18:

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

TIMOTHY H.,

RESPONDENT-APPELLANT.

No. 98-2108

IN RE THE TERMINATION OF PARENTAL RIGHTS OF
BRITTANY H., A PERSON UNDER THE AGE OF 18:

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

TIMOTHY H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
DENNIS J. FLYNN, Judge. *Affirmed.*

SNYDER, P.J. Timothy H. appeals from orders terminating his parental rights to two children. Timothy claims that the termination orders should be vacated because his consent to the termination of parental rights (TPR) was not voluntary pursuant to § 48.41, STATS. He also contends that the proceedings constituted “child bargaining” contrary to public policy and the best interests of the children. We are not persuaded by either argument and thus we affirm.

Timothy H. and Yvonne H. are the parents of Amber H., Brittany H. and Shawn H.¹ The subject of this appeal concerns only Timothy’s parental rights to Amber and Brittany. Timothy and Yvonne have had a history of violence and aggression towards each other and their children. As a result, in December 1995 the Racine County Human Services Department (Department) placed Amber and Brittany in protective custody and the children’s court found the children to be in need of protection or services (CHIPS) pursuant to § 48.13(10), STATS. As part of the CHIPS order, the court continued its out-of-home placement of the children and established conditions each parent needed to satisfy before unsupervised visitations could begin.

¹ Amber and Brittany were born in 1988 and 1989, respectively; Shawn was born in 1994.

Initially, Yvonne appeared to comply with the court's conditions, which included participating in a counseling program, maintaining a suitable residence for the children, and refraining from having contact with Timothy. However, later investigation revealed that she and Timothy had been living together contrary to the court's order. In July 1997, Yvonne absconded to Indiana with their son Shawn, who was also under a CHIPS order.

Meanwhile, Timothy had made little progress in meeting the court's conditions. Besides maintaining contact with Yvonne, Timothy was found to have been abusing cocaine and alcohol and to have physically assaulted his sister, who had been caring for the children. On October 16, 1997, the Department sought an involuntary termination of Timothy's and Yvonne's parental rights to Brittany and Amber. At the termination proceedings, Timothy offered to voluntarily terminate his parental rights. The trial court accepted his voluntary termination and ordered the Department to take custody of Amber and Brittany.² Timothy now appeals.

DISCUSSION

Timothy contends that his termination was involuntary as a matter of law because his consent was induced by promises made about the return of his son Shawn, who was also under a CHIPS order but not the subject of the termination proceedings. In TPR proceedings an "appellate court should give weight to the trial court's decision, although the trial court's decision is not controlling." *T.M.F. v. Children's Serv. Soc'y*, 112 Wis.2d 180, 188, 332 N.W.2d 293, 298 (1983) (quoted source omitted). "[T]he legal conclusion of voluntary and informed consent is derived from and intertwined with the trial court's factual

² At the same proceeding, Yvonne also voluntarily terminated her parental rights to Brittany and Amber.

inquiry” *Id.* Because the trial court has the opportunity to question and observe the witnesses, it is better prepared to reach an accurate and just conclusion on whether consent was voluntary. *See id.* Public policy is served by a standard that favors the finality of the trial court’s conclusion as to a parent’s voluntariness. *See id.*

Given the consequences and finality of a TPR order, the trial court’s determination of voluntariness must be “searching and penetrating.” *See A.B. v. P.B.*, 151 Wis.2d 312, 319, 444 N.W.2d 415, 418 (Ct. App. 1989). As set forth by the supreme court in *T.M.F.*, a trial court should consider the following information in determining whether consent is voluntary and informed:

1. the extent of the parent’s education and the parent’s level of general comprehension;
2. the parent’s understanding of the nature of the proceedings and the consequences of termination, including the finality of the parent’s decision and the circuit court’s order;
3. ... the parent’s understanding of the right to retain counsel at the parent’s expense;
4. the extent and nature of the parent’s communication with the guardian ad litem, the social worker, or any other adviser;
5. whether any promises or threats have been made to the parent in connection with the termination of parental rights;
6. whether the parent is aware of the significant alternatives to termination and what those are.

T.M.F., 112 Wis.2d at 196-97, 332 N.W.2d at 301-02.

From the outset of the January 12, 1998 termination proceedings, the trial court made a concerted effort to determine whether Timothy was acting knowledgeably and on his own accord in deciding to voluntarily terminate his parental rights:

[C]ertainly one of the issues we have to address is what is the position of the father, is he acting freely, knowingly and voluntarily, does he understand the issues that are involved here, does he understand the finality of these proceedings To say that this is an important issue is an understatement, so I need to have a record that reflects father's understanding of the importance of the issues and then whether father really wants to do this

We begin by reviewing the trial court's assessment of Timothy's level of education and comprehension. The record reveals that Timothy attended high school until the tenth grade although he could read and write "very little." Acknowledging Timothy's limitations, the court proceeded to determine his general understanding of the TPR. The court asked whether Timothy had received a copy of the TPR petition. Timothy replied that he had received a copy, that someone had read the petition with him and that he understood its contents.

Because Timothy had a history of alcohol and drug abuse, the court also inquired about Timothy's general level of comprehension at the time of the termination proceedings. Timothy replied that he was not presently using drugs or alcohol nor was he impaired in any way in making a decision about termination.

Next, the trial court questioned Timothy about his understanding of the TPR proceedings and consequences. Timothy responded that he wanted to voluntarily terminate his parental rights to Brittany and Amber based on "the way things were understood to me and the conditions for [Shawn]." Timothy explained that "if I lose with Amber and Brittany ... [t]here's a good chance I could lose [Shawn]." Timothy's comments stemmed from his understanding of § 48.415(10), STATS., which states that a prior involuntary termination of the parental rights of one child constitutes grounds for involuntary termination of the parental rights of another child.

Timothy also testified that he was aware of his right to contest the termination of his parental rights and that he had, in fact, reviewed the record and the potential witness testimony addressing the termination of his rights to Amber and Brittany. He indicated that he understood his voluntary termination would be irrevocable, conceding that once the court accepted his voluntary termination of parental rights he could not change his mind, absent a legal mistake.

The court then proceeded to inquire about Timothy's decision-making process. Timothy was asked whether his attorneys had explained to him the final nature of the proceedings. Timothy replied that they had. He was asked whether he had discussed his decision with family, friends or a religious adviser. Timothy stated that he had discussed the issue with his parents and two friends.

In short, we are convinced that the trial court carefully questioned Timothy about his general level of comprehension, his understanding of the nature and consequences of the proceedings and the finality of his decision. As the court stated in its findings of fact, "[Timothy] has, and perhaps at a higher level than would occur in any average case, ... a full understanding of his legal rights and of any potential defenses that may exist."

We next address Timothy's knowledge of his right to counsel and the nature of any communication between Timothy and an adviser. First, we note that Timothy was represented by two attorneys at the TPR proceedings. Both attorneys were present and participated in the proceedings. Second, the record indicates that Timothy's attorneys appreciated his concerns for his children, particularly his son Shawn. His attorneys carefully advised him about the choice he was preparing to make, stating that "[w]e didn't give him any guidance one way or another. We laid all the information out in front of him and he had to

make the decision He really had to go through some soul-searching. We wouldn't give him guidance. It had to be his decision.”

On the weekend prior to the termination proceedings, Timothy discussed the impact of his decision with his attorneys on at least three separate occasions. Based on the attorneys' representation at the proceedings, the court ultimately found:

[Timothy] has a full understanding of his legal rights The attorneys have pointed out very correctly that although they have provided information to [Timothy], the ultimate decision as it must be to either proceed on to jury trial or to voluntarily terminate parental rights is a decision that was made by [Timothy].

We agree with the trial court's assessment and conclude that the court appropriately examined Timothy's understanding of his legal rights and the role of his attorneys as advisers.

We next examine whether any promises or threats were made to Timothy in connection with the termination proceedings. The record supports that Timothy wished to terminate his rights to Amber and Brittany so that he would not risk losing his rights to Shawn. While the conditions placed on Timothy for the return of his son were discussed and outlined at the termination proceedings, Timothy understood that the conditions were wholly separate from the termination proceedings. As one of his attorneys stated:

We should be clear that one of [Timothy's] primary concerns is that he'll lose his son and he doesn't really want to run that risk ... and his position is there were further conditions extended – *we had discussions about the conditions, but they're not technically related. He's not saying you gave me these conditions now ...* so I'm going to voluntarily terminate. It was not based upon those discussions [Emphasis added.]

Reiterating the separate nature of the conditions for Shawn's return and the termination proceedings, the district attorney stated:

When [Timothy's] attorneys and I discussed [Shawn] yesterday I explained to them that since there are still conditions for return and other conditions and court orders [in] regards to [Shawn], that [Timothy] would certainly be allowed to continue to try to meet those conditions for return, but that *[Shawn's] case really had no bearing on this case and that we were not making any promises in regards to [Shawn] in relation to his voluntary termination regarding the girls.* [Emphasis added.]

With some hesitation, Timothy acknowledged that no promises or inducements had been offered him:

[TIMOTHY]: Yes, I heard what she said but I – you know there [were] conditions – you know the conditions that were set for me for return of [Shawn], you know. They didn't say they would[] promise me that [Shawn] would be returned but there would be if I met my conditions for the literacy class and Kettle Moraine, you know.

THE COURT: Okay, is that not the same as the district attorney just said?

[TIMOTHY]: Yeah, I suppose, yeah. Yes.

In spite of Timothy's concern for Shawn, he concedes that no promises were made regarding the return of his son. We are convinced that the trial court properly determined that no promises or inducements had been made fatal to Timothy's voluntary consent.

Finally, the record must show that Timothy was aware of the alternatives to termination. At the outset of the termination proceedings, the trial court indicated that it wanted to be certain "that [Timothy] understands that he does have a right to a jury trial." The court specifically asked Timothy whether his attorneys had explained to him the final nature of the proceedings. Timothy replied that they had. A significant amount of discussion occurred between the

court and the parties about Timothy's reasons not to contest the termination. Furthermore, Timothy said he understood that he had the right to contest the termination, but that if his parental rights were involuntarily terminated he would put at risk the opportunity to parent Shawn.

In sum, on the basis of the termination record, we are convinced that the trial court was correct when it concluded that Timothy's decision not to contest the termination was voluntary and informed.

Despite the foregoing, Timothy contends that "it would appear that no amount of questioning or care by the court could have made the decision by the appellant voluntary." We disagree. Timothy's testimony demonstrates that his motivation for voluntary termination was to avoid the impact of § 48.415(10), STATS. Although the trial court outlined the conditions required by another court for the return of Shawn, the district attorney plainly stated that it was "not making any promises in regards to [Shawn] in relation to his voluntary termination regarding the girls." Timothy replied that he understood that the conditions for Shawn's return were a separate matter. We conclude that Timothy's choice to terminate his parental rights was of his own making.

Timothy further suggests that public policy and the best interests of the child prevent "child bargaining" in voluntary termination proceedings such as this case. He asserts that because he "found it necessary to terminate his parental rights to two children in order to continue having a chance to parent a third [the proceedings] must be held to be contrary to public policy."

First, we disagree with Timothy's assertion that the voluntary termination proceedings contravened public policy by resulting in "child bargaining." We have already determined that the district attorney clearly stated,

and Timothy agreed, that Shawn's circumstances were separate from Amber's and Brittany's. While it is unfortunate that Timothy found himself in a position where the chances for his son's return involved his parental rights to his daughters, such circumstances do not constitute child bargaining.³

Second, although Timothy contends that the proceedings were contrary to the best interests of the children, he does not specifically take issue with the trial court's six-point analysis under § 48.426(3), STATS. Therefore, because he does not properly raise the issue of the best interests of the children, we need not address it. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). For the foregoing reasons, we affirm the orders of the trial court.

By the Court.—Orders affirmed.

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

³ Timothy does not contest the validity of § 48.415(10), STATS., itself, and thus we will not address this issue. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (“[A]ppellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal.”).

