COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP383 **Cir. Ct. No. 2008TP31**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JACOB D. W., A PERSON UNDER THE AGE OF 18:

CRYSTAL L. S.,

PETITIONER-APPELLANT,

V.

LUTHERAN SOCIAL SERVICES OF WISCONSIN AND UPPER MICHIGAN, INC., AS GUARDIAN FOR JACOB D. W.,

RESPONDENT-RESPONDENT,

JACOB L. D.,

RESPONDENT.

APPEAL from orders of the circuit court for Chippewa County: STEPHEN R. CRAY, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Crystal L. S. appeals an order granting her petition to terminate her parental rights to Jacob D. W. and an order denying her postdisposition motions. Crystal argues the circuit court failed to follow the statutory procedures for determining both whether her consent was informed and voluntary and whether termination was in Jacob's best interest. We reject Crystal's arguments and affirm.

BACKGROUND

¶2 Crystal petitioned to terminate her and the father's parental rights to Jacob, five days after his birth. Both parents appeared at the hearing without counsel and consented to termination. Also present were Jacob's guardian ad litem and an attorney representing Lutheran Social Services (hereinafter, the agency).

¶3 The agency's attorney questioned Crystal regarding her voluntary consent. She stated she understood that neither the guardian ad litem nor the agency attorney represented her and that she had the right to an attorney, and chose to waive that right. In response to the agency attorney's lengthy questioning, Crystal explained to the court her understanding of what it meant to terminate her parental rights. She stated she wished to terminate her parental rights and had discussed her decision with her family, the father, and the agency.

¶4 During the hearing, Crystal signed two forms that she had reviewed: a consent to termination of parental rights, and a voluntary consent to termination

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of parental rights. The first was a standard court form,[2] and the second was a four-page prepared document that, among other things, explained the constitutional and parental rights Crystal was giving up, presented alternatives to termination, and stated the termination decision was final. That form also repeatedly stated Crystal believed it was in Jacob's best interest to terminate her parental rights, and she also testified to that belief.

¶5 The guardian ad litem believed it was in Jacob's best interest to terminate the parents' rights. The court concluded Crystal's consent was knowing and voluntary and termination was in Jacob's best interest. Thus, the court granted Crystal's petition. Crystal subsequently filed, pro se, a notice of intent to pursue postdisposition or appellate relief, and both a motion to vacate and motion for reconsideration, alleging new evidence. She later retained counsel, who filed a motion to set aside the judgment based on fraud, misrepresentation, or other misconduct. The court denied the motions following a lengthy evidentiary hearing. On appeal, Crystal does not renew any of the arguments presented in her postdisposition motions.

DISCUSSION

¶6 Crystal first argues the circuit court did not follow the procedure in WIS. STAT. § 48.41(2), which states:

> The court may accept a voluntary consent to termination of parental rights only as follows:
>
> (a) The parent appears personally at the hearing and gives his or her consent to the termination of his or her parental rights. The judge may accept the consent only after the

[2] Form JC-1637, 11/99.

> judge has explained the effect of termination of parental rights and has questioned the parent, or has permitted an attorney who represents any of the parties to question the parent, and is satisfied that the consent is informed and voluntary.

She also cites ***T.M.F. v. Children's Service Society***, 112 Wis. 2d 180, 332 N.W.2d 293 (1983), where the court observed that the legislature "has set forth the conditions under which the court may accept a parent's voluntary consent." The court further stated:

> The legislatively prescribed procedures underscore the importance of the judicial proceeding to terminate parental rights when the parent has given his or her consent. The judicial proceeding is not a mere formality; the circuit court does not simply rubber-stamp the parent's consent. The circuit court must ensure that the parent has adequately considered the decision to terminate parental rights to the child, surely one of the most difficult decisions a person can ever make.

Id. at 186.

¶7 In contrast to the circumstances in ***T.M.F.***, however, Crystal does not contend she did not give voluntary and informed consent. *See* ***id.*** at 184. She only argues the consent was invalid because the court did not follow the WIS. STAT. § 48.41(2) procedure. Specifically, Crystal claims it was improper for the agency attorney, rather than the judge, to explain the effect of termination of parental rights. She also claims it was improper for the agency attorney to question her regarding her understanding and voluntariness because the agency was not a party.

¶8 We first conclude that because Crystal did not object to either the court's procedure or the agency attorney's participation at the hearing, she has forfeited her appellate right to assert error on those bases. *See* ***State v. Huebner***,

2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Regardless, Crystal's claims fail on the merits.

¶9 The circuit court's determination that consent is informed and voluntary is a conclusion of law. ***T.M.F.***, 112 Wis. 2d at 188. However, because the conclusion is derived from and intertwined with the factual inquiry, "'the appellate court should give weight to the [circuit] court's decision, although the [circuit] court's decision is not controlling.'" ***Id.*** (quoting ***Wassenaar v. Panos***, 111 Wis. 2d 518, 331 N.W.2d 357 (1983)). We have reviewed the record and conclude Crystal's consent was clearly both informed and voluntary.

¶10 While the court did not explain the effect of terminating parental rights to Crystal, it would have been redundant to do so. The agency attorney asked Crystal what it meant and Crystal explained in her own words: "I voluntarily give up any right I would have to my child, raising him and having any parental duties, making life-altering decisions, et cetera." When asked why she would be willing to give up those parental rights, Crystal stated she believed it was in Jacob's best interest because she did not feel she was adequately prepared to be a parent. She explained she held this belief "[e]ven though I know there's programs out there to help, I still don't think that would be enough."

¶11 In response to numerous further questions by the agency attorney, Crystal demonstrated she understood both the constitutional and parental rights she was giving up, that custody and guardianship would go to the agency pending adoption, and that her decision to give consent was final. She further demonstrated that her consent was not coerced in any way. Crystal also had the two consent forms in front of her, which she signed after acknowledging she knew and understood the longer, prepared document.

¶12 Additionally, the guardian ad litem questioned Crystal:

> [Y]ou understand that if you weren't comfortable with this decision today, that the child could remain in foster care for up to six months without a court order and even longer if you needed more time? Do you understand that?
>
> Yes, I do.
>
> Is that something you're interested in at all?
>
> No thank you.

The court then questioned Crystal and confirmed she had two years of schooling beyond high school. Next, the entire process was repeated with the father. The court then concluded that both parents' consent was informed and voluntary and agreed with them that it was in Jacob's best interest to terminate their parental rights: "The testimony is clear that, as to both [parents], … they have knowingly waived their legal rights …."

¶13 The circuit court here did not "simply rubber-stamp the parent's consent." *See* ***T.M.F.***, 112 Wis. 2d at 186. Rather, the record confirms that Crystal "adequately considered [her] decision" to terminate parental rights. *See* ***id.*** As noted previously, Crystal does not now claim her consent was either involuntary or uninformed. She has therefore not presented a prima facie case that she is permitted to withdraw her consent.[3] *See* ***Oneida County v. Therese S.***, 2008 WI App 159, ¶6, 762 N.W.2d 122 (parent must allege he or she did not know or understand the information that should have been provided at the hearing). Stated otherwise, Crystal has not shown she was actually prejudiced by the circuit court's

[3] Further, Crystal forfeited her appellate right to argue her consent was either involuntary or uninformed because she failed to request a remand for an evidentiary hearing on those grounds. *See* WIS. STAT. RULE 809.107(6)(am).

failure to strictly follow the statutory procedure for accepting consent. *See* ***id.***, ¶¶18-19; *see also* ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶¶27-32, 246 Wis. 2d 1, 629 N.W.2d 768 (WIS. STAT. § 805.18(2), the harmless error statute, applies to TPR proceedings). Although the court did not strictly follow the statutory procedure here, there was substantial compliance and the statute's objectives were met.[4]

¶14 We next address Crystal's other argument, that the circuit court failed to properly determine whether termination was in Jacob's best interest in accord with WIS. STAT. § 48.426(3). That statute sets forth a nonexclusive list of six factors a court is to consider:

> (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 the child 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

[4] Although the record clearly demonstrates informed and voluntary consent in this case, we encourage courts to follow the statutory procedure. While this procedure includes questioning by a party's attorney, the agency was not a party to the termination proceeding. Following the statutory procedure will both ensure parents' rights are not improvidently terminated and reduce the likelihood of appeals. Appeals are unlikely to serve a child's best interest because the child's disposition is in limbo during the delay and the child cannot transition into a stable environment, here, with the selected adoptive family.

> child's current placement, the likelihood of future placements and the results of prior placements.

Id. To exercise its discretion to terminate parental rights, the circuit court must consider the statute's six factors. ***A.B. v. P.B.***, 151 Wis. 2d 312, 318, 320, 444 N.W.2d 415 (Ct. App. 1989). "The court should explain the basis for its disposition, on the record, by alluding specifically to the factors in Wis. Stat. § 48.426(3) and any other factors that it relies upon in reaching its decision." ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶29-30, 255 Wis. 2d 170, 648 N.W.2d 402. Nonetheless, if a circuit court does not explain the reasons for a discretionary decision, we may search the record to determine whether it supports the court's decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶15 Crystal argues we must reverse because the circuit court did not mention WIS. STAT. § 48.426(3) or its factors or give any other reasons for concluding termination was in Jacob's best interest. She further asserts there was no testimony or evidence regarding any of the factors. We agree that the court should have specifically addressed the factors and explained its reasoning on the record. Nonetheless, the record demonstrates the failure to do so constitutes harmless error in this case.

¶16 Much of the same evidence that supported a finding of knowing consent also supported the best interest determination. First and foremost, the parents had considered alternatives and still believed termination was in Jacob's best interest. *See* ***A.B.***, 151 Wis. 2d at 322-23. Not only did the parents stipulate that termination was in Jacob's best interest, but Jacob's guardian ad litem also held that belief. Further, the termination was sought to permit an adoption. This fact weighs strongly in favor of the court's determination that termination was in

Jacob's best interest. *See* ***id.*** at 322. The record also contained several agency reports, setting forth the parents' reasons for choosing adoption, the parents' social history information, Jacob's health records, and an adoption plan. Additionally, the court's order set forth the statutory factors and indicated the court had considered them.[5]

¶17 Finally, looking specifically to the six WIS. STAT. § 48.426(3) factors, none of them weigh against termination here. First, adoption was already planned to occur after termination. Second, Jacob was a healthy newborn, also indicating adoption was likely. Third, because he was a newborn and was immediately placed in a foster home, Jacob had no substantial relationships with any parents or family members. Fourth, being a newborn, the child's wishes were irrelevant. Fifth, because a newborn has no ability to form permanent memories, the duration of separation was not highly relevant. Regardless, Jacob had been separated from his parents since his discharge from the hospital, aside from a single visit. Sixth, termination would enable Jacob to transition from foster care to a more stable, permanent family relationship with his adoptive family. Crystal explains neither how she was prejudiced by the circuit court's failure to state on the record that it had considered the statutory factors nor how a different outcome is reasonably possible.[6]

[5] We do not place great emphasis on this fact. The order was a preprinted form that the agency attorney had apparently completed and presented to the court for a signature at the close of the hearing. We assume, however, the court reviewed the order and the factors before signing.

[6] Additionally, to the extent Crystal is arguing the procedural defects denied her due process, she has forfeited that argument by failing to argue in her postjudgment motions that the judgment was void pursuant to WIS. STAT. § 806.07(1)(d). *See* WIS. STAT. § 48.46(2).

By the Court.—Orders affirmed.

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