

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2011

A. John Voelker
Acting 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. 2011AP384

Cir. Ct. No. 2010TP8

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

FLORENCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

JENNIFER B.,

RESPONDENT-APPELLANT,

EDWARD S., JR.,

RESPONDENT.

APPEAL from an order of the circuit court for Florence County:
PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

¶1 KESSLER, J.¹ Jennifer B. appeals an order terminating her parental rights to her son, Joseph S. Jennifer B. argues that the order should be vacated because the record fails to establish whether she voluntarily terminated her rights to Joseph S., entered a no contest plea, or admitted to the allegations in the termination petition. She also contends that even if we can discern from the record which of those options she chose, the order must still be vacated because the circuit court failed to establish a record of all of the statutory requirements for any of the options. Finally, Jennifer B. argues that the circuit court failed to establish a factual basis for the termination and failed to make the findings required by WIS. STAT. § 48.426. Because we conclude that the record does not clearly establish whether Jennifer B. voluntarily terminated her rights to Joseph S., entered a no contest plea, or made an admission to the allegations in the petition, we reverse and remand for a new hearing.²

BACKGROUND

¶2 Joseph S. was born to Jennifer B. and Edward S. on April 20, 2009. On July 14, 2010, the Florence County Human Services Department filed a petition to terminate both parents' rights to Joseph S. The petition alleged that Joseph S. was a child in need of protective services, pursuant to WIS. STAT. § 48.415(2). At the plea hearing, Jennifer B. indicated that she wished to contest the proceedings.

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

² Jennifer B. raises multiple arguments on appeal. Because we conclude that the record does not clearly establish whether she voluntarily terminated her rights to Joseph S., entered a no contest plea, or admitted the allegations in the termination petition, we need not reach her other arguments. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the narrowest possible grounds.).

¶3 Jennifer B. was also involved in termination proceedings involving her three older children. After a jury determined that grounds existed to terminate Jennifer B.'s rights to her three older children, a disposition hearing was held before the court as to the three older children on September 17, 2010. At the disposition hearing, Jennifer B.'s counsel, Richard Shawl, told the circuit court that Jennifer B. was "capitulating with regard to these three children and with regard to the case that is not called in this." Jennifer B. then appeared by telephone. Once Jennifer B. appeared by phone, the following exchange took place:

[The Court]: Mr. Shawl, you informed the Court that your client has informed you that she has agreed to the termination of the parental rights in these cases, is that correct?

[Attorney Shawl]: That is my understanding, your honor.

[The Court]: Would you make a detailed inquiry of your client to make sure that it is freely, knowingly and intelligently given.

[Attorney Shawl]: I will do my best, sir.

....

[Attorney Shawl]: You're aware that there is a termination of parental rights proceeding going on with each of your *four* children.

[Jennifer B.]: Yes.

[Attorney Shawl]: What are the names of your *four* children?

[Jennifer B.]: Sierra, Jordan, Brittany and Joey.

[Attorney Shawl]: And is it true that you informed me earlier today that *you wish not to contest these proceedings any longer*?

[Jennifer B.]: Yes.

[Attorney Shawl]: Okay. Now you understand that you have rights involved in relinquishing these proceedings that [you would] have to give up, correct?

[Jennifer B.]: Yes.

[Attorney Shawl]: Okay. You'd have a right to contest the dispositional hearing which is scheduled for today. Do you understand that?

[Jennifer B.]: Yes.

[Attorney Shawl]: You'd have a right to present evidence. Do you understand that?

[Jennifer B.]: Yes.

[Attorney Shawl]: Okay. And you have a right to call witnesses.

[Jennifer B.]: Yes.

[Attorney Shawl]: Okay. And you could cross examine the witnesses who would advocate to the Court a different disposition. Do you understand that?

[Jennifer B.]: Yes.

[Attorney Shawl]: Okay. And you understand that there are alternative dispositions available than simply terminating one's parental rights, correct?

[Jennifer B.] Yes.

[Attorney Shawl]: And yet you are choosing of your own free will to terminate your parental rights with regards to these *four* children, is that correct?

[Jennifer B.] Yes.

[Attorney Shawl]: Okay.

[The Court]: Ma'am, this is [the court]. Did anyone make any promises or threats to get you to do this?

[Jennifer B.]: No.

[The Court]: Anything further?

[Attorney Shawl]: If the Court is satisfied, I am.

....

[The Court]: Ma'am you understand that by your doing this termination, that no further actions are going to be held, and that these children – your rights to these children will be terminated. Do you understand that?

[Jennifer B.]: Yes.

....

[The Court]: You understand your rights to these *four* children are going to be terminated today.

[Jennifer B.]: Yes.

[The Court]: Thank you, ma'am, and I wish you well. Good day.

(Emphasis added.)

¶4 Jennifer B.'s telephone appearance ended immediately upon the end of her colloquy. After the circuit court heard testimony from Laura Knott, a case worker with Florence County Human Services, as to the best disposition for the three older children, counsel for the county asked the circuit court: "I don't know if we want to have it addressed with regard to the voluntary as to Joey." The circuit court responded, "[w]e're going to take that as a separate issue, an entirely separate case." Dispositions were then determined for Jennifer B.'s three older children.

¶5 On the same day as the dispositional hearing for the three older children, Jennifer B. signed a Consent to Termination of Parental Rights form with regard to Joseph S. The form indicated that Jennifer B. understood "that a court order terminating parental rights will permanently end **ALL legal rights and duties** that exist between myself and this child," that she "[wished] to give up any parental rights that I may have to this child and consent to the court entering an order terminating my parental rights," and that the decision was made of her own

free will, without threats or promises inducing the signing of the document. (Emphasis in original.) The form also contained a line, crossed out by Jennifer B., stating: “I give up the right to know of any future hearing or proceedings in this matter.”

¶6 A dispositional hearing for Joseph S. was held on November 8, 2010. Both Jennifer B. and Edward S. appeared by telephone.³ Knott again testified and recommended termination as to both parents. After cross-examining Knott, Attorney Shawl stated “[y]ou’re aware that Ms. [B.] has voluntarily agreed to terminate her parental rights.” The circuit court terminated the rights of both parents and informed both parents of their rights to appeal. After informing Jennifer B. of her right to appeal, the circuit court stated:

The Court has been provided with an order concerning termination of parental rights. The first one being a voluntary termination, and that is regarding Ms. [B.]. The Court finds that Ms. [B.] has freely, knowingly and intelligently terminated her parental rights, and the Court approves this order as presented.

¶7 Jennifer B. filed a notice of intent to pursue postdisposition relief. Her counsel filed a no-merit report, which we rejected in an order dated June 24, 2011. Following a motion to reconsider, we entered an amended order that converted the no-merit appeal to an appeal on the merits.

DISCUSSION

¶8 Jennifer B. argues that the order terminating her parental rights must be vacated because it is unclear from the record whether she voluntarily consented

³ A jury found grounds to terminate Edward S.’s rights to Joseph S. Jennifer B. was also scheduled for a jury trial as to grounds; however, an order was issued after the September 17, 2010 dispositional hearing stating that she was relieved from any obligation to appear at a jury trial.

to the termination of her parental rights, entered a no contest plea, or admitted the allegations in the petition. Without discussing the merits of the termination petition, we agree with Jennifer B. that the record does not clearly establish which of the three options she chose and does not establish compliance with all of the statutory requirements as to any of the options.

A. Voluntary Consent.

¶9 The State argues that Jennifer B. voluntarily terminated her rights based on: (1) her testimony at the disposition hearing of her three older children; (2) the fact that she signed a voluntary consent form regarding Joseph S.; (3) an order relieving her of any obligation to appear at a jury trial to determine grounds; and (4) the circuit court's reference at Joseph S.'s disposition hearing to Jennifer B.'s voluntary termination of her rights to the child. Based on the record, the relevant statute and case law, we cannot conclude that these factors added together constituted an informed voluntary termination on the part of Jennifer B.

¶10 A judicial proceeding terminating parental rights implicates a parent's fundamental rights. See *Minguey v. Brookens*, 100 Wis. 2d 681, 689, 303 N.W.2d 581 (1981). "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "The [S]tate and the parent share an interest in ensuring that the decision to terminate parental status is accurate and just." *T.M.F. v. Children's Serv. Soc'y of Wisconsin*, 112 Wis. 2d 180, 185, 332 N.W.2d 293 (1983). "In view of these concerns, the Wisconsin legislature has imposed on the circuit court the responsibility to determine whether the parent's consent to termination of his or her parental rights is voluntary and informed and

has set forth the conditions under which the court may accept a parent’s voluntary consent.” *Id.*; *see also* WIS. STAT. § 48.41.

¶11 A parent’s voluntary consent to terminate his or her parental rights is governed by WIS. STAT. § 48.41. The statute provides in relevant part:

(1) The court may terminate the parental rights of a parent after the parent has given his or her consent as specified in this section....

(2) 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 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.

(Emphasis added.)

¶12 The voluntary consent form signed by Jennifer B. does explain the effect of her termination of her rights to Joseph S.; however, WIS. STAT. § 48.41(2)(a) requires a judge to personally explain “the effect of termination” and to ensure that the parent has been sufficiently questioned to establish the voluntariness of the consent. *See id.* The court did not explain the effect of the termination.

¶13 In determining whether a parent has voluntarily consented to the termination of his or her parental rights, the circuit court must inquire about the following:

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 role of the guardian ad litem (if the parent is a minor) and 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.

See *T.M.F.*, 112 Wis. 2d at 196-97.

¶14 There is no indication that either the circuit court or Attorney Shawl inquired about Jennifer B.'s education or her level of general comprehension. More troubling is that the record suggests Jennifer B. may not have understood the nature of the proceedings. Jennifer B. was questioned about whether she wished to terminate her rights to Joseph S. at the disposition hearing for her other three children—a hearing that had nothing to do with Joseph S. Despite the circuit court's reference to Joseph S.'s termination proceedings as a "separate case" after Jennifer B. was no longer telephonically present, the hearing was muddled with various references to Joseph S. while Jennifer B. *was* present. Jennifer B. was also informed at that same hearing that "no further actions are going to be held," and that her "rights to these children will be terminated." However, it was apparent that a dispositional hearing for Joseph S. still had to be scheduled. It is unknown whether Jennifer B. thought the court was including Joseph S. in its "no further

actions” statement, as she had previously named all four of her children when asked whether she aware of the termination proceedings pertaining to them.

B. No Contest Plea/Admission.

¶15 If Jennifer B. intended to enter a no contest plea or admit to the facts in the petition, the record does not establish the necessary elements. WISCONSIN STAT. § 48.422(3) requires that “[i]f the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in [WIS. STAT. § 48.422(7)].” WIS. STAT. § 48.422(3). WISCONSIN STAT. § 48.422(7) provides in relevant part:

(7) Before accepting an admission of the alleged facts in a petition, the court *shall*:

....

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

(Emphasis added.)

¶16 Prior to accepting a plea of no contest to a termination petition, the circuit court is required to engage the parent in a personal colloquy in accordance with WIS. STAT. § 48.422(7). *See id.* Additionally, the record must establish that the parent understands the constitutional rights given up by the plea. ***Kenosha Cnty. Dep’t of Human Serv. v. Jodie W.***, 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. The parent must also understand that acceptance of a no contest plea will result in a finding of parental unfitness, which mandates termination of parental rights. ***Oneida Cnty. Dep’t of Soc. Serv. v. Therese S.***, 2008 WI App 159, ¶¶10-11, 314 Wis. 2d 493, 762 N.W.2d 122.

¶17 If Jennifer B.’s affirmative response to Attorney Shawl’s question “is it true ... that you wish not to contest these proceedings any longer?” constituted an attempt to enter a no contest plea, the circuit court did not comply with the mandates of WIS. STAT. § 48.422(7)(c) because it did not establish a factual basis for Jennifer B.’s admission to the facts in the termination petition. *See Karow v. Milwaukee Cnty. Civil Serv. Comm’n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (“The general rule is that the word ‘shall’ is presumed mandatory when it appears in a statute.”). No testimony was taken at the September 17, 2010 disposition hearing regarding the grounds for termination as to Joseph S. The testimony taken at Joseph S.’s disposition hearing, on November 8, 2010, involved the best interest of the child, namely the conditions both parents failed to meet in order to gain custody of Joseph S. *See* WIS. STAT. § 48.422(3).⁴ The record does not indicate that Jennifer B. was informed of the circuit court’s obligation to find her unfit if she did not contest or if she admitted to the facts in the petition. The record is muddled as to whether her constitutional rights pertaining to Joseph S. were even discussed, much less whether she

⁴ WISCONSIN STAT. § 48.422(3) provides:

If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7).

WISCONSIN STAT. § 48.422(7) provides in relevant part:

(7) Before accepting an admission of the alleged facts in a petition, the court shall:

....

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

understood the nature of those rights. The record also does not address the fact that Jennifer B. attempted to reserve her right to know about future hearings regarding Joseph S.—a reservation which is inconsistent with the voluntary termination argued by the State.

CONCLUSION

¶18 If Jennifer B. meant to consent to termination, the elements required by WIS. STAT. § 48.41 have not been established. If Jennifer B. meant to plead no contest or admit to the allegations in the petition, the elements required by WIS. STAT. §48.422(3) & (7) have also not been met. Therefore, we must reverse and remand for a new hearing.

By the Court.—Order reversed and cause remanded.

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

