COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
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. 2010AP321 **Cir. Ct. No. 2009TP38**

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRENDA B.,

RESPONDENT-APPELLANT,

BRIAN K.,

RESPONDENT.

APPEAL from orders of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Brenda B. appeals orders terminating her parental rights to her son, Desmond F., and denying her postdisposition motion. She contends her motion presented a prima facie case she did not knowingly and intelligently enter her no contest plea to the grounds portion of the petition. Specifically, Brenda argues the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent. We conclude the court was not required to advise Brenda of the additional statutory sub-dispositions or of her constitutional right to parent. We therefore affirm.

BACKGROUND

¶2 Brown County filed a petition to terminate Brenda's parental rights alleging she failed to assume parental responsibility and Desmond was in continuing need of protection or services. Brenda entered a no contest plea to the continuing need ground and the County dismissed the other ground. The court ultimately concluded the plea was knowingly and intelligently made. After a contested dispositional hearing, the court terminated Brenda's parental rights to Desmond.

¶3 Brenda filed a postdisposition motion arguing the plea colloquy was deficient because the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent. Further, the motion alleged Brenda was unaware of this information. The court denied Brenda's motion without conducting an evidentiary hearing.

[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.

DISCUSSION

¶4 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). ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶¶24-25, 293 Wis. 2d 530, 716 N.W.2d 845. That statute provides in part:

> (7) 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 ….
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. ...
>
> (br) Establish whether any person has coerced a birth parent ....
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

WIS. STAT. § 48.422(7) (emphasis added). Additionally, the parent must have knowledge of the constitutional rights given up by the plea. ***Jodie W.***, 293 Wis. 2d 530, ¶25 (citing ***State v. Bangert***, 131 Wis. 2d 246, 265-66, 389 N.W.2d 12 (1986)).

¶5 When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Under that analysis, 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 a prima facie showing is made, the burden then shifts to the county to demonstrate that the parent knowingly and intelligently waived the right to contest the allegations in the petition. ***Id.*** Whether Brenda has presented a prima facie case is a question of law we decide independently of the circuit court. *See* ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122.

¶6 We first address Brenda's argument that the court inadequately informed her of the potential dispositions set forth in WIS. STAT. § 48.427, which provides in part:

> (1) After receiving any evidence related to the disposition, the court shall enter one of the *dispositions* specified under subs. (2) to (4) .... [(Emphasis added.)]
>
> (1m) ....
>
> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:
>
> 1. A county department authorized to accept guardianship under s. 48.57(1)(e).
>
> 3. A child welfare agency licensed under s. 48.61(5) to accept guardianship.
>
> 4. The department.

> 5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.
>
> 6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.
>
> (am) Transfer guardianship and custody of the child to a county department authorized to accept guardianship under s. 48.57(1)(hm) for placement of the child for adoption by the child's foster parent or treatment foster parent, if the county department has agreed to accept guardianship and custody of the child and the foster parent or treatment foster parent has agreed to adopt the child.
>
> (b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.
>
> (c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.
>
> (3p**)** If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub. (3m)(a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.
>
> (4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

WISCONSIN STAT. § 48.428, referenced at § 48.427(4), in turn, indicates:

> (1) A court may place a child in sustaining care if the court has terminated the parental rights of the parent or parents of the child or has appointed a guardian for the child under s. 48.831 and the court finds that the child is unlikely to be adopted or that adoption is not in the best interest of the child.
>
> (2)(a) Except as provided in par. (b), when a court places a child in sustaining care after an order under s. 48.427 (4), the court shall transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare

agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am) and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, this licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3).

(b) When a court places a child in sustaining care after an order under s. 48.427 (4) with a person who has been appointed as the guardian of the child under s. 48.977 (2), the court may transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, that licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3). If the court transfers guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), the court shall terminate the guardianship under s. 48.977.

....

(6)(a) Except as provided in par. (b), the court may order or prohibit visitation by a birth parent of a child placed in sustaining care.

(b)1. Except as provided in subd. 2., the court may not grant visitation under par. (a) to a birth parent of a child who has been placed in sustaining care if the birth parent has been convicted under s. 940.01 of the first−degree intentional homicide, or under s. 940.05 of the 2nd−degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated.

1m. Except as provided in subd. 2., if a birth parent who is granted visitation rights with a child under par. (a) is convicted under s. 940.01 of the first−degree intentional homicide, or under s. 940.05 of the 2nd−degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated, the court shall issue an order prohibiting the birth parent from having visitation with the child on petition of the child, the

> guardian or legal custodian of the child, or the district attorney or corporation counsel of the county in which the dispositional order was entered, or on the court's own motion, and on notice to the birth parent.
>
> 2. Subdivisions 1. and 1m. do not apply if the court determines by clear and convincing evidence that the visitation would be in the best interests of the child. The court shall consider the wishes of the child in making that determination.

¶7 Brenda argues it was insufficient to confirm her understanding of only the two primary dispositions set forth at WIS. STAT. §§ 48.427(2) and (3), providing that either the termination petition would be dismissed or her parental rights would be terminated. Rather, she asserts the court was required to confirm her understanding of "the full range of options" specified under subsecs. (2) through (4).[2] Additionally, if Brenda is correct, we conclude her argument would compel a court to provide further information. We are confident a reasonable layperson would have no understanding of "sustaining care" under subsec. (4). Thus, a court would also be required to confirm a parent's understanding of, at least, the portions of WIS. STAT. § 48.428 set forth above regarding the sustaining care provided for as a sub-disposition under § 48.427(4).

¶8 Brenda cites no case in support of her interpretation of WIS. STAT. §§ 48.422(7)(a) and 48.427. Nor does she develop a statutory interpretation argument, aside from an observation that § 48.422(7) refers to "the potential dispositions" and a bare assertion that "the plain language of [§] 48.422(7)(a) trumps" the County's interpretation that the sub-dispositions need not be addressed because they only apply after the court terminates the parent's rights.

[2] While Brenda refers to "the full range of options," she inexplicably mentions only WIS. STAT. § 48.427(3m), without acknowledging subsecs. (3p) or (4).

To the extent Brenda is arguing the statutes unambiguously require a court to confirm a parent's understanding of both the primary and sub-dispositions, we disagree.

¶9 In ***Therese S.***, 314 Wis. 2d 493, ¶¶14-17, we concluded that "at the very least" a circuit court must confirm a parent's understanding of the two primary dispositions under WIS. STAT. §§ 48.427(2) and (3). As Brenda aptly points out, however, because the circuit court there failed to address even the two primary dispositions, it was unnecessary to determine, and we did not determine, whether the additional sub-dispositions must also be addressed as a general rule. *See* ***Therese S.***, 314 Wis. 2d 493, ¶¶15, 15 n.7, 22 (indicating, "of relevance *here*," and referring only generally to "the potential dispositions specified under WIS. STAT. § 48.427") (emphasis added). We did, however, reject Therese's broader argument that circuit courts must inform parents of all potential outcomes and alternatives to termination, as required in voluntary termination cases. *See* ***T.M.F. v. Children's Serv. Soc'y***, 112 Wis. 2d 180, 196, 332 N.W.2d 293 (1983). We did so because of the significant difference between voluntary and involuntary terminations, namely, that parents are seeking to terminate their rights in the former and have the option to stop the proceedings altogether. *See* ***Therese S.***, 314 Wis. 2d 493, ¶17.

¶10 We further noted, "While WIS. STAT. § 48.427 lists several additional dispositions under subsecs. (3m)-(4), those options only apply if the court first terminates parental rights under subsec. (3)," ***id.***, ¶15 n.7, and observed that Therese's proposed rule would be "unduly burdensome." ***Id.***, ¶17. Those observations are equally relevant here.

¶11 Only the two primary dispositions relate to the effect of termination on the parent—the parent either retains or loses their child. The sub-dispositions, on the other hand, pertain only to the effect on the child, addressing who will have guardianship and custody in the event the parent's rights are terminated as a primary disposition. To the extent those sub-disposition issues bear on the parent's decision to plead no contest, they are adequately addressed under WIS. STAT. §§ 48.422(7)(b) and (7)(bm). Those paragraphs require the court to ascertain whether any promises have been made to the parent and whether a proposed adoptive parent has been identified.

¶12 Additionally, it would be not merely burdensome, but practically impossible, to convey a full understanding of the court's disposition options upon termination. As our lengthy recitation of the alternatives at the outset of our analysis is intended to demonstrate, the alternatives are many and complex.

¶13 Further, as in ***Therese S.***, 314 Wis. 2d 493, ¶11, we find it helpful to make a comparison with the criminal plea context. There, the defendant must be apprised of the maximum penalty he or she faces upon conviction, but not of every possible sentencing option available to the court. *See* ***id.***, ¶11 n.4 (comparing WIS. STAT. §§ 48.422(7) and 971.08(1), referring to "potential dispositions" and "potential punishment," respectively). In the termination of parental rights context, termination is the maximum "punishment." Thus, by analogy, the parents must understand they may lose their child as a result of their no contest plea, but need not have a complete understanding of every possible alternative available to the court should it determine termination is in the child's best interest.

¶14 We now address Brenda's argument that the circuit court failed to inform her she was waiving her constitutional right to parent. Brenda correctly

observes this issue was left unresolved in ***Therese S.***, 314 Wis. 2d 493, ¶21. She declines, however, to acknowledge the issue was recently resolved—although, not definitively—in a consolidated appeal, ***Dane County DHS v. James M.***, Nos. 2009AP2038, 2009AP2039, unpublished slip op. (WI App Mar. 18, 2010).[3] We know Brenda was aware of this case because she commences her argument by copying-and-pasting paras. 17-19 of that decision.

¶15 It appears the County also knew of the ***James M.*** decision. The County's entire argument consists of paras. 15-23 copy-and-pasted from that decision, save for the substitution of the relevant names and facts. Yet, the County omits citation to ***James M.***, representing the reasoning as its own.[4]

¶16 In any event, neither party adds anything to the discussion presented in ***James M.***, and we discern no reason to depart from its holding that parents need not be informed they are waiving their constitutional right to parent by pleading no contest to the grounds for termination. We therefore adopt the thorough reasoning set forth in that case as our own. *See* ***id.***, ¶¶15-24. A copy of the ***James M.*** decision is available on the Wisconsin courts website at http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=48077.

By the Court.—Orders affirmed.

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[3] A one-judge opinion may be cited for its persuasive value, but is not precedent. WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09).

[4] "A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it." WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09). Where, however, parties parrot significant portions of such a case, if permissible under the rule, we suggest they acknowledge it and provide citation and a copy of the decision. *See* WIS. STAT. RULE 809.23(3)(c) (Sup. Ct. Order, *supra*).

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