COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1499

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

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

HOLLY R.,

PETITIONER-RESPONDENT,

V.

JOSEPH T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, P.J.[1] Joseph T. appeals from an order terminating his parental rights to Amber T. He argues that the trial court erred in terminating his parental rights because he did not consent to the termination and was not given a trial on the petition filed by his ex-wife. He also argues that after the trial judge set his trial before a twelve-person jury, he did not withdraw his right to a jury trial within the meaning of ***N.E. v. DHSS***, 122 Wis. 2d 198, 361 N.W.2d 693 (1985), and ***S.B. v. Racine County***, 138 Wis. 2d 409, 406 N.W.2d 408 (1987). We need not address Joseph T.'s first issue because we conclude that he did not withdraw his right to a jury trial and therefore a trial is necessary. We therefore reverse and remand for a trial.

¶2 Holly R., Amber T.'s mother, petitioned to terminate the parental rights of Joseph T., Amber T.'s father, alleging abandonment. *See* WIS. STAT. § 48.415(1) (1997-98).[2] Joseph T., who was then incarcerated in the Rock County jail, appeared without an attorney at his initial appearance. The trial court appointed a guardian ad litem for Amber T., and set over the initial appearance for three weeks. At the adjourned initial appearance, Joseph T. was still without an attorney. The trial court told Joseph T. that it would have the public defender's office contact him, and adjourned the initial appearance for another week. At the adjourned hearing, Joseph T. told the court that the public defender's office had said that someone would come to the jail for a conference, but that no-one had done so.

[1] This expedited appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 Holly R.'s attorney noted that this was the third initial appearance, and that he wanted the matter to proceed to a fact-finding hearing. The trial court obliged by entering a denial of the petition for Joseph T. and setting the case for a twelve-person jury trial. The trial was set for two days, about a month away. The court again said that it would contact the public defender's office and have someone see Joseph T.

¶4 At the fact-finding hearing, Holly R.'s attorney explained that the case had originally been set for a fact-finding hearing that day, but that it was his understanding that Joseph T. was going to withdraw his previous denial and admit that statutory grounds for termination existed. Joseph T.'s attorney confirmed this understanding, and told the court that Joseph T. was going to admit to having abandoned Amber T., and contest the termination at the dispositional hearing.

¶5 Joseph T.'s attorney then questioned Joseph T. concerning his alleged desire to admit that he had abandoned Amber T. It soon became readily apparent that Joseph T. did not admit that he had abandoned his daughter. Upon questioning by the guardian ad litem and the court, it also became apparent that he believed that his ex-wife had prevented him from seeing his daughter. On cross-examination, Holly R.'s attorney introduced a copy of a divorce court order denying Joseph T. visitation with Amber T. Joseph T. explained that he had been trying to see Amber T. for some time, but was frustrated by his ex-wife's actions. Finally, when asked: "[Y]ou are here, though, to voluntarily terminate your parental rights?" Joseph T. answered: "And I don't want to do that, sir." The trial court noted that Joseph T. had testified that he had not seen Amber T. for six months, so that the court could grant summary judgment in favor of Holly R. After further cross-examination, the trial court determined that Holly R. had proven that Joseph T. had abandoned Amber T., and that a dispositional hearing

would be scheduled. The trial court noted: "But there's certainly nothing very voluntary about any of this."

¶6 Holly R.'s attorney then moved the trial court to amend Holly R.'s petition to allege the existence of an order prohibiting placement that existed for a year without change, pursuant to WIS. STAT. § 48.415(4). The trial court permitted the amendment, and asked Holly R.'s attorney to file an amended petition. Joseph T.'s attorney objected to this procedure, noting that he had not seen the amended petition, and that if the petition was considered amended, grounds for termination had not been shown. The trial court noted:

> I think the court could—if they've got a court order, I can take judicial notice of that and find an additional ground. But I think what we want to do at this point is set a dispositional date, and then Mr. [T.] can tell us all about these things that he wants to talk about.

¶7 We need not consider whether the circuit court could take judicial notice of the records of the circuit court in another case, *see* ***Perkins v. State***, 61 Wis. 2d 341, 346-47, 212 N.W.2d 141 (1973), whether the amendment after what appears to be a trial was permissible, or whether the trial court did amend the pleadings. We do not consider these issues because we conclude that having been given the right to a jury trial, Joseph T. did not waive that right.

¶8 Joseph T.'s authority for his right to a jury trial is ***N.E. v. DHSS***, 122 Wis. 2d 198, 208, 361 N.W.2d 693 (1985), where the court said:

> We hold, as a matter of judicial administration, that once a juvenile has made a demand for a jury trial, the following procedural safeguards must be afforded to the juvenile to ensure that the juvenile's withdrawal of his or her jury demand is made knowingly and voluntarily. The juvenile must withdraw his or her demand for a jury personally. This withdrawal may not be made by the juvenile's

> attorney, regardless of whether the juvenile is or is not present. The juvenile may withdraw his or her jury trial demand in writing and must file this writing with the court. The writing must state that the juvenile has made this decision knowingly and voluntarily after receiving the advice of counsel. The juvenile may also withdraw his or her demand for a jury trial in open court, at which time the court must address the juvenile personally, on the record, in order to ensure that the juvenile's withdrawal of the jury demand is knowing and voluntary.

(Citations omitted.)

¶9 Joseph T. recognizes that he is not a juvenile, but argues that this language from ***N.E.*** is applicable to him because the ***N.E.*** court found that N.E. had a statutory right to a jury trial, though there was no statutory method of waiving that right. He cites ***S.B. v. Racine County***, 138 Wis. 2d 409, 413-16, 406 N.W.2d 408 (1987) for the court's application of ***N.E.***'s factors to a ch. 51 commitment proceeding, where there is also a statutory right to a jury trial but no statutory method of waiving that right, once asserted.

¶10 Holly R. does not respond to Joseph T.'s assertion that he was erroneously deprived of his right to a jury trial. When respondents do not respond to an appellant's propositions we take them as confessed. *See* ***State ex rel. Sahagian v. Young***, 141 Wis. 2d 495, 501, 415 N.W.2d 568 (Ct. App. 1987). We see no reason to depart from this rule here. Still, we recognize that termination proceedings are different from other civil proceedings, and we will consider Joseph T.'s arguments, albeit it without any assistance from Holly R.

¶11 The supreme court, though finding no constitutional right to a jury trial in ***S.B.*** and ***N.E.***, was emphatic in recognizing in both cases that clients, not attorneys, are possessed of a valuable right to a jury trial, and that right will not lightly be removed. ***S.B.***, 138 Wis. 2d at 410, 412; ***N.E.***, 122 Wis. 2d at 201, 208.

The right to parent one's child is also an important right, *see* ***State v. Allen M.***, 214 Wis. 2d 302, 318, 571 N.W.2d 872 (Ct. App. 1997), and the right to a jury trial in termination cases is recognized by WIS. STAT. § 48.422(4). As in ***S.B.*** and ***N.E.***, there is no statutory authority setting out the requirements for waiving a jury. Though Joseph T. did not make a demand for a jury, we do not find that this distinguishes ***S.B*** and ***N.E.*** Joseph T. was unrepresented when the court told him that the trial would be to a jury. Had the trial court not done so, and were Holly R. now to make the argument that Joseph T., though pro se, waived his right to a jury trial, we would probably not accept this argument. In short, we agree that the right to a jury, whether guaranteed by constitution or statute, is a valuable right, and that to waive that right, a litigant must take an affirmative act consistent with waiver. We need not determine what that act must be, or if all of the principles the court used in ***S.B.*** and ***N.E.*** are applicable in termination proceedings. Joseph T. did nothing which could be construed as a waiver of his right to a jury trial. Given his answers to the questions at the fact-finding hearing, it is unlikely that if asked, he would have waived his right to a jury trial. We conclude that Holly R. has conceded that Joseph T. is entitled to a jury trial. We further conclude that the better substantive view is that in the absence of an explicit waiver, he is so entitled. Accordingly, we reverse the order terminating Joseph T.'s parental rights, and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.