COURT OF APPEALS
DECISION
DATED AND FILED

June 05, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP679 **Cir. Ct. No. 2006TP298**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JENNIFER D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Jennifer D. appeals from an order terminating her parental rights. In proceedings which ultimately terminated her parental rights, appellant, Jennifer D., appeared personally, by adversary counsel and by her *guardian ad litem*. Initially, pursuant to statute, Jennifer D.'s counsel requested a jury trial. Subsequently, in Jennifer D.'s presence in open court, her counsel informed the court that Jennifer D. wished to have a court trial. Her *guardian ad litem* stated that the court trial was in Jennifer D.'s best interest. Over the State's objection, the trial court allowed withdrawal of her earlier request for a jury trial. After a trial to the court some time later, the trial court found grounds for termination of Jennifer D.'s parental rights, and that termination was in the best interests of Mya D. The trial court entered an order to that effect from which Jennifer D. now appeals, alleging that the trial court's failure to personally engage her in a colloquy on the record to establish that her waiver of the jury was "knowing and voluntary" requires reversal of the final order. We disagree and affirm.

¶2 Jennifer D. was twenty-one years old when these proceedings were commenced. She receives SSI benefits due to "cognitive delay." A *guardian ad litem* was appointed for her due to her limited mental abilities.[2] As the State advised the court in the termination proceedings: "In the CHIPS matter, the mother had a guardian ad litem appointed … because of her level of function

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] We understand from statements in the record by her *guardian ad litem*, who had previously served her in that capacity in another children's court proceeding, that Jennifer D. was mentally unable to understand more than the most rudimentary aspects of the court proceedings. She is referred to occasionally in the record as "incompetent" although the record does not disclose a formal guardianship proceeding making that legal determination.

which is unlikely to have changed since the time of the original CHIPS action for this child. I would ask that the Court appoint a guardian ad litem for her."

¶3 At the initial appearance with Jennifer D. and her *guardian ad litem* present, counsel for Jennifer D. requested a jury trial pursuant to WIS. STAT. § 48.422(4).[3] The trial court made a lengthy and comprehensive statement explaining the process, and her rights in the process, to Jennifer D. The record discloses no challenge by any participant to counsel's ability to request a jury trial on Jennifer D.'s behalf. The transcript discloses neither a colloquy directly with Jennifer D. to determine whether she joined in the request, nor an objection by any participant to the lack of such a colloquy. Indeed, it does not appear that Jennifer D. was ever asked a specific question or that she made any statement during the entire proceedings in which her statutory right to a jury trial was preserved by her counsel.

¶4 Subsequently, at the final pre-trial conference at which Jennifer D. and her *guardian ad litem* were again present, her counsel told the trial court that Jennifer D. wished to have a court trial rather than a jury trial. Jennifer D.'s *guardian ad litem* expressed the view that a court trial was in Jennifer D.'s best interest, that she understood the difference between a trial by twelve people or six people and a trial by one,[4] and that while he doubted she had the capacity to

[3] WISCONSIN STAT. § 48.422(4) provides: "Any party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition."

[4] Jennifer D.'s *guardian ad litem* told the court: "I think it's, frankly, a preference that she clearly understands the difference between one person and twelve people or six people … and she's nodding her head as I'm speaking indicating she knows the difference between twelve, six, and one. And I believe she understands at that limited level."

understand the legal difference between the jury and the judge in the decision-making process, he believed that at "a fundamental level … she understands the difference between a judge and jury." The State expressed the view that "because mother has been found incompetent … if a parent is not competent, they're not able to waive a jury trial and have a court trial. They can't waive anything because they're not competent."[5] The trial court concluded that Jennifer D.'s counsel could choose to waive the jury trial.

¶5 On appeal, Jennifer D. points out that the record does not establish that she personally "knowingly, intelligently and voluntarily" waived her right to a jury trial, therefore, she argues that the judgment terminating her parental rights must be vacated and the case remanded for a jury trial. In support of the claimed invalidity of the waiver, Jennifer D. relies on only a portion of the termination procedure at WIS. STAT. § 48.422(4), and also relies on delinquency cases,[6] mental commitment cases,[7] and criminal cases.[8] Jennifer D. does not argue that grounds for termination were not established by clear and convincing evidence, nor that the conclusion, that termination is in the best interests of the child Mya D., was in any factual way improper.

¶6 The trial court's conclusion that Jennifer D.'s counsel could both request a jury, and waive a jury, on her behalf involves interpretation of WIS.

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[5] The State has abandoned this argument on appeal and argues, instead, that the waiver was proper.

[6] ***In Interest of N.E.***, 122 Wis. 2d 198, 361 N.W.2d 693 (1985).

[7] ***S.B. v. Racine County***, 138 Wis. 2d 409, 406 N.W.2d 408 (1987).

[8] ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393.

STAT. § 48.422, and its role in the related termination of parental rights procedures. We interpret statutes *de novo*. ***Abbas v. Palmersheim***, 2004 WI App 126, ¶17, 275 Wis. 2d 311, 685 N.W.2d 546. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

¶7 The statutes specifically governing termination of parental rights are part of the Children's Code, WIS. STAT. ch. 48, but are set forth generally in WIS. STAT. §§ 48.40 through 48.48. The process for voluntary termination of parental rights is described in WIS. STAT. § 48.41. Perhaps because of the lack of the protections that adversarial fact-finding provides,[9] and perhaps because conceding the grounds for termination has significant consequences, the statutes require detailed inquiry by the court of the person consenting to terminate their parental rights. *See* § 48.41. The court must be satisfied that the consent to termination is "informed and voluntary." Section 48.41(2)(a). No similar finding is required in an involuntary termination proceeding that includes an adversarial fact-finding process.

¶8 The process of termination of parental rights is split into two distinct parts: the first is a determination of whether there are grounds for termination, WIS. STAT. § 48.415; the second, if grounds exist, is a disposition based upon the best interests of the child, WIS. STAT. § 48.426. The statutes specifically allow

[9] Without the tests of: (1) the State's witness testimony subject to cross examination, (2) assistance of counsel, and (3) the ability to subpoena witnesses on the parent's behalf, and to have the ultimate facts found by a court or jury, potentially vulnerable parents might be subject to significant, and perhaps improper, pressures to give up their rights and responsibilities vis-à-vis a child.

determination of grounds by either a jury or a court. WIS. STAT. § 48.424(3) and (4). To obtain a jury trial, "[a]ny party … whose rights may be affected … *shall* be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition." WIS. STAT. § 48.422(4) (emphasis added). A jury may only determine whether grounds for termination have been proven; it is for the court to decide what of the alternative dispositions described by WIS. STAT. § 48.427 is in the best interests of the child, *see* WIS. STAT. § 48.424(3), after applying specific statutory standards and factors, WIS. STAT. § 48.426.

¶9 We see from the way the legislature has chosen to structure the termination of parental rights process that there is a limited grant of a jury trial. The time when a jury trial may be requested is limited. WIS. STAT. § 48.422(4). The facts that may be addressed by the jury are limited. WIS. STAT. § 48.424(3). No statute prohibits waiver of the jury trial request after it has been made. However, the Children's Code does not include a specific waiver procedure. *See generally* WIS. STAT. ch. 48.

¶10 Our supreme court has held that termination of parental rights cases are civil in nature. ***M.W. v. Monroe County Dep't of Human Servs.***, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984) ("Although serious human rights are implicated in the termination-of-parental rights proceedings, the proceeding is civil in nature."), *modified in part on other grounds by* ***Steven V. v. Kelley H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856. In addition, in ***Waukesha County Dep't of Social Servs. v. C.E.W.***, 124 Wis. 2d 47, 53, 368 N.W.2d 47 (1985), our supreme court applied rules of civil procedure regarding jury instructions and preservation of error to a jury instructions issue in a termination of parental rights proceeding appeal.

> No statute or rule in the Children's Code (ch. 48) provides a procedure different from sec. 805.13(3) for objecting to instructions.… In other cases this court has assumed that chs. 801 to 847 generally apply to ch. 48 proceedings. In *In Matter of E.B.*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983), for example, the court of appeals, the parties and this court assumed, without discussing the issue, that secs. 805.13(4) and 972.10(5) applied to a delinquency hearing.

C.E.W., 124 Wis. 2d at 53 (footnote omitted). Consequently, because the procedure for waiver of a jury trial is not otherwise specified in the termination of parental rights procedure, we look to the rules of civil procedure applicable to withdrawal of a jury demand.

¶11 WISCONSIN STAT. § 805.01(3) addresses the waiver of the right to a jury in a civil case. It provides, in relevant part:

> WAIVER…. The right to trial by jury is also waived if the parties *or their attorneys of record*, by written stipulation filed with the court or *by an oral stipulation made in open court and entered in the record, consent to trial by the court* sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(Emphasis added.)

¶12 Here, counsel for Jennifer D. waived the jury trial in open court, on the record, and represented that this was the wish of her client. Jennifer D. was present and did not indicate disagreement with her counsel. Jennifer D.'s *guardian ad litem* agreed that a court trial was in Jennifer D.'s best interest and concurred in the waiver. We conclude that the waiver in this case complied with the requirements of WIS. STAT. § 805.01(3).

¶13 It is undisputed that although Jennifer D. was present during the waiver of the jury trial, the court did not engage in a colloquy with Jennifer D.

personally. The court relied on representations of her counsel, as it was entitled to do under WIS. STAT. § 805.01(3), and statements by her *guardian ad litem*. Nothing in the record, or in this appeal, suggests that Jennifer D. did not want the jury waiver, that she was pressured in any way to agree to the jury waiver, or that she had the capacity to understand more than the difference between twelve people and one person deciding disputed issues.

¶14 The sole issue on this appeal is whether, once requested, a jury request in a termination of parental rights case may be waived by a respondent in the absence of a court finding, based upon a specific colloquy with the individual, that the waiver is knowing, intelligent, and voluntary.[10] A jury trial in a termination of parental rights case is a civil matter. Contrary to Jennifer D.'s arguments here, we find nothing in the statutes, or in the pronouncements of our supreme court in termination cases, that establishes either a constitutional right to a jury trial, or a constitutional limitation on waiver of that jury trial, in termination cases. Our supreme court, as we have seen, has applied the rules of civil procedure to termination of parental rights cases when WIS. STAT. ch. 48 is silent on the process in dispute. *See* ***C.E.W.***, 124 Wis. 2d at 53. The civil procedure applicable to waiver of a jury trial, found in WIS. STAT. § 805.01(3), was properly applied in this case.

[10] Counsel for Jennifer D. does not argue that her limited mental capacity is a factor which should require such a colloquy and finding. Indeed, the opinions of her *guardian ad litem* were that the waiver was in her best interest and that Jennifer D.'s understanding of the significance of the change from a jury to a court as the fact-finder was limited to understanding the difference between twelve people and one person deciding. Under these circumstances, one is left to ponder how Jennifer D. could ever make an intelligent, knowing decision to have a jury in the first place, or to waive one later. That dilemma is, of course, solved by application of the usual rules of civil procedure that allow an attorney to act on behalf of a client in matters of procedure and tactics.

By the Court.—Order affirmed.

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