COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 Nos. 2008AP2710
2008AP2711
2008AP2712

Cir. Ct. Nos. 2008TP2
2008TP3
2008TP4

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

NO. 2008AP2710

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JACOB G.,

RESPONDENT-APPELLANT,

MELISSA G.,

RESPONDENT-CO-APPELLANT.

NO. 2008AP2711

IN RE THE TERMINATION OF PARENTAL RIGHTS TO

JUSTICE G., A PERSON UNDER THE AGE OF 18:

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JACOB G.,

RESPONDENT-APPELLANT,

MELISSA G.,

RESPONDENT-CO-APPELLANT.

NO. 2008AP2712

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JACOB G.,

RESPONDENT-APPELLANT,

MELISSA G.,

RESPONDENT-CO-APPELLANT.

APPEAL from orders of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Melissa G. and Jacob G. appeal from orders terminating parental rights to their children, Jamal G., Keisha G., and Justice G., and denying their postdisposition motion. They claim: (1) that counsel for both were ineffective for failing to object that the trial court lost competency to proceed because the court delegated the task of mailing written dispositional orders and the notice of grounds to terminate to the corporation counsel when the statute requires the court to do so and (2) their plea colloquies were deficient such that their pleas were not knowingly, intelligently, and voluntarily entered. The first issue is a nonstarter. The statute does not prohibit a court from delegating the function of sending the notice. Here, the two parents were provided with a notice that was complete and accurate. As to the second issue, we agree with the postjudgment court that the record demonstrated, by clear and convincing evidence, Melissa and Jacob's knowing, intelligent and voluntary pleas. We therefore affirm.

¶2 Jacob's and Melissa's three eldest children were found to be children in need of protection or services (CHIPS) pursuant to WIS. STAT. § 48.13(10) on August 28, 2006. The court filed dispositional orders to remove the children from the home on October 17, 2006, and social services placed the children in foster care shortly thereafter.

¶3 Melissa and Jacob attended the dispositional hearing and pled no contest to the allegations of neglect in the petition for protection and services. After engaging each parent in a colloquy, the court referenced the conditions each

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

parent needed to meet to secure the return of their children. Finally, the court orally described each element of the grounds for termination identified in the "Notice Concerning Grounds to Terminate Parental Rights" form. The distribution list for the order and attached conditions and notice concerning grounds for termination of parental rights included Melissa and Jacob. The court filed two extension orders on July 31, 2007, and July 31, 2008, respectively, when the parents failed to meet the conditions for return of the children. Once again the distribution list for the extension orders and required attachments included the parents.

¶4 The Manitowoc County Human Services Department filed a petition for termination of parental rights on behalf of Jamal, Keisha, and Justice pursuant to WIS. STAT. § 48.415(2)(a) on January 14, 2008. The court scheduled a jury trial for June 12 and 13, 2008, for the grounds phase of the termination of parental rights proceedings. However, the morning of the trial, Jacob and Melissa decided to waive their rights to a jury trial and admit that grounds existed to terminate their parental rights.

¶5 In light of the parents' decisions, the trial court first engaged Jacob in a colloquy, referring to his signature and initials on each line of a two-page waiver of a jury trial and admission for grounds document for each individual child. Jacob admitted that he had read the text, understood it, and had discussed the text with his attorney and that his initials next to each separate line substantiated his understanding. The trial court also confirmed with Jacob that he understood that by waiving his rights and admitting grounds, the court could consider whether his parental rights should be terminated. Jacob's attorney

asserted for the record that she reviewed the jury instructions, WIS JI—CHILDREN 324, with her client, and Jacob confirmed this assertion.

¶6 The trial court then turned to Melissa, who was present throughout Jacob's colloquy. Melissa confirmed she understood the court determined her parental rights independently of Jacob's rights. Melissa then confirmed her initials on each line of the waiver and admission document meant the court could consider the termination of her parental rights. Melissa's attorney stated that he reviewed the jury instructions with his client and went over the elements of the charge and that Melissa appeared to comprehend the information before completing the waiver and admission forms for each child. Melissa expressly confirmed that this was true, even after a second prompting from the trial court to ensure that she understood.

¶7 Based on the parents' written, signed admissions, their colloquies with the court, and additional testimony from the social worker from Manitowoc county human services, the court ultimately found Jacob and Melissa to be unfit and scheduled a dispositional hearing for August 14, 2008. After testimony from social workers and the parents at that hearing, the trial court held that it was in the best interest of the three children to terminate Melissa's and Jacob's parental rights.

¶8 Melissa and Jacob filed a postjudgment motion to address several contested issues, including that counsel was ineffective for failing to object to corporation counsel mailing the dispositional orders instead of the court and that the plea colloquies were insufficient because the court did not inform the parents that their pleas would result in an automatic finding of unfitness.

¶9 At the first ***Machner***[2] hearing on March 5, 2009, the postjudgment court made a preliminary finding that Melissa and Jacob had established a prima facie case that their plea colloquies were deficient and the burden shifted to the County to prove that their pleas were knowingly, voluntarily, and intelligently entered. Over the course of three evidentiary hearings, the postjudgment court heard testimony from Melissa and Jacob, their previous counsel, the social worker for the case, and lastly the corporation counsel paralegal that had mailed the dispositional orders.

¶10 The postjudgment court first addressed the issue of ineffective counsel in the mailing of the dispositional orders. The court found that as part of a 1988 reorganization, the circuit court had directed corporation counsel to draft dispositional orders, wherein the court then reviewed and entered the orders, at which point corporation counsel distributed the orders to the parties. Prior to this reorganization, officers of the circuit court prepared and distributed the dispositional orders.

¶11 Here, the paralegal for corporation counsel received the orders and attachments from the court and requested the most recent address for both parents from their social worker before mailing the orders via regular mail. There was no indication that corporation counsel followed any procedures for mailing differing from those followed by the clerk of courts office. And both parents indicated to the court that they received the mailings. In light of the facts presented at the hearing, the postjudgment court held that the parents received the appropriate

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

written order and attached recommendations and notice concerning grounds for termination according to statute, and therefore counsel was not ineffective.

¶12 In addressing the sufficiency of the plea colloquies, the court first found that Melissa and Jacob understood the elements of the charge to which they were pleading. Next, the court found the colloquy with each parent established, in substantially equivalent wording, that the parents understood that their admissions would result in an automatic finding of unfitness which would work to conclude the grounds phase of the trial. Ultimately, the postjudgment court held that the record and facts presented by the County demonstrated by clear and convincing evidence that Jacob and Melissa knowingly, intelligently, and voluntarily entered their pleas.

¶13 The claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). While we will uphold factual determinations unless clearly erroneous, we review questions of law without deference to the trial court. ***Id.*** at 324-25. An ineffective assistance of counsel claim is a two-part test in which the defendant must prove that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both prongs if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697. Counsel's performance is considered deficient when the defendant can show that counsel's errors were so serious that counsel was no longer acting as the counsel guaranteed by the Sixth Amendment. ***Id.*** at 687. To make such a showing, the defendant must prove that counsel's representation fell below an objective standard of reasonableness, that of the reasonable counsel under the prevailing professional norms. ***Id.*** at 687-88.

¶14 Melissa's and Jacob's argument relies on the language in WIS. STAT. §§ 48.355(2)(d) and 48.356(2). They contend that, when read in combination, the statutes impose a mandatory duty on the court, and only the court, to mail written notices to parents subject to dispositional orders. Section 48.355(2)(d) states in relevant part:

> The *court shall provide* a copy of a dispositional order relating to a child in need of protection or services to the child's parent …. (Emphasis added.)

And § 48.356(2)[3] states in relevant part:

> In addition to the notice required under sub. (1) [that the court shall orally inform the parents of any grounds for termination of parental rights under WIS. STAT. § 48.415], *any written order* which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1). (Emphasis added.)

¶15 The interpretation and application of statutes is a question of law that we review without deference to the trial court. *See* ***Gonzalez v. Teskey***, 160 Wis. 2d 1, 7-8, 465 N.W.2d 525 (Ct. App. 1990).

¶16 We hold that the language of the statute is clear and unambiguous. When read together, the statutes clearly indicate that the court has the duty to fully inform the parents in writing of the information in the dispositional order, conditions for return of their children, and possible grounds that exist to terminate their parental rights. However, it is just as plain that there is no prescribed method for the dissemination of that written information; it must simply be "provided." *See* WIS. STAT. §§ 48.355(2) and 48.356(2).

[3] WISCONSIN STAT. § 48.356 is titled "Duty of court to warn."

¶17 The postjudgment court found that both Melissa and Jacob received the dispositional orders, conditions, and the notice concerning grounds for termination of parental rights in the mail. The postjudgment court also found that corporation counsel exerted every effort to deliver the written orders to the parents by working with the social workers and the court to ensure that complete documentation was mailed to the correct address. We completely agree with the postjudgment court's analysis. The statute requires courts to provide this information. It does not mandate a particular method for *providing* it.

¶18 We note that, on appeal, Melissa and Jacob cite to cases to support their argument, which cases we have dropped to a footnote.[4] Suffice it to say, these cases do not even begin to address the method of providing notice; they indicate merely that the information required by the statute to be provided is mandatory. As such, this caviling over the form of the court's fulfillment of the statute, when, in fact, both parents received timely and complete written notice in accordance with the statute, is of no merit. We hold that Melissa and Jacob failed to sufficiently show that counsel was deficient for failing to object to the court's method of delivery and, therefore, counsel was not ineffective.

[4] *See* ***D.F.R. v. Juneau County, Dep't of Soc. Servs.***, 147 Wis. 2d 486, 489, 495, 433 N.W.2d 609 (Ct. App. 1988) (discussing the mandatory nature of notice itself and not the method of service where the trial court failed to include written notice concerning grounds for termination of parental rights in the dispositional and extension orders), *abrogated in part on other grounds by* ***Jamie L. v. LaCrosse County Human Servs. Dep't***, 172 Wis. 2d 218, 493 N.W.2d 56 (1992); ***F.T. v. State***, 150 Wis. 2d 216, 224-25, 441 N.W.2d 322 (Ct. App. 1989) (holding that the statutory meaning of the word "shall" in the notice statutes meant that the conditions to be fulfilled by the appellant in conjunction with the dispositional order were mandatory and should have been given to the appellant orally and in writing).

¶19 Turning to the second issue, the question of whether the County met its burden to demonstrate by clear and convincing evidence that Melissa and Jacob knowingly, intelligently, and voluntarily entered their pleas is a question of law, which we review without deference to the circuit court.[5] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). The procedures by which a circuit court may properly accept a plea are mandated by statute. ***State v. Bangert***, 131 Wis. 2d 246, 260-61, 389 N.W.2d 12 (1986); ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Prior to accepting an admission of grounds or a plea of no contest, the court must (1) address the parties present and determine that the admission is made voluntarily and understandingly, (2) establish if any promises or threats were made to elicit an admission, (3) establish if a proposed adoptive parent of the child has been identified, and (4) make such inquiries as satisfactorily establish a factual basis for the admission. WIS. STAT. § 48.422(7); ***Steven H.***, 233 Wis. 2d 344, ¶39. In addition, the person entering the no contest plea must have knowledge of the constitutional rights he or she is giving up by making the plea. ***Bangert***, 131 Wis. 2d at 265-66.

¶20 In ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122, our supreme court concluded that for a no contest plea to be knowing and intelligent, a parent must

[5] On appeal, Melissa and Jacob seem to argue that the record is unclear as to whether the postjudgment court ruled that they had established a prima facie case. Even a superficial scanning of the record shows that the postjudgment court explicitly *did* find that the parents established a prima facie case, as required under the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), and that the burden then shifted to the County to prove by clear and convincing evidence that the parents plea admissions and waivers were knowingly, voluntarily, and intelligently made.

understand how a plea admitting to grounds for termination results in a finding of parental unfitness. *See also* ***Bangert***, 131 Wis. 2d at 266-67 (imposing a duty on the court to ascertain the defendant's understanding of the nature of the charge). This is because a finding of unfitness is a direct, immediate and fundamental consequence of entering a no contest plea and concludes the grounds phase of the proceedings. ***Therese S.***, 314 Wis. 2d 493, ¶11. We accept that the circuit court judge who took the plea, the now-retired Honorable Fred Hazelwood, did not expressly tell the parents that their pleas meant an "automatic" finding of unfitness such that the grounds phase of the termination of parental rights proceedings would be over and the case would then move to the dispositional phase. This is why the postjudgment court, the Honorable Darryl Deets presiding, held that a prima facie case had been made.

¶21 But as did Judge Deets, we—as the reviewing court—look to the entire record to discern whether Melissa and Jacob's pleas were knowing, intelligent, and voluntary at the time they were entered. *See* ***Bangert***, 131 Wis. 2d at 283. To begin, we point out that both Melissa and Jacob had had some experience with the mechanics of pleading no contest prior to entering their pleas in the grounds phase of the termination of parental rights case, as they both pled no contest to the petition for protection of services during their children's CHIPS disposition hearing. This resulted in the children being removed from their home for a period of one year, no small consequence. Further, at the initial appearance in the termination of parental rights proceedings held on February 22, 2008, counsel for both Melissa and Jacob asserted that they had discussed the rights available in the two-part procedure for the termination of parental rights hearings with their clients, including a right to a twelve-person jury trial during the first phase, and the availability of a bench trial, which both parties declined.

¶22 While it is pertinent that Melissa and Jacob understood pleadings in the past, we must find that they understood their plea at the time it was entered. *See* ***id.*** at 269. At the grounds hearing, Judge Hazelwood confirmed that counsel had read through WIS JI—CHILDREN 324, which lists the elements of the charge, with Melissa and Jacob and that Melissa and Jacob comprehended the charges as indicated in their signed waiver.[6] *See* ***Bangert***, 131 Wis. 2d at 268 (stating that a trial judge may refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge). So the record reflects that both Melissa and Jacob understood the nature of the charges when they entered their plea.

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[6] The court referred to statement: "(1) I have reviewed Wisconsin Jury Instruction—Children #324 with my attorneys and I understand its contents," which was specifically initialed on the individual "waiver of jury trial and admission of grounds" forms signed by both Melissa and Jacob. The jury instructions read in relevant part:

> 1. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
>
> ….
>
> 2. Did the ____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?
>
> ….
>
> 3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)'s home?
>
> ….
>
> 4. Is there a substantial likelihood that (parent) will not meet these conditions within the twelve-month period following the conclusion of this hearing?

WIS JI—CHILDREN 324 (2007).

¶23 We now turn to whether Melissa and Jacob understood that their admissions would result in a finding of unfitness and the dispositional phase would be directed by the best interests of the children. We begin with Jacob.

¶24 In its colloquy with Jacob, Judge Hazelwood explicitly discussed that an admission of grounds resulted in a finding of unfitness as follows:

> THE COURT: You understand that by doing so [admitting grounds and waiving a jury trial] you're putting the court in the position of being able to consider whether your parental rights should be terminated?
>
> MR. G.: Yes.
>
> THE COURT: We can't deal with that issue or address that issue until we find that *there are grounds to consider you an unfit parent* and thus, putting the court in the position to make a decision about terminating your parental rights. Do you understand that, sir?
>
> Mr. G.: Yes. (Emphasis added.)

¶25 Jacob's confirmation to the court showed he understood that he was admitting that he was an unfit parent.

¶26 Plus, Jacob signed a two-page waiver and admissions document, marking his initials after each line explaining the constitutional rights he was waiving and affirming he had discussed the document with his attorney. One of those lines stated, "(4) A disposition hearing will be scheduled at which the court will decide whether it is in the *best interests of my children* to terminate my parental rights. I understand that the court may or may not terminate my parental rights to my child." This indicates Jacob understood his admission would result in the ending of the grounds phase and advance to the disposition phase of the proceedings, where the court would make its decision based on the best interests of the children.

¶27 Lastly, despite Jacob's lack of education, we come to the same conclusion as Judge Deets—that Jacob did not lack the ability to understand his plea. Jacob's counsel testified that they went over the statutory elements of the charge and each line of the admission for grounds and waiver with their client. Jacob initialed each line of the document and signed his name on June 12, 2008, after the statement reading:

> I have reviewed each item in this document with my attorneys. I understand all of the contents of this document. I sign this document, waive my rights, and enter admissions freely and voluntarily. I fully understand the legal consequences of admitting that grounds exist to terminate my parental rights, including the possibility that the court will terminate my parental rights to the child.

¶28 Turning to Melissa, the record shows that she was present for all of Jacob's colloquy. Specifically, Melissa was present when the court discussed that the grounds admitted were that the parents were unfit. *See* ***id.*** at 268. It is perfectly acceptable for a trial court to refer to some portion of the record in lieu of a personal colloquy so long as it demonstrates knowledge of the constitutional rights being waived. *See* ***Moederndorfer***, 141 Wis. 2d at 826-27. The relevant portion of Melissa's colloquy is as follows:

> THE COURT: …. Okay. Let me turn to Melissa G. Melissa G. you've been present while I have been talking to your husband. You have the same identical rights that he has and the jury has to make a separate determination in connection with your case and the case affecting these children. Do you understand that?
>
> MELISSA G.: Yes.
>
> ….
>
> THE COURT: You realize the affect of signing these documents is to, in effect, allow the court to consider the termination of your parental rights? Do you understand that?

MELISSA G.: Yes.

¶29 In addition to her plea colloquy, Melissa testified at the postjudgment hearing that her understanding of the purpose of the jury trial was for the jury to make a determination of whether she was a fit parent. But the record shows that Melissa signed an admission of grounds and waiver of jury trial document, identical to that signed by Jacob. This demonstrates she understood the constitutional rights she waived and that her admission would be the catalyst for the second phase—the dispositional hearing—at which the court would consider the best interests of the children in determining the termination of her parental rights.

¶30 Further, Judge Deets recognized Melissa was a special education student. Still, sitting as the postjudgment court, he held that Melissa's signed admission statement and testimony, as well as her counsel's testimony, clearly showed that she understood both the elements of the charge and the ramifications of entering her no contest plea.

¶31 In light of our review of the record in its entirety, and under the totality of the circumstances, we conclude that the County met its burden of proof with respect to both parents and, as such, Judge Deets properly confirmed the termination of Melissa's and Jacob's parental rights by denying their motion to withdraw their pleas. Therefore, we affirm.

By the Court.—Orders affirmed.

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