COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3029 **Cir. Ct. No. 01-TP-54**

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

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

RACINE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

STORMY W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Stormy W. is seeking to withdraw her voluntary consent to the termination of her parental rights. She maintains that her consent was neither voluntary nor informed and her counsel provided ineffective assistance. We affirm since the circuit court conducted an adequate inquiry to determine that Stormy's consent was voluntary and informed and correctly concluded that counsel zealously represented Stormy.

¶2 Stormy is a thirty-four-year-old woman with long-term mental health problems; she is mildly retarded and carries a diagnosis of schizophrenia, paranoid type. She gave birth to Teresa W. on March 18, 2000, and the child's custody was transferred to the Racine County Department of Human Services (HSD) on May 9, 2000. HSD filed a petition to terminate Stormy's parental rights, alleging a continuing parental disability and failure to assume parental responsibilities. WIS. STAT. § 48.415(3), (6).[2] Attorney Mark Lukoff, assistant

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 48.415 provides, in part:

> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
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> ….
>
> **(3)** CONTINUING PARENTAL DISABILITY. Continuing parental disability, which shall be established by proving that:
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> (a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33(2)(a), (b) or (c), licensed treatment facilities as defined in s. 51.01(2) or state treatment facilities as defined in s. 51.01(15) on account of mental illness as defined in s. 51.01(13)(a) or (b) or developmental disability as defined in s. 55.01(2) or (5);

(continued)

state public defender, was appointed to represent Stormy. Although Stormy at first contested the petition and demanded a court trial, she ultimately agreed to voluntarily terminate her rights.

¶3 The circuit court ordered the termination of Stormy's parental rights after it found that her consent was voluntary and informed. Subsequently, she filed a notice of appeal and we granted new counsel's motion to remand the case to the circuit court for the purpose of pursuing motions to preserve issues for appeal. In the circuit court, Stormy filed motions contending that she should be allowed to withdraw her consent because it was not voluntary and informed and that trial counsel had not provided effective assistance because he failed to ensure

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> (b) The condition of the parent is likely to continue indefinitely; and
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> (c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.
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> ….
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

that Stormy understood all of the ramifications of her voluntarily consenting to the termination of her parental rights. She pursues her appeal after the circuit court denied her motions following an evidentiary hearing.

¶4 Stormy maintains that the circuit court failed to make a searching and penetrating inquiry into whether she voluntarily terminated her parental rights. She contends that the circuit court erred in not asking if she understood that her consent would be a final decision on her part, placing on the record its perceptions about her level of comprehension, making an inquiry into her mental health issues and retardation, and, finally, in ascertaining if she had been advised of all alternatives to a termination of her parental rights. She also contends that Lukoff provided ineffective assistance because he failed to establish that she understood the meaning of a voluntary consent to the termination of her parental rights and he failed to make sure that the circuit court made a searching inquiry before accepting her consent.

¶5 We begin with the applicable standard of review. In ***T.M.F. v. Children's Service Society***, 112 Wis. 2d 180, 332 N.W.2d 293 (1983), the supreme court held that the applicable standard is that "the appellate court should give weight to the trial court's decision, although the trial court's decision is not controlling." ***Id.*** at 188 (quoted source omitted). The court noted that when proceedings to terminate parental rights are undertaken, "the legal conclusion of voluntary and informed consent is derived from and intertwined with the trial court's factual inquiry." ***Id.*** Because the circuit court has the opportunity to question and observe the witnesses, it is better prepared to reach an accurate and just conclusion on this issue. ***Id.*** Furthermore, public policy is served by a standard which favors the finality of the circuit court's conclusion as to the voluntariness of the parent's consent. ***Id.***

¶6 In ***T.M.F.***, 112 Wis. 2d at 196-97, the supreme court set forth six points of "basic information" that trial courts "must ascertain to determine ... whether consent is voluntary and informed:"

> 1. the extent of the parent's education and ... level of general comprehension;
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> 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;
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> 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;
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> 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; [and]
>
> 6. whether the parent is aware of the significant alternatives to termination and what those are.

¶7 With this as our standard, we will independently review the entire record, including the original hearing in which Stormy agreed not to contest the petition, as well as the post-order hearing wherein she challenged the voluntariness of her admissions. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51, 233 Wis. 2d 344, 607 N.W.2d 607. During this review, we will be mindful that courtroom proceedings do not unfold like a play with actors following a script or being required to utter magic words to meet some standard. "Additionally, when a specific finding is missing, appellate courts may assume that the missing finding 'was determined in favor of or in support of the judgment.'" ***Michael A.P. v.***

Solsrud, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993) (citation omitted).

¶8 We start with Stormy's education and level of general comprehension. During the post-order hearing, the circuit court reiterated that it was familiar with Stormy, which gave it an understanding of her difficulties in a lot of situations. The circuit court held that at the plea hearing Stormy understood what she was doing. The circuit court explained that Stormy demonstrated her intelligence and general comprehension by failing to answer questions where the answers could be harmful to her attempt to withdraw her admissions. Based upon our review of the record, it is apparent that the circuit court's conclusion that Stormy had sufficient education and general competence to understand the proceedings and ramifications of her decision is supported by the record.[3]

¶9 We next consider Stormy's level of understanding of the nature of the proceedings and the consequences of the termination. At the post-order hearing, Lukoff testified that after several meetings with Stormy, "there was no question but that Stormy understood what giving up [her rights to] the child meant,

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[3] In the context of discussing what standard a circuit court should apply in deciding if a defendant was competent to stand trial, the supreme court has explained:

> [T]he trial court must weigh evidence that the defendant is competent against evidence that he or she is not. The trial court is in the best position to decide whether the evidence of competence outweighs the evidence of incompetence.… [T]he court must ultimately determine whether evidence that the defendant is competent is more convincing than evidence that he or she is not.

State v. Garfoot, 207 Wis. 2d 214, 222-23, 558 N.W.2d 626 (1997). We know of no reason why we should not apply this benchmark in considering the circuit court's determination of Stormy's education and level of general comprehension.

and that this is what she wanted to do because she believed it was the best for the child." The day before the termination hearing, Lukoff took the unusual step of having Stormy's caseworker present when he again discussed with Stormy the scheduled proceedings and ramifications of agreeing to a termination of her parental rights. Counsel opined:

> Even though Stormy is developmentally disabled and has a mental illness, I think she clearly understood what various stages of the proceedings meant, and she clearly understood what she wanted to do at the time she did it. I didn't have any doubt in my mind.

From this testimony the circuit court concluded that Stormy was able to reasonably question Lukoff in an effort to understand the situation she was facing.

¶10 In our own review of the record, we have found that under questioning at the fact-finding hearing and the post-order hearing, Stormy gave answers that demonstrated her understanding of the nature of the proceedings and consequences of termination, including the finality of the decision and the circuit court's order. We agree with the circuit court that Stormy "is not a person without intelligence and intellect." We also adopt the circuit court's conclusion, based upon Stormy's testimony, that she was adequately prepared for all court hearings and "[s]he's pretty quick … on the upbeat on what's got to be done to get a situation addressed."

¶11 Our consideration of Stormy's understanding of the duties of the guardian ad litem (GAL) and her contacts with him is necessarily brief because Stormy was an adult. Stormy's GAL questioned her on the record, at both hearings, and took time to explain to her the portions of the proceedings and consequences that he believed she had trouble understanding. Stormy's contacts with her GAL were sufficient under the circumstances of this case.

¶12 Stormy had sufficient contacts with her caseworker. As we have previously explained, Lukoff had Stormy's caseworker participate in the meeting the day before the termination hearing. Lukoff testified that was because he believed Stormy had a good relationship with her caseworker and the two of them were able to understand each other. From our review of the record, we conclude that the participation of the caseworker was beneficial to Stormy's general comprehension of the proceedings and did not coerce her in the decision to voluntarily terminate her parental rights.

¶13 Because Stormy does not make any allegations that promises or threats were made to induce her decision to voluntarily terminate her parental rights, we turn to whether she was aware of the "significant alternatives" to termination of her parental rights and what those alternatives are. The circuit court concluded that Stormy "knew her alternatives before she consented" and after reviewing the record we agree. Lukoff offered testimony that he discussed the alternatives with Stormy in preparing for the fact-finding hearing.[4]

¶14 We consider instructive the supreme court's commentary in ***T.M.F.*** when it considered the issue of voluntary consent in a termination proceeding. The court there stated:

> We do not and cannot set forth precisely what information must be given to the parent in each termination hearing or what questions must be asked or what responses must be elicited on the record to ensure that a sufficient judicial inquiry is made to determine that the consent is voluntary and informed. Each parent and each family will be different. In this nonadversarial setting, the circuit court

[4] While Stormy disputed Lukoff's testimony, the circuit court stated that her testimony did not carry the same credibility as Lukoff's because she exhibited a knowledge of what should be said at the post-order hearing.

> has a unique opportunity and a special obligation to be vigilant in protecting the interests of all parties.

T.M.F., 112 Wis. 2d at 196. Applying the broad requirements of ***T.M.F.***, we conclude that the circuit court's finding that Stormy's consent to the termination of her parental rights was both voluntary and informed should be upheld.[5]

By the Court.—Orders affirmed.

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

[5] Since Stormy's termination of her parental rights was voluntarily and intelligently made, we need not consider her claim that trial counsel provided ineffective representation by failing to ensure she understood all of the ramifications of voluntarily consenting to the termination of parental rights. Indeed, trial counsel's performance exceeded the professionally competent assistance that is demanded. Given the facts of this case, counsel's performance was more than adequate.