COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1106 **Cir. Ct. No. 2012TP4**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ELLA M. S.,
A PERSON UNDER THE AGE OF 18:

GREEN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ERICKA L. R.,

RESPONDENT-APPELLANT,

STEVEN D. AND DEBORAH D.,

INTERESTED PARTIES-RESPONDENTS.

APPEAL from an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Ericka L.R. appeals the circuit court's order terminating her parental rights to Ella M.S. Ericka argues that the circuit court erred in several ways when the court denied her request to withdraw her consent to a voluntary termination of her parental rights. Ericka's most prominent argument is that the circuit court should have allowed her to withdraw her consent because she showed a "fair and just reason" for withdrawal. Ericka did not, however, frame her argument this way in the circuit court and, therefore, I reject it as forfeited. At the same time, I choose to address the substance of her fair and just reason argument and, as an additional basis for rejecting it, conclude that it is not persuasive. I also reject other arguments Ericka makes and, therefore, I affirm.

Background

¶2 On November 16, 2012, the Green County Department of Human Services petitioned to terminate Ericka's parental rights to Ella, alleging that Ericka would consent to a voluntary termination.[2] According to the petition allegations, Ella was six years old at the time and was living with her legal guardians, Steven and Deborah D.[3]

¶3 On January 7, 2013, the circuit court held a hearing and conducted a colloquy with Ericka, under oath, regarding Ericka's consent to the termination.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The County also sought termination of Ella's father's parental rights in the same circuit court case. The circuit court terminated Ella's father's parental rights, and he filed a separate appeal, case no. 2014AP1155.

[3] The circuit court allowed the guardians to participate as a party. Ericka does not challenge their participation in that capacity. The guardians, the County, and the guardian ad litem have each filed a brief in Ericka's appeal.

After the colloquy and additional questioning by counsel, the circuit court found that Ericka freely and voluntarily consented to the termination and that Ericka believed that terminating her parental rights was in Ella's best interest.[4]

¶4 In September 2013, before the case proceeded to a dispositional hearing, Ericka moved to withdraw her consent. She alleged a number of grounds for withdrawal, the principal one being that she was coerced or "manipulat[ed]" by an "un-official agreement" with the guardians pertaining to child support that Ericka owed.

¶5 The County and guardians opposed Ericka's motion to withdraw her consent and argued that the circuit court should address the motion by applying plea withdrawal standards under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Ericka conceded that courts have applied the ***Bangert*** standards in WIS. STAT. ch. 48 proceedings. *See, e.g.*, ***Brown Cnty. Dep't of Human Servs. v. Brenda B.***, 2011 WI 6, ¶¶34-36, 331 Wis. 2d 310, 795 N.W.2d 730 (applying ***Bangert*** standards to question of whether parent may withdraw no contest plea in

[4] Voluntary consent to termination of parental rights is authorized by WIS. STAT. § 48.41, which provides, in part:

> **(1)** The court may terminate the parental rights of a parent after the parent has given his or her consent as specified in this section....
>
> **(2)** The court may accept a voluntary consent to termination of parental rights only as follows:
>
> (a) The parent appears personally at the hearing and gives his or her consent to the termination of his or her parental rights. The judge may accept the consent only after the judge has explained the effect of termination of parental rights and has questioned the parent, or has permitted an attorney who represents any of the parties to question the parent, and is satisfied that the consent is informed and voluntary.

involuntary termination of parental rights proceeding). Ericka argued, however, that courts should not be limited to the ***Bangert*** standards when analyzing a request to withdraw consent in a voluntary termination of parental rights proceeding. She asserted that the circuit court should analyze her request for withdrawal by holding an evidentiary hearing and examining the "totality of circumstances." According to Ericka, a full examination of all of the circumstances would reveal that she was coerced into consenting based on economic factors.

¶6 The circuit court held a non-evidentiary hearing and denied Ericka's request to withdraw her consent. The court applied the ***Bangert*** standards, and concluded that Ericka failed to establish a prima facie case for withdrawing her consent. The court pointed out that, during Ericka's consent colloquy, Ericka testified that she did not feel pressured by anyone to terminate her parental rights, that she had not received anything of value to influence her decision, and that she was consenting to the termination because she thought it was best for Ella to be with Ella's guardians.

¶7 After the dispositional hearing, the circuit court terminated Ericka's parental rights to Ella. I reference additional facts as pertinent to the discussion below.

Discussion

¶8 Ericka makes several arguments, but her most prominent argument is that she should be allowed to withdraw her consent because she showed a "fair and just reason" for withdrawal. I address that argument first, then turn to her remaining arguments.

A. Fair And Just Reason

¶9 Ericka argues that the circuit court erred by applying the ***Bangert*** standards instead of the "fair and just reason" standards from criminal case law addressing pre-sentencing plea withdrawal, as set forth in ***State v. Jenkins***, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24. Ericka cites no case in which a court has applied the fair and just reason standards to a termination of parental rights proceeding, but she asserts that there is logic to applying those standards when a parent seeks, as she did here, to withdraw consent prior to disposition.

¶10 Ericka fails to show that she raised her fair and just reason argument in the circuit court. Although it is true that she argued that the court should not be limited to ***Bangert*** and should apply a "totality of circumstances" test, I find no reference in her circuit court arguments to the fair and just reason standards or to fair and just reason case law. Also, Ericka does not meaningfully reply to the guardians' assertion that she failed to raise her fair and just reason argument in the circuit court. I therefore conclude that Ericka forfeited her fair and just reason argument, and I reject it on that basis. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (declining to address, as forfeited, argument not raised in the circuit court); *see also* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession).

¶11 I also choose, however, to discuss the substance of Ericka's fair and just reason argument. As an additional basis to reject it, I agree with the County, the guardian ad litem, and the guardians that Ericka's fair and just reason argument is not persuasive.

¶12 "A 'fair and just reason' has never been precisely defined." ***Jenkins***, 303 Wis. 2d 157, ¶31. In the criminal context, the court has said that the reason must be something other than the desire to have a trial or "belated misgivings" about a plea. ***Id.***, ¶32. Examples of situations that may constitute or contribute to a fair and just reason in the criminal context include a "[g]enuine misunderstanding of a guilty plea's consequences," "[h]asty entry" of a plea, "confusion on the defendant's part," and "coercion on the part of trial counsel." *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).

¶13 Whether there is a fair and just reason justifying withdrawal of a plea is a discretionary call for the circuit court. ***Jenkins***, 303 Wis. 2d 157, ¶¶29-31. Here, of course, the circuit court did not have the opportunity to exercise this discretion, and I cannot exercise that discretion or make fact findings for the circuit court. I can, however, explain why Ericka's fair and just reason argument, as presented on appeal, is not persuasive.

¶14 The court is to use a "'liberal'" and not "'rigid'" approach in deciding what constitutes a fair and just reason. *See* ***id.***, ¶31 (quoted source omitted). Still, the party seeking to show a fair and just reason has the burden to prove its existence by a preponderance of the evidence. ***Id.***, ¶32. The court in ***Jenkins*** explained that this burden is significant:

> On the surface, the language and history of the fair and just reason standard suggest that a defendant is required to meet a relatively low burden to justify plea withdrawal before sentence. In actual application, however, the burden has been more difficult. Upon a motion to withdraw a plea before sentencing, the defendant faces three obstacles. First, the defendant must proffer a fair and just reason for withdrawing his plea. Not every reason will qualify as a fair and just reason. Second, the defendant must proffer a fair and just reason that the circuit court finds credible. In other words, the circuit court must believe that the defendant's proffered reason actually

> exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

Id., ¶43 (citations omitted).

¶15 Here, Ericka argues that there are "a number of factors which collectively give rise" to a fair and just reason for withdrawal of her consent to termination. In particular, she focuses on three alleged factors: (1) problems with an attorney that advised her during the pertinent time period; (2) her "hasty" decision to give consent; and (3) an agreement with the guardians regarding child support. As I explain below, Ericka's factors are insufficiently specific as to the first two and, as to the third, the record establishes that there was no specific agreement that could have coerced Ericka's consent.

1. Problems With Attorney

¶16 Ericka points out that she alleged in the circuit court that an appointed attorney who assisted her during the pertinent time was "dishonest" and "refused to do what [she] asked of him." She also points out that she had no more than 40 days to consult with counsel. However, Ericka fails to tie these conclusory allegations in any fact-specific way to the reasons for her consent. She has not alleged, for example, that her attorney gave her no advice or bad advice relating to consent, nor does she point to evidentiary support for that proposition. Ericka's bare allegations regarding counsel are not sufficient.

2. "Hasty" Decision

¶17 Ericka asserts that she gave her consent in a "hasty" manner. She argues that hastiness is shown by the undisputed fact that she consented to the termination on January 7, 2013, at her first court appearance, which was less than

two months after the County filed the petition to terminate her parental rights on November 16, 2012. Nothing about this time frame, however, shows that Ericka did not have sufficient time to consider her decision. Ericka fails to make sufficiently specific allegations as to why, under the circumstances, her decision was rushed.

¶18 Moreover, I observe that Ericka's testimony during the consent hearing strongly supports a conclusion that Ericka had sufficient time to consider her decision. Under questioning by the guardian ad litem, Ericka acknowledged that she contested a previous petition to terminate her parental rights to Ella, but, after giving the matter some thought, changed her mind and came to believe that it was in Ella's best interest for Ella to be with Ella's guardians:

> Q Ericka, this is, has been the second case that the County has brought to terminate your parental rights; is that correct?
>
> A Yes.
>
> Q And actually, the first case was a year or two ago; is that right?
>
> A Yeah.
>
> Q And you contested the case at that time; right?
>
> A Yes.
>
> Q What has changed since that time to today now to change your mind of why you are supporting or willing to voluntarily terminate your parental rights?
>
> A Ella's age. She's six years old. She's, she's been at the [guardians]' home her whole life…. I don't, I don't think it's fair for me to take her away from there[, that it] is a good idea. I, I know she's happy and comfortable in that home environment. That's, that's her family. I wish it was different, but it's not, and the best thing for her is for her to stay there.
>
> *Q And you've thought a lot about this; haven't you?*

> *A* *Yeah.*
>
> *Q* *And is there anything that could change your mind?*
>
> *A* *No.* Just even my interactions with Ella, I can tell that she's, she's so happy there. *I can't—I could never take her away from there. I couldn't. I think that it would be very detrimental to take her away from the [guardians] at this time.*

(Emphasis added.)

3. Agreement Regarding Child Support

¶19 Ericka asserts, as she did in the circuit court when arguing in favor of a totality of circumstances test, that she was coerced by an agreement under which the guardians would pay or forgive Ericka's accumulated child support in exchange for Ericka's consent to terminate. Ericka argues that this alleged agreement was at best an improper influence on her decision and at worst "a wholly improper quid pro quo."

¶20 Ericka relies on her allegation in the circuit court that there was an "un-official agreement" with the guardians to "eliminate all my [child support] arrearages upon their successful adoption [of Ella]." Ericka also relies on portions of deposition testimony she gave on March 26, 2013, approximately two and one-half months after her consent hearing. Specifically, Ericka relies on her testimony that she and the guardians had a discussion during which the guardians told her that they would "help [her] out" with her child support obligation "[b]ut not until [she] terminate[d]."

¶21 Before proceeding, I note that Ericka's deposition occurred *before* Ericka moved to withdraw her consent. However, her deposition covered the topic of the alleged agreement, and Ericka points to nothing pertinent about the alleged

agreement or her child support obligations that she would not have known about at the time of the deposition. I therefore follow Ericka's lead and rely on her deposition in addressing her allegation that there was an agreement that coerced her consent. For three reasons, I conclude that the deposition undercuts rather than supports Ericka's allegation that she was coerced by an agreement with the guardians.

¶22 First, Ericka's deposition testimony shows that the pertinent discussion between Ericka and the guardians occurred approximately one month before the deposition date, meaning that the discussion occurred *after* the date of Ericka's consent hearing. Ericka appears to dispute the timing of this discussion, but, as far as I can tell, she disputes the timing based on her mistaken reading of pages 22 to 25 of her deposition. I see nothing in the deposition indicating that Ericka and the guardians discussed child support in June 2012, as Ericka argues her deposition shows. Thus, so far as the record indicates, an agreement about child support, if there was one, occurred *after* Ericka consented and could not have affected her decision to consent.

¶23 Second, even if the discussion about child support that Ericka describes in her deposition occurred *before* she consented, Ericka's deposition testimony on this topic, when read as a whole, shows that this discussion was not specific or final as to what the guardians agreed to do with regard to child support. In other words, Ericka's deposition testimony refutes instead of supports her allegation that there was any real agreement. Accordingly, Ericka's allegation

about the nature of the alleged agreement is not borne out by her deposition testimony.[5]

[5] Ericka's deposition testimony on the topic of her discussion with the guardians about child support is as follows:

> Q Did you ever talk to your social workers or—or the [guardians] about giving you some relief from that child support?
>
> A The [guardians].
>
> Q And did they refuse to give you relief?
>
> A No, no.
>
> Q They wouldn't give you relief?
>
> A No, they said once everything's over and done with that they can help me out with that.
>
> Q But not until you terminate?
>
> A Right.
>
> ….
>
> Q You said the [guardians] had told you that they will work with you on the child support after this is done?
>
> A Uh-huh.
>
> Q Can you describe that conversation more, who said what and how it came up.
>
> A It was just—I had talked to [the guardians] about them dropping or getting rid of the child support that was back owed. That was basically the conversation, [and] they said once the TPR goes through and everything goes through, then [one of the guardians] can go to court with you and talk to—who is it—or figure—we'll figure out then what's going on with the child—the back owed child support.
>
> Q And when did that conversation take place?
>
> A Probably about a month ago.

(continued)

¶24 Third, Ericka's deposition testimony demonstrates that, consistent with Ericka's earlier consent hearing testimony, the predominant reason Ericka consented to the termination was Ericka's belief that Ella's best interests were served by Ella remaining with Ella's guardians, with whom Ella had spent the majority of her life. For example, Ericka testified at her deposition that she consented because she "just [didn't] think that Ella should be moved from her home that she's always known" and that Ericka still felt that way at the time of her deposition. Similarly, Ericka testified that her thinking in deciding to consent was that "I just don't want to—I don't want to take [Ella] away from someone that she's always known, that's—who she regards as family. It's sad and it hurts, but it's true."

¶25 Ericka may be making a more general, alternative argument, regardless of any specific agreement, that she was coerced into consenting to termination because her financial circumstances made it impossible to keep up with her child support obligations and because she faced jail time if she failed to pay those obligations. If that is her argument, it is not borne out by the record. Ericka points to a portion of her deposition testimony in which she described the

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Q And how did that conversation get initiated, did you initiate it?

A I started it.

Q Okay. You asked them to do something about child support?

A Yes, I did.

Q And they said we can talk about it when it's over?

A Yeah.

extreme difficulty of keeping up with her child support obligations and said that those obligations were "part" of the reason she decided to terminate her parental rights. As already explained, however, Ericka's other deposition testimony shows that this was not the predominant reason for her decision. Rather, Ericka consistently and repeatedly testified that she consented to terminate her parental rights because she thought Ella should stay with the guardians that Ella had come to know as her family. Ericka's "part"-of-the-reason testimony, read in this context, simply reinforces a conclusion that child support obligations and other financial circumstances were not a predominant reason for Ericka's decision. As the circuit court recognized, the fact that a parent may take financial matters into consideration when deciding to consent to a termination of parental rights does not show coercion.[6]

¶26 To sum up so far, I reject Ericka's fair and just reason argument as forfeited and, additionally, reject it as unpersuasive. I turn to her remaining arguments.

B. Ericka's Remaining Arguments

¶27 Ericka argues that the circuit court erred by failing to conduct an evidentiary hearing. She also argues that her consent was constitutionally invalid.

[6] In discussing her child support obligations and the threat of jail time for failing to pay those obligations, Ericka makes passing reference to a condition of the guardianship order requiring her to be free of incarceration for 24 consecutive months. If Ericka means to argue that she consented to the termination of her parental rights because she faced an impossible condition of return under the guardianship order, her argument is neither legally nor factually developed. Moreover, I fail to see how the record before me could support such an argument, particularly given Ericka's deposition testimony.

1. Evidentiary Hearing

¶28 Ericka argues that the circuit court erroneously exercised its discretion by failing to conduct an evidentiary hearing. I disagree. I am uncertain whether Ericka believes she should have received an evidentiary hearing under the fair and just reason standards or under the ***Bangert*** standards, but, whichever it is, I am not persuaded that a hearing was necessary.

¶29 If Ericka is arguing that the circuit court should have conducted an evidentiary hearing because she sufficiently alleged a fair and just reason to withdraw consent, that argument is forfeited for the reasons explained in ¶10 above. Moreover, even if her argument were not forfeited, I fail to see why the circuit court would have needed to hold an evidentiary hearing given her bare allegations, her consent colloquy, and her deposition testimony as discussed above. *See* ***State v. Damaske***, 212 Wis. 2d 169, 190, 567 N.W.2d 905 (Ct. App. 1997) (circuit court need not hold an evidentiary hearing to decide whether there is a fair and just reason to withdraw a plea when the defendant's allegations raise no question of fact, when the allegations are merely conclusory, or when the record conclusively demonstrates that the defendant is not entitled to relief).

¶30 If Ericka is instead arguing that the circuit court should have conducted an evidentiary hearing under the ***Bangert*** standards, I disagree for the reasons explained in the next section below.

2. Constitutional Validity Of Ericka's Consent

¶31 Ericka argues that her consent was constitutionally invalid because the circuit court failed to conduct a colloquy in full compliance with ***T.M.F. v. Children's Service Society of Wisconsin***, 112 Wis. 2d 180, 332 N.W.2d 293

(1983). The court in ***T.M.F.*** explained that the contents of a consent colloquy are flexible, but that there is "basic information the circuit court must ascertain to determine on the record whether consent is voluntary and informed":

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

Id. at 196-97. As I understand Ericka's briefing, she argues that her consent could not have been voluntary, and was therefore unconstitutionally obtained, because the circuit court failed to comply with some of these requirements, namely, the fifth and sixth requirements.

¶32 I begin by observing that ***T.M.F.*** does not state that a parent is entitled to withdraw consent whenever the circuit court fails to comply with all six requirements. Regardless, I reject Ericka's argument.

¶33 As to the fifth requirement, it is true that the circuit court did not ask Ericka during the consent colloquy whether anyone made her any "promises" in

connection with the termination of her parental rights. However, the circuit court asked Ericka whether she received anything of value, received any threats, or felt pressured by anyone in connection with the termination of her parental rights. Ericka responded "no" to each of these questions. I conclude that this shows compliance with the fifth requirement.

¶34 As to the sixth requirement, I acknowledge that the circuit court did not establish on the record whether Ericka was aware of significant alternatives and what those alternatives were. However, when Ericka moved to withdraw consent, she did not raise this "alternatives" issue as a ground for withdrawal. Her failure constitutes a forfeiture of the argument, and I reject it on that basis. I also note that Ericka does not allege that there was a significant alternative of which she was unaware.[7]

Conclusion

¶35 In sum, for the reasons stated above, I affirm the circuit court's order terminating Ericka L.R.'s parental rights to Ella M.S.

By the Court.—Order affirmed.

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

[7] For these same reasons, I reject Ericka's argument in her reply brief that, if the ***Bangert*** standards apply, then she made a prima facie case for withdrawing her consent under those standards. Under the ***Bangert*** standards, a parent establishes a prima facie case by showing that the parent's colloquy was deficient *and* alleging that the parent did not know or understand the information that should have been provided. *See* ***Brown Cnty. Dep't of Human Servs. v. Brenda B.***, 2011 WI 6, ¶¶34-36, 331 Wis. 2d 310, 795 N.W.2d 730.