COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3540

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF LA'SHONIA MARIE B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TA'SHONIA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Reversed and cause remanded.*

FINE, J. Ta'Shonia B. appeals from the trial court's order terminating her parental rights to her daughter La'Shonia B. She claims that the trial court was obligated to, but did not, comply with § 48.422(7), STATS. This court agrees. Accordingly, this court remands for trial.

I.

Ta'Shonia B. was fourteen years old and incarcerated in a juvenile facility when she gave birth to La'Shonia. As far as the record reveals, she is still incarcerated. In April of 1998, when La'Shonia was approximately one year and eight months old and living with a foster family, the State filed a petition to terminate Ta'Shonia B.'s parental rights to La'Shonia. Ta'Shonia B. was represented by counsel, and the trial court appointed a guardian *ad litem* for her.

A jury trial on the State's petition was ultimately scheduled for August 18, 1998. On that day, Ta'Shonia B.'s guardian *ad litem* told the trial court that he had discussed the proceedings with her: "She indicated to me she wanted to exhaust every effort to try to prevent the termination of parental rights. She wouldn't feel right simply voluntarily giving up those rights." Additionally, the guardian *ad litem* noted that he had spoken with Ta'Shonia B.'s therapist "who indicated to me that he believed that, based upon her strong determination to exhaust every effort at preventing termination of her parental rights, he thought it would be in her best interest and the fact it would be detrimental to her in the long run to voluntarily give up her parental rights in this matter."[1]

Ta'Shonia B. agreed to waive her right to a jury trial and have the factual issues relevant to whether her parental rights to La'Shonia should be terminated heard by the trial court in a bench trial. After colloquy about a possible adjournment, the trial court set the trial to start that afternoon. When the case was

[1] The word "it" in the phrase "he thought it would be in her best interest" appears to refer to Ta'Shonia B.'s intention "to exhaust every effort at preventing termination of her parental rights." Taking the phrase in context, this court does not read it as saying that the therapist thought that termination of Ta'Shonia B.'s parental rights to La'Shonia was in Ta'Shonia B.'s "best interest."

recalled, and after the trial court told Ta'Shonia B.'s guardian *ad litem* that his presence would not be needed, Ta'Shonia B.'s lawyer told the trial court that Ta'Shonia B. "has decided that she would like to proceed with a no contest on the termination proceeding." Ta'Shonia B.'s guardian *ad litem* was not in court when Ta'Shonia B. agreed not to contest the petition to terminate her parental rights.

The bulk of the colloquy with Ta'Shonia B. relating to her decision not to contest the State's petition to terminate her parental rights to La'Shonia was done by the assistant district attorney representing the State. That colloquy elicited that Ta'Shonia B. was born in June of 1982, that she was currently committed to a juvenile correctional facility, that she was sixteen, that she was in the tenth grade, that she had, in the words of the assistant district attorney, "an opportunity to review the termination petition that's been filed on behalf of your daughter, La'Shonia B[]," and that she had reviewed the petition with her attorney. Ta'Shonia B. also answered yes to the following questions:

> "Do you feel she's explained to you all the different options in this case?";
>
> "And it's my understanding at this time that you wish to enter what is known as a no contest to the petition before the Court?";
>
> "And you understand that the petition before the Court alleges that you failed to assume parental responsibility for your daughter La'Shonia?";
>
> "And that you have never established a substantial parental relationship with her; is that correct?";
>
> "And have you had enough time to talk to [Ta'Shonia B.'s lawyer]?";
>
> "And do you understand that by entering a no contest posture to this, that you're also giving up your right to a court trial in this matter?";
>
> "And that also you're giving up the right to present any witnesses on your behalf and to have your attorney cross-exam those witnesses?"

The State also elicited a "yes" to a question that asked whether Ta'Shonia B. had enough time to talk to her guardian *ad litem*.

La'Shonia's guardian *ad litem* asked Ta'Shonia B. three questions, eliciting "yes" answers to:

> "Do you understand that the effect of doing a no contest means the Judge will most likely find that grounds exist to terminate your parental rights?";
>
> "And you're basically allowing him to make that finding without fighting it?"; "And that's what you want to do?"

Ta'Shonia B.'s lawyer elicited "yes" answers to the following questions:

> "At this time have we had enough time to talk?";
>
> "More than you probably wanted to, right?";
>
> "We've seen and talked to each other the last week every day?"

The lawyer elicited "no" answers to the following questions:

> "Any questions of me today?";
>
> "Any more questions?"

The trial court's colloquy with Ta'Shonia B. was the following:

THE COURT:	Has anyone made any threats or promises to get you to agree to this no contest plea?
THE WITNESS:	No.
THE COURT:	You're doing this on your own?
THE WITNESS:	Yes.

The trial court then took evidence from a Milwaukee County youth social worker, who provided the factual basis for the termination. The trial court agreed that

termination of Ta'Shonia B.'s parental rights to La'Shonia was appropriate, and entered a formal written order.

II.

There is no dispute but that a proceeding to terminate a person's parental rights to his or her child must be infused with exacting safeguards.

> A judicial proceeding terminating parental rights implicates a parent's fundamental rights. At stake is the parent's interest in the companionship, care, custody, and management of his or her child. This court has recognized that these interests are "cognizable and substantial" and that the integrity of the family is subject to constitutional protection through the due process clause of the state and federal constitutions.
>
> ...
>
> The state and the parent share an interest in ensuring that the decision to terminate parental status is accurate and just. In view of these concerns, the Wisconsin legislature has imposed on the circuit court the responsibility to determine whether the parent's consent to termination of his or her parental rights is voluntary and informed and has set forth the conditions under which the court may accept a parent's voluntary consent.
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> ...
>
> … The judicial proceeding is not a mere formality; the circuit court does not simply rubber-stamp the parent's consent. The circuit court must ensure that the parent has adequately considered the decision to terminate parental rights to the child, surely one of the most difficult decisions a person can ever make.

D.L.S. v. Children's Service Society, 112 Wis.2d 180, 184–186, 332 N.W.2d 293, 296–297 (1983) (citations omitted). Thus, § 48.422(3), STATS., requires in those cases where a petition to terminate a person's parental rights is not contested that the trial court take testimony in accordance with § 48.422(7), STATS., which provides, among other things:

> Before accepting an admission of the alleged facts in a petition, the court shall:
>
> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission ….

The trial court must not only ascertain whether an agreement by a person to the termination of his or her parental rights is "informed and voluntary," but also must make an adequate record so that an appellate court can review the trial court's decision. *See* ***D.L.S.***, 112 Wis.2d at 188–189, 332 N.W.2d at 298 (appellate court must give weight to trial court's finding of voluntariness, but only if record supports such finding). "Yes" responses to "leading and complex questions" do not cut the mustard unless there is also an adequate record that demonstrates that the person whose parental rights are sought to be terminated has "the educational level or ability to understand the complex series of explanations or questions." ***Ibid.*** In light of this, and given the lack of meaningful inquiry into Ta'Shonia B.'s ability to understand the complex questions and concepts put to her, the colloquy here was inadequate for the trial court to make a reasonable judgment that Ta'Shonia B. was not contesting the petition "voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions," *see* § 48.422(7), STATS., especially in light of Ta'Shonia B.'s guardian *ad litem*'s statement to the court earlier that day that Ta'Shonia B. "wanted to exhaust every effort to try to prevent the termination of parental rights." This court, therefore, rejects La'Shonia's argument that the trial court complied with § 48.422(7), STATS.

The State does not, in essence, contest Ta'Shonia B.'s contention that the colloquy did not satisfy § 48.422(7), STATS., but argues that "the record

supports the involuntary grounds to terminate" Ta'Shonia B.'s parental rights, and further, both the State and La'Shonia argue that Ta'Shonia B. "has not shown that she did not know or understand the information that the court was required to give her under § 48.422, stats." (Uppercasing omitted.) The issue, of course, is not whether there is support in the record to terminate Ta'Shonia B.'s parental rights; absent a knowing and voluntary decision not to contest the petition, Ta'Shonia B. was entitled to have termination decided in a trial. Additionally, although the failure of a trial court to advise a person whose parental rights are sought to be terminated of various procedural safeguards does not invalidate the proceedings unless the person can show that he or she did not know that he or she had those options, ***Burnett County Department of Social Services v. Kimberly M.W.***, 181 Wis.2d 887, 892–893, 512 N.W.2d 227, 230 (Ct. App. 1994) (right to request substitution of judge) (relying on ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986)), *see* ***State v. Kywanda F.***, 200 Wis.2d 26, 37, 546 N.W.2d 440, 446 (1996) (approving ***Kimberly M.W.*** in context of advising subject of a juvenile delinquency proceeding of the right to request substitution of judge), the crux of Ta'Shonia B.'s appeal is that her decision not to contest the petition was not, in the words of § 48.422(7)(a), made "voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions." Indeed, only a short time before Ta'Shonia B. acquiesced in the petition to terminate her parental rights to La'Shonia, when, as noted, her guardian *ad litem* was not present, Ta'Shonia B.'s guardian *ad litem* told the trial court in clear and unambiguous language that Ta'Shonia B. wanted to fight to keep La'Shonia. There is nothing in the record comporting with the standards recognized by ***D.L.S.*** that contradicts either her guardian *ad litem*'s assertions before the trial court, or Ta'Shonia B.'s contentions on appeal. Accordingly, under ***D.L.S.*** this court must remand for trial. *See* ***id.***, 112 Wis.2d at 183, 332 N.W.2d at 295 (parent has right to withdraw petition for

voluntary termination of parental rights when record insufficient to demonstrate that petition was in fact voluntary).

By the Court.—Order reversed and cause remanded.

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