COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2208

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MEGAN E.M., DANIELLE M., JENNA M., AND LINDSAY M., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TAMMY M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Tammy M. appeals from a juvenile court order terminating her parental rights to her four children. Tammy argues that she did not knowingly and voluntarily waive her right to the fact-finding hearing. In addition, Tammy argues that the juvenile court erred by failing to take testimony in support of the factual allegations in the petition. We reject both of Tammy's arguments. We affirm the order.

FACTS AND PROCEDURAL HISTORY

¶2 On May 28, 1998, Manitowoc County filed a petition seeking to terminate Tammy's parental rights to one of her children, Megan E.M. The petition alleged that Megan was in continuing need of protection or services (CHIPS) and that Tammy had failed to satisfy the conditions prescribed in the CHIPS order pertaining to Megan.[2] Attorney Erik Loy was appointed to represent Tammy in this matter. On October 18, 1998, Judge Patrick L. Willis conducted a hearing on this petition. At the hearing on the petition, Loy advised Judge Willis that Tammy did not wish to contest the petition. Judge Willis then engaged Tammy in a personal colloquy, advising her of all of her rights and the consequences of her decision. After this exchange, Tammy changed her mind. Judge Willis scheduled a jury trial on the petition for January 21, 1999.

¶3 On December 15, 1998, the county filed three further petitions seeking the termination of Tammy's rights to her other three children, Danielle M., Jenna M. and Lindsay M.[3] Like the petition concerning Megan, these

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The petition also sought to terminate the parental rights of Megan's father.

[3] These petitions also sought to terminate the parental rights of the fathers of these children.

petitions also alleged that the children were in continuing need of protection or services and that Tammy had failed to satisfy the conditions prescribed in the CHIPS orders pertaining to the children. Attorney Paul Burke was appointed to represent Tammy in these matters. Later, the two cases were consolidated and a jury trial was scheduled for April 6, 1999, on all the petitions.

¶4 On April 2, 1999, Tammy met with Burke. As a result of this meeting, Tammy signed a document entitled "WAIVER OF JURY TRIAL AND ADMISSION OF GROUNDS." This waiver document bore the caption of the consolidated cases and recited the names of Tammy's four children. The waiver recited in bold type in the opening paragraph that Tammy "wish[ed] to admit that grounds exist to terminate my parental rights under section 48.415(2) of the Wisconsin Statutes. I understand that by admitting that grounds exist to terminate my parental rights I give up the following rights[.]" The waiver then recited all of Tammy's relevant rights at a fact-finding hearing. Tammy initialed the recital of each of these rights.[4]

¶5 Attached to the waiver was a copy of WIS JI—CHILDREN 323, the standard jury instruction that sets out the elements for termination of parental rights based upon the child's continuing need for protection or services and the parent's inability to satisfy the conditions for the return of the child to the home. Also attached to the waiver was a copy of the standard special verdict for this type of case. Tammy initialed each page of these attachments.

[4] The waiver recited the following: (1) the right to a fact-finding hearing and the right to a jury trial at such hearing, (2) the five-sixth's rule and the applicable burden of proof, (3) the obligation of the county to obtain favorable answers to all of the questions in the special verdict, (4) the right of confrontation, and (5) the right to produce witnesses and to personally testify.

¶6 Tammy also initialed each of the following statements in the waiver form: (1) that she had reviewed the jury instruction with her attorneys and that she understood its contents, (2) that no one had threatened her to give up her rights, (3) that no one had made any promises to her in exchange for her waiver of her rights, (4) that a dispositional hearing would be conducted to determine whether it would be in the best interests of her children to terminate her parental rights, (5) that she had reviewed the petitions and understood the allegations recited therein and that the petitions stated a factual basis for her admission that grounds existed to terminate her parental rights, (6) that she understood a jury would have to make separate findings as to each child, (7) that she had the choice to make an admission or a denial as to each child, (8) that she could read, write and understand English, and (9) that she was not under the influence of drugs or alcohol and that the medications she was taking did not interfere with her ability to make decisions.

¶7 The waiver concluded with the following statement printed in bold type:

> 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 all four children.

The document is dated April 2, 1999, and bears Tammy's signature.

¶8 On the scheduled jury trial date, April 6, 1999, Tammy appeared with both Loy and Burke. Judge Fred H. Hazlewood conducted the proceeding. We review Judge Hazlewood's rulings in this appeal. Judge Hazlewood opened the proceedings by stating his understanding that Tammy wished to waive the fact-finding hearing and that the dispositional phase would continue on a contested

basis. Loy confirmed this understanding and presented Judge Hazlewood with Tammy's written waiver. Loy stated that he had reviewed the document with Tammy and that Burke had also done so separately with Tammy. Judge Hazlewood asked Tammy if Loy's statement was correct and she replied that it was.

¶9 Judge Hazlewood then asked Tammy: (1) if she understood that her decision was final, (2) whether she understood that the county had to first get past the fact-finding hurdle before the court could decide whether it was in the best interests of the children to terminate Tammy's parental rights, and (3) whether her decision was freely and voluntarily made. To each question, Tammy answered, "Yes." The judge then inquired of Tammy: (1) whether anyone had threatened her, (2) whether any promises had been made to her, (3) whether anyone had told her that it would be in her best interests to terminate her parental rights, and (4) whether she had any questions she wanted to ask the court. To each question, Tammy answered, "No."

¶10 Based upon the record in the case, Judge Hazlewood found that Tammy had voluntarily waived her right to the fact-finding hearing. Based upon his "knowledge of the files in these matters," Judge Hazlewood determined that sufficient grounds existed to demonstrate that the children had been out of the home for more than six months, that the department had made a diligent effort to provide the services required in the prior court order, and that Tammy had failed to demonstrate substantial progress towards meeting the conditions for return of the children and that there was a substantial likelihood that she would not meet those conditions within the twelve-month period following the proceedings.

¶11 At the ensuing dispositional hearing, Judge Hazlewood determined that it was in the best interests of all the children to terminate Tammy's parental rights.

¶12 Represented by new counsel, Tammy brought a posttermination motion raising the issues we address in this appeal. Judge Hazlewood denied the motion. We will address the judge's ruling in detail as we discuss the appellate issues.

DISCUSSION

1. Waiver of Fact-Finding Hearing

¶13 Tammy contends that her waiver of the fact-finding hearing was not knowing or voluntary. She contends that her waiver was not voluntary because Judge Hazlewood never expressly ascertained that she understood the facts alleged in the petition, the elements of a termination of parental rights claim or the potential consequences of her waiver. She contends that her waiver was not knowing because she thought that she was merely waiving a jury, not her right to a hearing on the factual allegations in the petitions.

¶14 Pursuant to WIS. STAT. § 48.422(7), when a parent wishes to enter an admission to the facts alleged in a termination of parental rights petition, the juvenile court must among other things:

> (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….

When reviewing a juvenile court determination regarding consent to a termination of parental rights, our supreme court has set out the following standard of review:

> In proceedings to terminate parental rights, the legal conclusion of voluntary and informed consent is derived from and intertwined with the trial court's factual inquiry during which the trial court has the opportunity to question and observe the witnesses; the trial court is thus better prepared to reach a just and accurate conclusion than is an appellate court. Furthermore, public policy favors finality of the trial court's conclusion as to the nature of the parent's consent. *Thus, on review of a trial court's conclusion that the parental consent is voluntary and informed "the appellate court should give weight to the trial court's decision, although the trial court's decision is not controlling."*

T.M.F. v. Children's Serv. Soc'y, 112 Wis. 2d 180, 188, 332 N.W.2d 293 (1983) (emphasis added; quoting ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983)).[5]

¶15 In ***T.M.F.***, the supreme court also observed that a fixed rule could not be set out as to what information must be provided a parent in each termination case or what questions must be asked or what responses must be elicited. However, the court cautioned that the juvenile court must be "vigilant in protecting the interests of all parties." ***Id***. at 196.

¶16 In this case, Judge Hazlewood placed great reliance on Tammy's written waiver. This kind of document is akin to the guilty plea/waiver form often used in criminal cases. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). There, the court of appeals spoke to the value of such a form:

> People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the

[5] In ***T.M.F. v. Children's Service Society***, 112 Wis. 2d 180, 332 N.W.2d 293 (1983), the supreme court was reviewing a parent's application for voluntary consent to terminate parental rights, *see* ***id***. at 182, whereas here we are reviewing a consent to only the fact-finding portion of the hearing. Nonetheless, we see no reason why the standard of review should be any different from that set out in ***T.M.F.***

> rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting. A trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one.

Id. at 828.

¶17 Loy, one of Tammy's attorneys, testified at the posttermination hearing that Tammy's attorneys decided to prepare a written waiver because of her change of mind during the earlier proceedings before Judge Willis. Loy testified that he prepared the form to assure that Tammy knew what she was doing and to assure that a written record existed to document her decision in an effort "to be as complete as possible in terms of waiver of rights."

¶18 As our recital of the facts reveals, the written waiver sets out in detail Tammy's rights and the procedures which would apply at a fact-finding hearing. In addition, the waiver explains that a dispositional hearing would still be conducted to determine whether it would be in the best interests of the children to terminate Tammy's parental rights. The waiver opened and closed with bold type stating, respectively, that Tammy wished to admit that grounds existed to terminate her parental rights and that she had reviewed the document with her attorneys, understood its contents and acknowledged the possibility that the juvenile court could terminate her parental rights.

¶19 Tammy's written waiver supports Judge Hazlewood's determination that Tammy knowingly and voluntarily waived her right to the fact-finding hearing.

¶20 In addition, Judge Hazlewood questioned Tammy's credibility at the posttermination hearing. The judge observed that in the earlier proceeding involving Megan, Judge Willis had advised Tammy in great detail of her rights and the procedures in a termination of parental rights proceeding. In light of that prior experience, Judge Hazlewood expressed understandable skepticism about Tammy's claim that she did not understand the instant proceedings. In matters tried before a court without a jury, we are directed to give "due regard … to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2).

¶21 Finally, Judge Hazlewood determined that Tammy had thoroughly discussed this matter with her attorneys and that the decision to forego the fact-finding hearing and to focus instead on the dispositional hearing was a tactical one, which Tammy understood and approved. This finding is supported by the following: (1) the testimony of Tammy's attorneys, (2) the waiver form which confirms that a dispositional hearing would still be necessary, and (3) Judge Hazlewood's colloquy with Tammy at the waiver hearing when the judge explained that the county would first have to get past the fact-finding hearing before the court could make any determination as to whether Tammy's parental rights could be terminated.

¶22 In summary, giving due regard to Judge Hazlewood's assessment of the credibility of the witnesses pursuant to WIS. STAT. § 805.17(2) and the appropriate weight to the judge's finding that Tammy's waiver of the fact-finding hearing was voluntary and informed, we conclude that Tammy knowingly and voluntarily waived her right to a fact-finding hearing on the allegations in the petition.

2. Need for Testimony at the
Fact-Finding Hearing

¶23 Tammy argues that Judge Hazlewood erred by failing to take testimony in support of the allegations in the petition at the fact-finding waiver hearing. She relies on WIS. STAT. § 48.422(3), which states, "If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)."

¶24 We read Judge Hazlewood's bench ruling rejecting Tammy's motion as two tiered. First, the judge concluded that subsec. (3) did not apply because Tammy, despite her waiver of the fact-finding portion of the proceeding, continued to contest the dispositional phase of the proceedings.

¶25 Second, Judge Hazlewood reasoned that a commonsense reading of subsec. (3) did not require testimony. The judge correctly noted that, despite the reference in subsec. (3) to "testimony … including testimony as required in sub. (7)," subsec. (7) does not expressly require testimony in a fact-finding waiver proceeding. Rather, para. (7)(a) only requires that the court "address" the parties when determining whether an admission is voluntary. In addition, para. (7)(c) requires that the court "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission."

¶26 However, we need not reach this interesting issue of first impression because we agree with the county's alternative argument that Tammy has failed to demonstrate any prejudice resulting from the absence of testimony at the fact-finding waiver hearing. In ***Burnett County Department of Social Services v. Kimberly M.W.***, 181 Wis. 2d 887, 512 N.W.2d 227 (Ct. App. 1994), the court of appeals held that the juvenile court's failure to deliver certain mandatory advice pertaining to the right of judicial substitution was not fatal to the proceedings

absent a showing of prejudice. *See* ***id***. at 892-93. The court likened the issue to a criminal case where a trial court had failed to follow the plea requirements set out in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). In that setting, the defendant must allege prejudice in addition to noncompliance with the statutory procedure. *See* ***Bangert***, 131 Wis. 2d at 274.

¶27 Here, Tammy has failed to allege, much less demonstrate, any prejudice resulting from the lack of formal testimony at the waiver hearing.[6] Rather, Tammy's argument is that the statute is mandatory and any failure to follow its dictates is per se fatal. But that is not the law.

CONCLUSION

¶28 We conclude that Tammy knowingly and voluntarily waived her right to the fact-finding hearing and that she was not prejudiced by the absence of testimony in support of the petitions.

By the Court.—Order affirmed.

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

[6] This is perhaps understandable since the evidence adduced at the dispositional hearing supported many of the allegations in the petitions.