STATE OF WISCONSIN

I N S U P R E M E C O U R T

In re the Matter of the Termination of Parental Rights to Desmond F.
A Person under the age of 18:

BROWN COUNTY DEPARTMENT
OF HUMAN SERVICES,

Petitioner-Respondent,

v.

Case No. 2010AP00321

BRENDA B.

Respondent-Appellant-Petitioner,

BRIAN K.,

Respondent.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS DISTRICT THREE FROM AN ORDER INVOLUNTARILY TERMINATING PARENTAL RIGHTS AND AN ORDER DENYING MOTION TO WITHDRAW PLEA TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH 7, THE HONORABLE TIMOTHY A. HINKFUSS PRESIDING

RESPONDENT-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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STATEMENT OF ISSUE

DID THE TRIAL COURT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING BRENDA'S MOTION TO WITHDRAW HER NO CONTEST PLEA THAT GROUNDS EXISTED FOR TERMINATION OF HER PARENTAL RIGHTS WITHOUT AN EVIDENTIARY HEARING?

The trial court and Court of Appeals answered this question in the negative. The issue was raised in the briefs of both parties to the Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested as the respondent-appellant-petitioner (hereinafter Brenda) believes the court will want the benefit of questioning counsel about the procedural implications of its decision in this case. Publication is appropriate for every Supreme Court decision.

STATEMENT OF THE CASE

This is an appeal regarding proceedings to terminate the parental rights (TPR) of Brenda B. to her son, Desmond F. (hereinafter Desmond). The parental rights of the father, Brian K. (hereinafter Brian) or the unknown father were also terminated by default in the same proceedings. This case is before the appellate courts pursuant to a Notice of Appeal filed on February 3, 2010 (55), an Notice of Additional Appeal filed on

March 23, 2010 (74) and an order by this Court on September 13, 2010 granting Brenda's petition for review.

This case was commenced by the filing of a petition on June 4, 2009 by the petitioner-respondent (hereinafter Brown County) for the termination of the parental rights of Brenda and Brian and any unknown father to Desmond on the grounds of continuing need for protection and services (continuing CHIPS) and failure to assume parental responsibility. Sec. 48.415(2) and (6) Wis. Stats. (1-3). An initial appearance was held on June 24, 2009 but continued to arrange for the appointment of counsel for Brenda (57). A continued initial appearance was held on July 14, 2009 (58) at which Brenda appeared with Attorney Christopher Froelich (21), entered a denial to the petition, demanded a jury trial and waived the statutory time limits. A pretrial conference was held on October 5, 2009 (59). Brenda entered a no contest plea to grounds for termination of her parental rights because of continuing CHIPS on October 6, 2009 (60).

A court report were filed (42). The dispositional hearing was held on November 9, 2009 (61) and concluded on November 11, 2009 (61). On November 17, 2010, Judge Hinkfuss issued a written decision (48) to terminate the parental rights of Brenda and Brian or any unknown father to Desmond. The court entered an order to terminate Brenda's parental rights on December 1, 2009 (49 and 50; App. 112-115).

Brenda subsequently filed a Notice of Intent to Pursue Post-Adjudication Relief (52). On February 3, 2010, the undersigned attorney filed a Notice of Appeal (55). On February 16, 2010, the undersigned attorney filed a motion for remand so that Brenda could file a motion to withdraw her no contest plea that grounds existed for the termination of her parental rights (66). On February 18, 2010, the Court of Appeals granted the motion for remand (67).

On February 24, 2010, Brenda filed a motion to withdraw her no contest plea to grounds for TPR (68; App. 117-121). The court held a hearing on March 12, 2010 at which the court denied Brenda's motion without an evidentiary hearing (76). The court subsequently

entered a written order denying the motion (72; App. 116) which Brenda appealed (74). On June 2, 2010, the Court of Appeals affirmed Judge Hinkfuss's orders (101-111).

STATEMENT OF FACTS

The only issue Brenda raised on appeal is whether the trial court erroneously exercised its discretion in denying Brenda's motion to withdraw her no contest plea that grounds existed to terminate her parental rights without an evidentiary hearing. Therefore, only the facts in the record relevant to that issue will be set forth in this petition.

At the hearing on October 6, 2009, Attorney Froelich indicated that Brenda would change her plea to no contest with respect to grounds for TPR because of Continuing CHIPS under Sec. 48.415(2), Wis. Stats. (60: 2). Assistant Corporation Counsel (ACC) Collins also indicated if Brenda entered a valid plea that the remaining ground for TPR would be dismissed (60: 3).

Judge Hinkfuss addressed Brenda under oath and inquired into her educational and employment background and her mental status. (60: 3-7). Brenda was satisfied with Attorney Froelich's representation of her (60:7). Brenda wished to plead no contest and understood the allegations in the petition (60: 8-9). Judge Hinkfuss also determined that Brenda understood her rights at a trial to cross-examine witnesses and call witnesses on her own behalf (60: 9). Brenda also understood Brown County had to prove the allegations by clear and convincing evidence to 10 of 12 persons in a jury (60: 10-11). At the dispositional hearing, the court could either grant the petition to terminate Brenda's rights or dismiss the petition (60: 11).

Judge Hinkfuss outlined the verdict a jury would consider and determined that Brenda understood the questions a jury would have to answer (60: 12-17). Brenda also indicated that she understood that if Judge Hinkfuss accepted her no contest plea, he would make a finding of parental unfitness if she contested the disposition (60: 18-19). Judge Hinkfuss also outlined the factors he would consider at disposition to

determine the best interests of the child (60: 20). Brenda also understood she retained the rights to contest disposition and that Attorney Froelich could assist her in that process (60: 21-22).

ACC Collins questioned Brenda to determine that she understood the rights she would lose if the court terminated her parental rights at disposition (60: 24). Brenda had not been promised anything or threatened to get her to enter her plea (60: 25). Brenda's aunt's friend in Arkansas was interested in adopting Desmond but Brenda also knew that Michelle Arrowood, the present caretaker, was interested as well (60: 27). During Brenda's work with Brown County, it had gone over alternatives such as custody with the Department of Human Services, foster care, residential care and institutionalization (60: 27).

Attorney Froelich confirmed that Brenda was attending a methadone clinic but that her methadone did not affect her ability to understand proceedings (60: 28-29). She had talked with Froelich in a variety of settings about the evidence and her options in the case (60: 29-30). Brenda reconfirmed her understanding of

the difference between the fact-finding hearing and disposition and the elements of proof (60: 30-35). Brenda also spoke to her husband, Paul B., about her decision (60: 35).

Attorney Froelich believed that Brenda's plea was freely, voluntarily and intelligently given (60: 37). Judge Hinkfuss also found Brenda's plea to be freely, voluntarily and intelligently entered and that there was a factual basis for the same (60: 39-40).

Brenda's motion to withdraw her plea (68; App. 117-121) argued that the court's colloquy with Brenda was inadequate because it failed to inquire into whether Brenda understood all of the potential dispositions available as disposition and the forfeiture of Brenda's constitutionally protected right to act as a parent (par. 4, pages 3-4; App. 119-120). After reviewing the written submissions of the attorneys and hearing the arguments of counsel, Judge Hinkfuss found that his colloquy adequately set forth the dispositional options and that the explicit waiver by Brenda of her constitutional right to parent was not

required by statutory or case law (76: 8-14; App. 122-128).

ARGUMENT

A COLLOQUY IN AN ADMISSION TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS SHOULD INCLUDE AN EXPLANATION OF ALL DISPOSITIONAL OPTIONS SET FORTH IN SEC. 48.427 AND A WAIVER OF THE CONSTITUTIONAL RIGHT TO PARENT A CHILD.

A. General principles and substantive law.

The requirements for an admission (or plea of no contest) in a TPR case is governed by Sec. 48.422(7), Wis. Stats. which provides:

> (7) 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 and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances that would not be apparent to them.

To evaluate challenges to a plea proceeding in a TPR case, courts have adopted the analysis of State v. Bangert, 131 Wis. 2d 246, 274-75, 398 N.W.2d 12 (1986), interpreting Wis. Stat. § 971.08(1), the criminal code's analogue to § 48.422(7)(a). See, e.g., Waukesha County v. Steven H., 2000 WI 28, Par 42-51, 233 Wis. 2d 344, 607 N.W.2d 607. If a parent challenges the validity of his or her plea, the court is required to establish that the parent understands and has knowledge of the constitutional rights given up by the plea. In re Yasmine B., 2008 Wis. App. 159, par 5, 314 Wis.2d 493, 762 N.W.2d 122. citing Kenosha County v. Jodie W., 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. It is also required to determine that a parent understands that there will be a finding that the parent is unfit. Yasmine B., par. 10. Finally, the court must ascertain that the parent understands the potential dispositions and the standard that will be applied at disposition. Yasmine B., par. 16.

If the colloquy was deficient, Brown County would be required to establish by clear and convincing evidence in an evidentiary hearing that the parent

"knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." Jodie B., par. 26.

Brenda's motion (68; App. 117-121) alleged that the colloquy conducted by the court in accepting the plea was deficient in that it failed to inquire into whether Brenda understood all of the potential dispositions available at disposition and the forfeiture of Brenda's constitutionally protected right to act as a parent.

The options available at disposition provided for in Sec. 48.427, Wis, Stats. included:

> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:

1. A county department authorized to accept guardianship under s. 48.57 (1) (e) or (hm).

3. A child welfare agency licensed under s. 48.61 (5) to accept guardianship.

4. The department.

5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.

6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.

(b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.

(c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.

(3p) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub. (3m) (a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.

(4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

The Court of Appeals decision set forth Sec. 48.428, Wis. Stats. as an additional disposition (App.

105-107). However, it is Brenda's position that reference in a colloquy to "sustaining care" as a disposition would be sufficient. Sec. 48.428 sets forth a variety of procedures governing sustaining care that go well beyond what Brenda believes constitutes a disposition.

The issue to be decided by this court, the requirements for a sufficient colloquy, is one of law for which the standard of review is *de novo*. Yasmine B., 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122. To the extent the interpretation of a statute is involved, it is also a question of law. Oneida County DSS v. Nicole W., 2007 WI 30, ¶9, 299 Wis. 2d 637, 728 N.W.2d 652. Thus, no deference is required to the decision of either the trial court or the Court of Appeals.

B. Failure to ascertain Brenda's understanding of potential dispositions.

Judge Hinkfuss advised Brenda during his colloquy with her of the court's options at disposition to

either grant or dismiss the petition and the legal standards he would apply in doing so. However, Judge Hinkfuss did not outline the full range of options available which are set forth in Sec. 48.427, Wis. Stats. As the Supreme Court observed in the context of a no contest plea in a criminal case (regarding a collateral consequence related to the sex offender registry), "if a defendant does not understand the implications of the plea he [or she] should not be entering the plea and the court should not be accepting the plea," State v. Brown, 2006 WI 100, par. 37, 293 Wis.2d 594, 716 N.W.2d 906.

In Yasmine B. the Court of Appeals declined to require courts to inform parents who entered admissions in detail of all potential outcomes, including all alternatives to termination. Id., par 17. It distinguished admissions to grounds for TPR from voluntary termination of parental rights which require more detailed explanations. Id., citing T.M.F. v. Children's Service Society, 112 Wis.2d 180, 332 N.W.2d 293 (1983).

The issue of whether advising a parent entering an admission to grounds to TPR required outlining all the potential statutory outcomes was not squarely before the Yasmine B. court. That court acknowledged that the circuit court failed to apprise Theresa of the two primary dispositions as well as what it termed "additional options." Yasmine B., footnote 7. Brenda submits the Court of Appeals *dicta* was contrary to the plain language of Sec. 48.422(7), Wis. Stats. which requires a court to determine that a parent understands "the potential dispositions." This included the "additional options" that are included in Sec. 48.227(3m)(3p) & (4) that Judge Hinkfuss believed that he did not have to ask Brenda about.

The plain language of Sec. 48.422(7)(a) required that a parent entering an admission understand "potential dispositions"—not just "primary dispositions" of granting or dismissal of the petition. As a matter of law, the court's colloquy with Brenda inadequately established Brenda's understanding of "the potential dispositions."

In denying Brenda's motion to withdraw her plea, Judge Hinkfuss agreed with Brown County's argument that it was unnecessary to inform Brenda of the additional dispositions set forth in Sec. 48.427(3m)-(4) because those options only applied if the court terminated parental rights under Sec. 48.427(3) (76: 11; App. 125). However, Brenda submits the plain language of Sec. 48.422(7)(a) trumps such a position. Further, a parent's decision to concede grounds for TPR may well be affected positively or negatively by the parent's knowledge of the possible placement of the parent's child if the parent's rights to the child are terminated.

The issue of whether a colloquy in an admission of grounds for TPR must include dispositions other than dismissal or termination was incorrectly decided by the Court of Appeals. Contrary to the position of the Court of Appeals (App. 108-109), a colloquy on potential dispositions more extensive that the one explicitly required by Yasmine B. need not be "unduly burdensome." As in criminal cases and in many voluntary TPR cases, a plea questionnaire could be utilized. Circuit court

forms JC-1636 and JC-1637 are already available to assist the courts in voluntary TPR cases (although they do not contain all the acknowledgments required by statute). Further, plea forms needed in TPR cases where only a respondent such as Brenda concedes grounds for TPR and not TPR itself need not be kept in inventory at clerk or attorney offices since they are available with a few clicks of any computer with internet access. Both the statute and sound judicial policy favor require that a parent be aware of **all** potential dispositions in a TPR case before waiving a right to a trial on grounds for TPR.

C. Failure to inquire into Brenda's understanding of her loss of constitutional right to parent a child.

A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. Mrs. R. v. Mr. and Mrs. B., 102 Wis. 2d 118, 136, 306 N.W.2d 46

(1981); L.K. v. B.B., 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983). Because termination of parental rights interferes with a fundamental liberty interest, the State must establish that a parent is unfit before terminating his or her parental rights. Mrs. R., 102 Wis. 2d at 136.

Brenda had a fundamental right to parent her child, a right protected by the substantive due process clause of the United States Constitution. Sec. 48.415 sets forth various grounds for termination of parental rights, and Sec. 48.424(4) requires that the circuit court find the parent unfit upon finding that one of those grounds exists. In the context of a plea, once the court accepts a no contest plea at the grounds stage, the parent must be found unfit. Yasmine B., 314 Wis. 2d 493, ¶9. In this first phase, often referred to as the "grounds phase," the "parent's rights are paramount … the burden is on the government, and the parent enjoys a full complement of procedural rights." Sheboygan County DHHS v. Julie A.B., 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. ¶1. After a finding

of unfitness, the proceeding moves to the second phase, the dispositional hearing, where the court determines whether termination of parental rights is in the child's best interests based on the factors prescribed in Sec. 48.426. Id., ¶28. "The outcome of this hearing is not pre-determined, but the focus shifts to the interests of the child," because the prevailing factor considered by the court is the best interests of the child. Id.; Sec. 48.426(1)-(2). At the dispositional hearing the court may enter an order terminating parental rights, Sec. 48.427(3), or it may dismiss the petition "if it finds that the evidence does not warrant the termination of parental rights." Sec. 48.427(2).

Because a finding of unfitness was required once the court accepts Brenda's plea, the court was obligated to inform Brenda before accepting her plea that, upon the finding of unfitness (which the court delayed until the start of the contested dispositional hearing), she would lose her fundamental right to parent Desmond. Even though her parental rights cannot be terminated until after the dispositional hearing,

Brenda lost her fundamental right to parent her child upon the acceptance of her plea because it was now a matter of sound discretion of a judge rather than her constitutionally protected personal right.

The Yasmine B. court declined to address the issue that a parent needed to be informed that the parent was waiving the constitutional protections of her right to parent her child. Yasmine B., par 21. Its decision was based upon inconsistent positions the parent had taken during the course of the litigation and its decision to reverse the trial court on other grounds. Brenda asks this court to address it in this case as it is squarely before it.

Judge Hinkfuss took the position that an express waiver by Brenda of her constitutional right to parent was not necessary because the colloquy he had with Brenda regarding the procedural rights she waived amounted to the same thing (76: 12; App. 115). The Court of Appeals concurred by reference to an unpublished decision cited on App. 110. Brenda does not accept the same as having persuasive value and thus believes she does not have to include a copy of it with

this brief as required by Rule 809.23. However, in an abundance of caution and in anticipation that Brown County will cite the case, the same is attached to the appendix to this brief.

Brenda respectfully disagrees with the Court of Appeals that the colloquy in this case was sufficient to waive her constitutional right to parent. The constitutional right to parent is a substantive right separate and distinct from procedural rights guaranteed by the 5th and 14th Amendments to the United States Constitution. It is not as widely appreciated as the more explicit rights set forth in Bill of Rights such as free speech, the right to bear arms, the right against unreasonable searches and seizures, etc. However, it is just as real and fundamental as the cases cited on pages 17 and 18 of this brief have made clear.

A parent's waiver of a trial on the merits as to the grounds phase of a TPR case clearly waives that right because of the statutory-required finding of unfitness. Yet, simply telling a parent that a plea to the grounds phase of a TPR case results in a finding of

unfitness is not the same as informing the parent of the more solemn loss of constitutionally protected parental rights. Brenda's no contest plea to grounds for TPR was not knowing, intelligent and voluntary without such an explicit waiver.

If this court finds the colloquy engaged in by the trial court in this case was inadequate, that does not necessarily mean Brenda will be allowed to withdraw her pleas. See page 11 of this brief. An evidentiary hearing would be required whose outcome is uncertain. However, a decision in Brenda's favor by this court will bolster public confidence in the administration of justice by providing procedural rules that insure to a greater degree than existing precedent that parties who admit to grounds for TPR do so with a fuller understanding of the implications of their pleas.

CONCLUSION

For the reasons stated above, Brenda asks this court to reverse the decision of the Court of Appeals, the order terminating Brenda's parental rights to Desmond and the order denying her motion to withdraw

her plea to grounds for TPR and remand this matter to the trial court for an evidentiary hearing on Brenda's motion to withdraw her no contest plea to grounds for TPR.

Dated this 13th day of October, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has 24 pages.

Dated this 13th day of October, 2010.

LEN KACHINSKY

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of October, 2010.

LEN KACHINSKY

INDEX TO APPENDIX

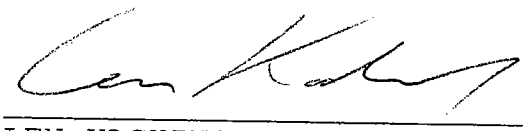
CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that

the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of October, 2010.



LEN KACHINSKY

CERTIFICATION UNDER RULE 809.19(13)

I have not submitted an electronic copy of this appendix, which complies the requirements of Rule 809.19(13).

I further certify that:

This electronic appendix, if filed, is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of October, 2010.

LEN KACHINSKY

COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 No. 2010AP321 **Cir. Ct. No. 2009TP38**

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRENDA B.,

RESPONDENT-APPELLANT,

BRIAN K.,

RESPONDENT.

APPEAL from orders of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

App 101

¶1 HOOVER, P.J.[1] Brenda B. appeals orders terminating her parental rights to her son, Desmond F., and denying her postdisposition motion. She contends her motion presented a prima facie case she did not knowingly and intelligently enter her no contest plea to the grounds portion of the petition. Specifically, Brenda argues the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent. We conclude the court was not required to advise Brenda of the additional statutory sub-dispositions or of her constitutional right to parent. We therefore affirm.

BACKGROUND

¶2 Brown County filed a petition to terminate Brenda's parental rights alleging she failed to assume parental responsibility and Desmond was in continuing need of protection or services. Brenda entered a no contest plea to the continuing need ground and the County dismissed the other ground. The court ultimately concluded the plea was knowingly and intelligently made. After a contested dispositional hearing, the court terminated Brenda's parental rights to Desmond.

¶3 Brenda filed a postdisposition motion arguing the plea colloquy was deficient because the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent.

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

App 102

Further, the motion alleged Brenda was unaware of this information. The court denied Brenda's motion without conducting an evidentiary hearing.

DISCUSSION

¶4 Prior to accepting a plea of no contest to a termination petition, the circuit court is required to engage the parent in a personal colloquy in accordance with WIS. STAT. § 48.422(7). ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶¶24-25, 293 Wis. 2d 530, 716 N.W.2d 845. That statute provides in part:

> (7) 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 ....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. ...
>
> (br) Establish whether any person has coerced a birth parent ....
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

WIS. STAT. § 48.422(7) (emphasis added). Additionally, the parent must have knowledge of the constitutional rights given up by the plea. ***Jodie W.***, 293 Wis. 2d 530, ¶25 (citing ***State v. Bangert***, 131 Wis. 2d 246, 265-66, 389 N.W.2d 12 (1986)).

¶5 When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies. ***Waukesha County v. Steven H.***, 2000 WI 28,

App 103

¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Under that analysis, the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing. ***Id.*** If a prima facie showing is made, the burden then shifts to the county to demonstrate that the parent knowingly and intelligently waived the right to contest the allegations in the petition. ***Id.*** Whether Brenda has presented a prima facie case is a question of law we decide independently of the circuit court. *See* ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122.

¶6 We first address Brenda's argument that the court inadequately informed her of the potential dispositions set forth in WIS. STAT. § 48.427, which provides in part:

> (1) After receiving any evidence related to the disposition, the court shall enter one of the *dispositions* specified under subs. (2) to (4) .... [(Emphasis added.)]
>
> (1m) ....
>
> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:
>
> 1. A county department authorized to accept guardianship under s. 48.57(1)(e).

App 104

> 3. A child welfare agency licensed under s. 48.61(5) to accept guardianship.
>
> 4. The department.
>
> 5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.
>
> 6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.
>
> (am) Transfer guardianship and custody of the child to a county department authorized to accept guardianship under s. 48.57(1)(hm) for placement of the child for adoption by the child's foster parent or treatment foster parent, if the county department has agreed to accept guardianship and custody of the child and the foster parent or treatment foster parent has agreed to adopt the child.
>
> (b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.
>
> (c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.
>
> (3p) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub. (3m)(a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.
>
> (4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

WISCONSIN STAT. § 48.428, referenced at § 48.427(4), in turn, indicates:

> (1) A court may place a child in sustaining care if the court has terminated the parental rights of the parent or parents of the child or has appointed a guardian for the child under s. 48.831 and the court finds that the child is unlikely to be adopted or that adoption is not in the best interest of the child.

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(2)(a) Except as provided in par. (b), when a court places a child in sustaining care after an order under s. 48.427 (4), the court shall transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am) and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, this licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3).

(b) When a court places a child in sustaining care after an order under s. 48.427 (4) with a person who has been appointed as the guardian of the child under s. 48.977 (2), the court may transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, that licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3). If the court transfers guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), the court shall terminate the guardianship under s. 48.977.

....

(6)(a) Except as provided in par. (b), the court may order or prohibit visitation by a birth parent of a child placed in sustaining care.

(b)1. Except as provided in subd. 2., the court may not grant visitation under par. (a) to a birth parent of a child who has been placed in sustaining care if the birth parent has been convicted under s. 940.01 of the first–degree intentional homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated.

1m. Except as provided in subd. 2., if a birth parent who is granted visitation rights with a child under par. (a) is convicted under s. 940.01 of the first–degree intentional

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> homicide, or under s. 940.05 of the 2nd–degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated, the court shall issue an order prohibiting the birth parent from having visitation with the child on petition of the child, the guardian or legal custodian of the child, or the district attorney or corporation counsel of the county in which the dispositional order was entered, or on the court's own motion, and on notice to the birth parent.
>
> 2. Subdivisions 1. and 1m. do not apply if the court determines by clear and convincing evidence that the visitation would be in the best interests of the child. The court shall consider the wishes of the child in making that determination.

¶7 Brenda argues it was insufficient to confirm her understanding of only the two primary dispositions set forth at WIS. STAT. §§ 48.427(2) and (3), providing that either the termination petition would be dismissed or her parental rights would be terminated. Rather, she asserts the court was required to confirm her understanding of "the full range of options" specified under subsecs. (2) through (4).[2] Additionally, if Brenda is correct, we conclude her argument would compel a court to provide further information. We are confident a reasonable layperson would have no understanding of "sustaining care" under subsec. (4). Thus, a court would also be required to confirm a parent's understanding of, at least, the portions of WIS. STAT. § 48.428 set forth above regarding the sustaining care provided for as a sub-disposition under § 48.427(4).

¶8 Brenda cites no case in support of her interpretation of WIS. STAT. §§ 48.422(7)(a) and 48.427. Nor does she develop a statutory interpretation argument, aside from an observation that § 48.422(7) refers to "the potential

[2] While Brenda refers to "the full range of options," she inexplicably mentions only WIS. STAT. § 48.427(3m), without acknowledging subsecs. (3p) or (4).

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dispositions" and a bare assertion that "the plain language of [§] 48.422(7)(a) trumps" the County's interpretation that the sub-dispositions need not be addressed because they only apply after the court terminates the parent's rights. To the extent Brenda is arguing the statutes unambiguously require a court to confirm a parent's understanding of both the primary and sub-dispositions, we disagree.

¶9 In ***Therese S.***, 314 Wis. 2d 493, ¶¶14-17, we concluded that "at the very least" a circuit court must confirm a parent's understanding of the two primary dispositions under WIS. STAT. §§ 48.427(2) and (3). As Brenda aptly points out, however, because the circuit court there failed to address even the two primary dispositions, it was unnecessary to determine, and we did not determine, whether the additional sub-dispositions must also be addressed as a general rule. *See* ***Therese S.***, 314 Wis. 2d 493, ¶¶15, 15 n.7, 22 (indicating, "of relevance *here*," and referring only generally to "the potential dispositions specified under WIS. STAT. § 48.427") (emphasis added). We did, however, reject Therese's broader argument that circuit courts must inform parents of all potential outcomes and alternatives to termination, as required in voluntary termination cases. *See* ***T.M.F. v. Children's Serv. Soc'y***, 112 Wis. 2d 180, 196, 332 N.W.2d 293 (1983). We did so because of the significant difference between voluntary and involuntary terminations, namely, that parents are seeking to terminate their rights in the former and have the option to stop the proceedings altogether. *See* ***Therese S.***, 314 Wis. 2d 493, ¶17.

¶10 We further noted, "While WIS. STAT. § 48.427 lists several additional dispositions under subsecs. (3m)-(4), those options only apply if the court first terminates parental rights under subsec. (3)," ***id.***, ¶15 n.7, and observed

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that Therese's proposed rule would be "unduly burdensome." ***Id.***, ¶17. Those observations are equally relevant here.

¶11 Only the two primary dispositions relate to the effect of termination on the parent—the parent either retains or loses their child. The sub-dispositions, on the other hand, pertain only to the effect on the child, addressing who will have guardianship and custody in the event the parent's rights are terminated as a primary disposition. To the extent those sub-disposition issues bear on the parent's decision to plead no contest, they are adequately addressed under WIS. STAT. §§ 48.422(7)(b) and (7)(bm). Those paragraphs require the court to ascertain whether any promises have been made to the parent and whether a proposed adoptive parent has been identified.

¶12 Additionally, it would be not merely burdensome, but practically impossible, to convey a full understanding of the court's disposition options upon termination. As our lengthy recitation of the alternatives at the outset of our analysis is intended to demonstrate, the alternatives are many and complex.

¶13 Further, as in ***Therese S.***, 314 Wis. 2d 493, ¶11, we find it helpful to make a comparison with the criminal plea context. There, the defendant must be apprised of the maximum penalty he or she faces upon conviction, but not of every possible sentencing option available to the court. *See* ***id.***, ¶11 n.4 (comparing WIS. STAT. §§ 48.422(7) and 971.08(1), referring to "potential dispositions" and "potential punishment," respectively). In the termination of parental rights context, termination is the maximum "punishment." Thus, by analogy, the parents must understand they may lose their child as a result of their no contest plea, but need not have a complete understanding of every possible alternative available to the court should it determine termination is in the child's best interest.

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¶14 We now address Brenda's argument that the circuit court failed to inform her she was waiving her constitutional right to parent. Brenda correctly observes this issue was left unresolved in ***Therese S.***, 314 Wis. 2d 493, ¶21. She declines, however, to acknowledge the issue was recently resolved—although, not definitively—in a consolidated appeal, ***Dane County DHS v. James M.***, Nos. 2009AP2038, 2009AP2039, unpublished slip op. (WI App Mar. 18, 2010).[3] We know Brenda was aware of this case because she commences her argument by copying-and-pasting paras. 17-19 of that decision.

¶15 It appears the County also knew of the ***James M.*** decision. The County's entire argument consists of paras. 15-23 copy-and-pasted from that decision, save for the substitution of the relevant names and facts. Yet, the County omits citation to ***James M.***, representing the reasoning as its own.[4]

¶16 In any event, neither party adds anything to the discussion presented in ***James M.***, and we discern no reason to depart from its holding that parents need not be informed they are waiving their constitutional right to parent by pleading no contest to the grounds for termination. We therefore adopt the thorough reasoning set forth in that case as our own. *See* ***id.***, ¶¶15-24. A copy of the ***James M.*** decision is available on the Wisconsin courts website at

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[3] A one-judge opinion may be cited for its persuasive value, but is not precedent. WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09).

[4] "A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it." WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09). Where, however, parties parrot significant portions of such a case, if permissible under the rule, we suggest they acknowledge it and provide citation and a copy of the decision. *See* WIS. STAT. RULE 809.23(3)(c) (Sup. Ct. Order, *supra*).

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http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=48077.

By the Court.—Orders affirmed.

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

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STATE OF WISCONSIN, CIRCUIT COURT, BROWN COUNTY

For Official Use

IN THE INTEREST OF

DESMOND F.
Name

05/25/2004
Date of Birth

Order Concerning Termination of Parental Rights (Involuntary)

Case No. 09 TP 38

FILED
DEC 01 2009
CLERK OF COURTS
BROWN COUNTY, WI

THE COURT FINDS:

1. Notice has been given to all those entitled to notice.

2. The provisions of the Indian Child Welfare Act do not apply.
(For an Indian child, use the Indian Child Welfare Act version (IW-1639) of this order.)

3. The parent(s) are:
☒ a. Mother's name: Brenda J. B _____ Date of birth: 03/ /1981
☒ b. Father's name: Unknown _____ Date of birth: Unknown
☒ c. Other possible father(s):
Name: Brian Kennedy _____ Date of birth: Unknown
Name: _____ Date of birth: _____
Name: _____ Date of birth: _____

☒ 4. There has been no declaration of paternal interest.

☒ 5. Name(s): Brian K[illegible] and Any Known or Unknown Father failed to appear at the hearing, and is/are in default.

6. This matter was tried to ☐ a jury ☒ the court and the following grounds for termination of the parental rights of _____ were found to exist:

Mother	Father	
☐	☒	abandonment
☐	☐	relinquishment
☒	☐	continuing need of protection or services
☐	☐	continuing parental disability
☐	☐	continuing denial of periods of physical placement or visitation
☐	☐	child abuse
☐	☒	failure to assume parental responsibility
☐	☐	incestuous parenthood
☐	☐	homicide or solicitation to commit homicide of parent
☐	☐	parenthood as a result of sexual assault
☐	☐	commission of a serious felony against one of the person's children
☐	☐	prior involuntary termination of parental rights to another child

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STATE PUBLIC DEFENDER
MADISON APPELLATE

☒ 7. The ☒ mother ☒ father is unfit.

8. It is in the best interest of the child that the parental rights of the ☒ mother ☒ father(s) be terminated after considering the following factors:
- The likelihood of the child's adoption after termination.
- The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- The wishes of the child.
- The duration of the separation of the parent from the child.

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- Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

☐ 9. The child is placed in sustaining care because:
☐ the child is not likely to be adopted.
☐ adoption is not in the best interest of the child.

10. *(Complete one of the following only if there is a permanency plan.)*
Reasonable efforts to achieve the goal(s) of the permanency plan were:
☒ made by the department or agency responsible for providing services.
per Testimony and Social Worker Report

☐ not made by the department or agency responsible for providing services.

11. Any parent who has appeared has been informed of the provisions of §§48.432, 48.433 and 48.434, Wisconsin Statutes.

☐ 12. Other: _____

☐ 13. The evidence does not warrant the termination of the parental rights of (name): _____

THE COURT ORDERS:

☒ 1a. The parental rights of (name of parent(s): Brenda J. and Any Known or Unknown Father is/are terminated.
Guardianship, placement and care responsibility, and custody of the child:
☐ remain with the parent whose rights have not been terminated.
☒ are transferred pending adoption to: State Department of Children and Families
☐ Other: _____

If guardianship or custody is transferred to an agency, that agency shall be responsible for securing the adoption of the child or establishing the child in a permanent family setting. The child's permanency plan:
☐ has been filed. ☐ is attached. ☒ will be filed within 60 days.

The provisions of §§48.432, 48.433 and 48.434, Wisconsin Statutes are attached.

☐ 1b. The petition to terminate parental rights of (name) _____ is dismissed.

☐ 2. Other: _____

THIS IS A FINAL JUDGMENT/ORDER FOR PURPOSES OF APPEAL.

BY THE COURT:

_____
Circuit Court Judge

Judge Timothy A. Hinkfuss
Name Printed or Typed

12-1-09
Date

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH VII | BROWN COUNTY

In the Interest of:

DESMOND F., d.o.b. 05/25/2004

a person under the age of 18.

ATTACHMENT TO ORDER FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

Case No. 09 TP 38

The above-entitled action having come on for hearing on June 24, 2009, July 14, 2009, October 5, 2009, October 6, 2009, November 9, 2009, and November 11, 2009 before the Honorable Timothy A. Hinkfuss, Brown County Circuit Court, Branch VII, with the following appearances: the petitioner, Brown County Human Services Department by Amy Dingeldein; Attorney Rob Collins, representing the Brown County Human Services Department; Attorney Peter Borchardt, Guardian Ad Litem for the minor child, and Attorney Christopher Froelich, representing Brenda

FURTHER FINDINGS:

Brian K and Any Known or Unknown Father did not appear in court at the hearing scheduled in this matter, and having been properly noticed, are in default.

The continuation of the child in the parent's home is contrary to the welfare of the child.

Reasonable efforts were made to prevent the removal of the child from the home, and reasonable efforts have been made to make it possible for the child to return to his home.

That the agencies involved are in compliance with the permanency plan goals of TPR and Adoption and that the agencies have made diligent efforts to achieve permanency.

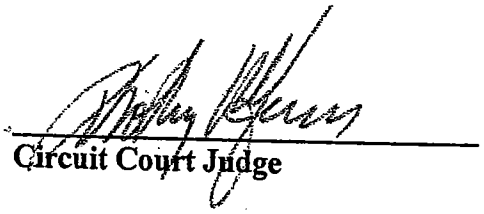
The parent is hereby informed of his rights under §48.432, §48.333, and §48.434, Wis. Stats., by attachment hereto.

IT IS FURTHER ORDERED AND ADJUDGED THAT:

1. Brenda J. B nd any Known or Unknown Father shall provide the Brown County Human Services Department with the medical and genetic information necessary for that Department to meet the requirements set forth in §48.425(1)(am), Wis. Stats.

2. This judgment is final and appealable under §808.03(1), Wis. Stats., according to the procedure specified in §809.107, Wis. Stats., except any appeal must be taken within thirty (30) days of the date of the entry of this Order, pursuant to §808.04(7m).

BY THE COURT:



Circuit Court Judge

Judge Timothy A. Hinkfuss

Name Printed or Typed

12-1-09

Date

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | BROWN COUNTY

In Re the Termination of Parental Rights to
DESMOND F., a person under the age of 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

Case No. 09 TP 38

BRENDA B.,
Respondent-Appellant,

BRIAN K.,
Respondent

ORDER DENYING BRENDA'S MOTION TO WITHDRAW PLEA TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

Pursuant to the order of the Court of Appeals in Case Number 2010AP321 on February 18, 2010, the court held a hearing on March 12, 2010 to consider the motion of the respondent-appellant (hereinafter Brenda) for permission. to withdraw her plea to grounds for termination of parental rights. Based upon the court's review of the record and the oral and written arguments of counsel, the court found that its plea colloquy with Brenda was sufficient. Therefore,

IT IS ORDERED that Brenda's motion to withdraw her plea is DENIED for the reasons stated on the record.

Dated this 17 day of March, 2010.

BY THE COURT:

TIMOTHY A. HINKFUSS
Circuit Judge, Branch 7

Orig: Clerk of Courts-Brown County, P.O. Box 23600, Green Bay, WI 54305-3600
cc: ACC Rob Collins, P.O. Box 23600, Green Bay, WI 54305-3600
GAL Peter Borchardt, P.O. Box 2402, Green Bay, WI 54306-2402
Attorney Len Kachinsky, 103 W. College Avenue #1010, Appleton, WI 54911

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | BROWN COUNTY

In Re the Termination of Parental Rights to
DESMOND F., a person under the age of 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,

v. Case No. 09 TP 38

BRENDA B.,

Respondent-Appellant,

BRIAN K.,
Respondent

BRENDA'S MOTION TO WITHDRAW ADMISSION TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

Pursuant to the order of the Court of Appeals in Case Number 2010AP321 on February 18, 2010, the respondent-appellant (hereinafter Brenda), by her attorneys, SISSON AND KACHINSKY LAW OFFICES by Len Kachinsky, moves the court for permission. to withdraw her admission to grounds for termination of parental rights based upon the following:

1. This is a post-dispositional motion arising from an Order Concerning Termination Parental Rights (Involuntary) by Brown County Circuit Judge Timothy A. Hinkfuss (Branch 7) that was entered on December 1, 2009. The petitioner-respondent (hereinafter Brown County) filed a petition to terminate Brenda's parental rights to Desmond F. on June 4, 2009. On June 29, 2009, Attorney Christopher Froelich was appointed by the State Public Defender to represent Brenda.

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2. Brown County's petition to terminate Brenda's parental rights to Desmond alleged continuing need for protection and services and failure to assume parental responsibility. Sec. 48.415(2) and (6), Wis. Stats. A plea hearing was held on October 6, 2009. At the hearing Brenda entered an admission to grounds for termination of parental rights (TPR) because of continuing CHIPS. Brown County dismissed the grounds for TPR based upon failure to assume parental responsibility.

3. An admission in a TPR case is governed by Sec. 48.422(7), Wis. Stats. which provides:

> (7) 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 and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances that would not be apparent to them.

To evaluate challenges to a plea proceeding in a TPR case, courts have adopted the analysis of State v. Bangert, 131 Wis. 2d 246, 274-75, 398 N.W.2d 12 (1986), interpreting Wis. Stat. § 971.08(1), the criminal code's analogue to § 48.422(7)(a). See, e.g., Waukesha County v. Steven H., 2000 WI 28, Par 42-51, 233 Wis. 2d 344, 607 N.W.2d 607. If a parent challenges the validity of his or her plea, the court is required to establish that the parent understands and has knowledge of the constitutional rights given up by the plea. In re Yasmine B., 2008 Wis. App. 159, par 5, 314 Wis.2d 493,762 N.W.2d 122. citing Kenosha County v. Jodie W., 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. It is also required to determine that a parent understands that there will be a finding that the parent is unfit. Yasmine B., par. 10. Finally, the court must

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ascertain that the parent understands the potential dispositions and the standard that will be applied at disposition. Yasmine B., par. 16.

If the colloquy is deficient, Brown County would be required to establish by clear and convincing evidence in an evidentiary hearing that the parent "knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." Jodie B., par. 26.

4. Brenda alleges that the colloquy conducted by the court in accepting the admission was deficient in that it failed to inquire into whether Brenda understood all of the potential dispositions available at disposition and the forfeiture of Brenda's constitutionally protected right to act as a parent. The options available at disposition provided for in Sec. 48.427, Wis, Stats. included:

> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:
>
> 1. A county department authorized to accept guardianship under s. 48.57 (1) (e) or (hm).
> 3. A child welfare agency licensed under s. 48.61 (5) to accept guardianship.
> 4. The department.
> 5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.
> 6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.
>
> (b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has

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resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.

(c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.

(3p) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub. (3m) (a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.

(4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

5. Brenda asserts that she was unaware of the implications of her admission with respect to the matters above. They were not provided to her by her attorney, Chris Froelich, nor was she aware of said implications from any other sources.

WHEREFORE, the undersigned attorney requests that this court permit Brenda to withdraw her admission to grounds for TPR. If the court is unable to schedule and hold a hearing on this motion within twenty days as required by the Court of Appeals order dated February 18, 2010 due to conflicts in attorney and court calendars or other acceptable reasons, the undersigned attorney is willing to file a motion with the Court of Appeals for an extension.

Dated this 23rd day of February, 2010.

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
Attorneys for the Respondent-Appellant
State Bar No. 01018347

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ACC Rob Collins, P.O. Box 23600, Green Bay, WI 54305-3600
GAL Peter Borchardt, P.O. Box 2402, Green Bay, WI 54306-2402
Brenda B., c/o J ır., 1740 S. l Avenue, Rm. , Green Bay, WI 54303
Attorney Christopher Froelich, 125 S. Quincy, Green Bay, WI 54301

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error in the colloquy in this case.

THE COURT: Thank you. Just take a moment, I'm going to review this, and I'll be back with you gentlemen.

(Short recess taken.)

THE COURT: All right, we're back on the record. I did have a chance, as I stated, to review the submissions by Attorney Kachinsky and Attorney Collins in this particular action. I also heard the arguments of Mr. Collins and Mr. Kachinsky and the guardian ad litem, Mr. Borchardt, in this action.

If I could just address the different grounds for the withdrawal of the plea. First of all, the first argument is, from Mr. Kachinsky, is that the plea colloquy was defective because I did not point out the potential dispositions or potential that dispositions that could happen at a fact-finding hearing, excuse me, at the disposition hearing. The case we are all talking about here today is *Yasmine B.* -- Y-a-s-m-i-n-e, B. -- *v. Therese S.* -- T-h-e-r-e-s-e, S. -- and that cite is 314 Wis. 2d 493. It's a Court of Appeals case in which the Court of Appeals addressed many of the issues that are before us right now.

As we go through this process, and I do remember

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this case specifically, in fact, I keep this case in front of me because it offers a road map on how the Courts are supposed to inform persons of a fact-finding hearing plea. The first part is, on page 499, the Court of Appeals stated, "We conclude that in order for no contest pleas at the grounds stage to be entered knowingly and intelligently, parents must understand that acceptance of their plea will result in a finding of parental unfitness." And I did state that, and that's in the record itself.

Then it goes on on page 502, it talks about the dispositions in this case. These are potential dispositions available at disposition, on page 502, the Court of Appeals wrote, quote, "Of relevance here, the Court may either dismiss the petition under subsection (2) or it may terminate the parental rights under subsection (3)." And when I went through this with Ms. B , that's what I told her, is that I can either dismiss the petition, that is, a petition for TPR, or may terminate or grant the petition, may terminate parental rights. It appears Mr. Kachinsky's argument, and if I'm wrong, Mr. Kachinsky, please tell me, that Courts are obligated to state everything in 48.427, and that would include: (3m), (3m)(a) 1 and 2, at least in

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your brief, 4, 5, 6, 6(b), 6(a), 6(c), (3p) and all the way to number (4,) as opposed to just telling her what the potential dispositions are that a Court may use at the disposition hearing. I believe the philosophy behind telling a party about those dispositions is so that he or she makes a knowing decision when he or she decides not to go through the ground phase and enters a plea of no contest.

In my review of the transcript in this case, not only I but Mr. Collins and Mr. Froelich, her attorney, made it very clear just what the grounds phase was and that there was a second phase, a dispositional phase, and then Ms. Boyd was contesting the dispositional phase, and she had a right to be heard on that. I went through the different factors that I have to consider when I'm making a decision at the dispositional phase and what the options would be at that point, either to terminate or to not terminate, to grant the petition or to not grant the petition, that would be dismissal.

So I suppose that, using the argument that's been afforded to me, all the factors under 48.427, every one of the parens should be pointed out by the Court to the particular person, Ms. B 's seat, and I'm finding that's not true, based upon common sense,

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number one, and number two, the Court of Appeals decision when it states "of relevance here." That's the important part. I agree with Mr. Collins when he stated in his brief on page 2, I noticed when I was preparing for this hearing this statement, and I'm quoting, "While Wisconsin statute section 48.427 lists several additional dispositions under (3m)," and there's (3m) through (4), "those options only apply if the Court first terminates parental rights under subsection (3.)" So to me that answers that particular question.

With respect to the second argument -- before we get to the second argument, on the *Yasmine* case, also, I did explain the potential, the explanation of the disposition hearing, the statutory standards that I must use at that particular hearing.

Then on page 504 of the case, the Court of Appeals specifically did not address the claim that -- Therese's claim that she was not properly informed she is waiving constitutional protections of a right to parent her child. So, as I said, the Court of Appeals didn't address that, which is why I asked Mr. Kachinsky when we first started out whether there's some case that I didn't see that specifically states what the Court of Appeals did not address. I

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believe what Mr. Kachinsky said and, Mr. Collins, correct me if I'm wrong, is that nobody has a different cite.

I also went through the transcript, and in the transcript itself, I did go through in detail with Ms. B. First of all, I asked her on page 7, if you don't understand or if you have various questions, raise your hand, and she said that she would. But then on page -- on pages 9 and 10 and pages thereafter, I went through specific rights with her about the right to remain silent, the right to cross-examine, the right to a jury or a judge, in that matter, what the jury or judge would decide, that there was a second phase to the proceeding, that's the dispositional phase, and the standard would be the child's best interests as opposed to the standard used during the fact-finding proceeding. I also read to her the entire jury instruction on page 19, 20, and 21, what the jury would consider, the relationship or what a jury is used for in TPR findings, or a Court, for that matter, and what comes after grounds are found in terms of the dispositional hearing.

So I am going to deny the motion to withdraw the admission. Again, I'm going to amend that, and,

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Mr. Kachinsky, with your permission, I don't think it was an admission to withdraw, I'll just say the plea to grounds for termination of parental rights, based upon what I have said, based upon the case that we all are talking about, and that is the *Yasmine B. v. Therese S.* case. I believe that I did proper when I conducted the colloquy with Ms. B I did inform her of the legal standard to be used, I did inform her of the unfitness, that that finding would have to be made, and I did inform her of the dispositions in this case. As I said, on these TPR cases on the fact finding, I keep this case up here because in a large part I do think this is a road map for Courts to use from the appellate courts.

With respect to the constitutional right to parent the child, I'd have to say that explicitly I don't see that anywhere in the law, either case law or in the statutory law. Frankly, that's why we're all here. I mean, that's why Ms. B has a Court-appointed, in this case it was a public defender, attorney. She has various rights that I went through you, both at the fact finding and at the dispositional phase. So I don't know that a court would have to explicitly state that she has a constitutional right to parent the child. It's the

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very essence of why we're having all these proceedings, both the fact finding and the dispositional phase.

So I am going to deny the motion, and I will allow Mr. Kachinsky to proceed from here. My understanding is that there has to be a certain turn-around on the transcript and other proceedings, which I'm sure all counsel are aware of.

Mr. Collins, did you want to state anything else?

MR. COLLINS: No, Your Honor. I guess just to supplement the arguments under the second claim that the mom wasn't informed she was waiving her constitutional protective right to parent her child, I guess just to make a record for the Court of Appeals, I would note the County, on page 28 of the October 6 transcript, did inform mom, Ms. E , she could lose her parental rights to Desmond at the dispositional hearing, and Miss B indicated that she understood that.

THE COURT: Thank you. Mr. Kachinsky, did you want to supplement the record or add anything else?

MR. KACHINSKY: I don't see any need to add anything additional to the record at this time.

THE COURT: Thank you very much. Mr.

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COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP2038
2009AP2039

Cir. Ct. No. 2008TP59

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2009AP2038

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES M.,

RESPONDENT-APPELLANT.

NO. 2009AP2039

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT, App 129

V.

DIANE G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] James M. and Diane G. are the parents of Cheyenne M. and the parental rights of each were terminated. Both appeal, contending that their respective pleas to the ground for termination were not knowing and voluntary because the court did not inform them and they did not understand that the plea would result in the loss of their substantive due process right to parent their child. In addition, James contends that his plea was invalid because the court did not perform a mandatory duty under WIS. STAT. § 48.422(7)(bm) (2007-08), which provides that, before accepting a plea, the court in certain circumstances must request and review a report on payments made to the child's parents by the proposed adoptive parents. For the following reasons, we reject these arguments and affirm.[2]

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BACKGROUND

¶2 On June 12, 2008, the Dane County Department of Human Services filed a petition seeking to terminate the parental rights of James and Diane to Cheyenne, born May 31, 2004. The petition alleged two grounds: that Cheyenne was a child in need of protection and services (CHIPS) under WIS. STAT. § 48.415(2), and that each parent had failed to assume parental responsibility under § 48.415(6). On January 20, 2009, both parents appeared with counsel for pretrial motions. Each attorney informed the court that her client wished to enter a plea to the grounds for termination and obtain a date for the dispositional hearing in which each parent wished to participate. Counsel for Dane County advised the court that it wished to voluntarily dismiss the failure-to-assume ground and proceed only on the CHIPS ground. Both James' attorney and Diane's attorney said they had no objection.

¶3 The court then engaged in the following colloquy with James and Diane.

> THE COURT: All right. Then I started to explain to the parents that I'm going to go through the plea colloquy and if you could answer first, Ms. [G.], and Mr. [M.] second. Let me ask the parents then, and point out that the petition alleges in the first ground for parental rights, the second one now being dismissed, that Cheyenne [M.] was adjudged to be a child in need of protection and service on September 15, 2006, that she had been placed outside her parental home on March 17, 2006, and that she has continued in placement outside her parental home by Court order since September 15, 2006. To that allegation how do you plead?
>
> MS. [G.]: No contest, Your Honor.
>
> MR. [M.[: No contest.
>
> THE COURT: Do you understand that with a plea of no contest that you are not contesting the State's ability to prove the facts stated in the petition at least with respect to Count 1?
>
> MS. [G.]: Yes, Your Honor.
>
> MR. [M.]: No contest.
>
> THE COURT: But do you understand that that relieves the State from having to prove those allegations regarding the finding of CHIPS in the time period that Cheyenne has been out of the parental home?
>
> MR. [M.]: Yes.

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THE COURT: And by entering into this stipulation or plea, do you understand that you're waiving your right to have a jury decide this issue, the first phase which is the grounds phase?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: Is that something that you've had enough time to discuss with your attorney? We'll go with Ms. [G.] first.

MS. [G.]: Just since we got here today. I haven't really had time to think about it, it was like five minutes ago.

THE COURT: Well, I know that you've been discussing this with your attorneys for 40 minutes. Are you indicating that you need more time?

MS. [G.]: I'm not really sure. I told them I would do whatever they thought was right so I guess it's okay.

THE COURT: Ms. Fruth [counsel for Diane], would you like – Were you going to say something?

MS. FRUTH: Just that, Your Honor, in the last, I don't know how many weeks, we've kind of gone over the different issues in the case, the different conditions of return, the evidence and things like that. So while I'm respectfully not trying to disagree with her, I think these are issues that have sort of been in play for some time. And, as I said, I'm not trying to disagree with what Ms. [G.] is saying.

THE COURT: Ms. [G.], how old are you?

MS. [G.]: I'll be 50 in February.

THE COURT: Mr. [M.]?

MR. [M.]: I'll be 55 January 29th, this month.

THE COURT: What is your highest level of education or last grade completed?

MS. [G.]: 12, Your Honor.

MR. [M.]: 12.

THE COURT: Are you, either of you under any psychiatric treatment at this time?

MS. [G.]: No, Your Honor.

MR. [M.]: No.

THE COURT: Have you consumed any alcohol or, any alcohol or drugs in the last 24 hours?

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MS. [G.]: No, Your Honor.

MR. [M.]: No, Your Honor.

THE COURT: How about medication?

MS. [G.]: No, Your Honor.

MR. [M.]: Just what my doctors prescribe me, high blood pressure medicine, antidepressants.

THE COURT: Ms. [G.]?

MS. [G.]: No, Your Honor.

THE COURT: Does that medication, Mr. [M.], affect your ability to understand what you're doing today?

MR. [M.]: No, it doesn't.

THE COURT: And you both read and write English; is that correct?

MR. [M.]: Yes.

MS. [G.]: Yes.

THE COURT: Okay. Let me ask Ms. [G.] to respond first.

MR. [M.]: I'm sorry, Your Honor.

THE COURT: That's okay, it's just for the court reporter's benefit in taking it down. And do you understand that the purpose of today's hearing was originally to hear arguments on pretrial motions?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes.

THE COURT: And I think I've asked you and maybe I haven't but I'll ask again then, have you, do you understand that the first phase, the grounds phase is a jury trial phase? Do you understand that?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

THE COURT: And do you understand that you're waiving that phase of the hearing today?

MS. [G.]: Yes, Judge.

MR. [M.]: I'm doing what my lawyer talked to me about.

THE COURT: Well, but do you agree with what your lawyer is recommending?

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MR. [M.]: Yes, I do.

THE COURT: And you understand that the second phase that would be conducted in this case would be a phase that is, that the main emphasis on that phase is what would be in Cheyenne's best interests?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

THE COURT: Do you understand that ultimately if the Court were to determine that it would be in Cheyenne's best interests to have your parental rights terminated, that you would be losing certain rights you would have? You would lose the right to have visitation with your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And you would also lose the right to have any information about your child including where she was living, where she was going to school or information about her health?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: You would also be losing the right to make any decisions for your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And your child would be losing the right to inherit from you?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And conversely you would be losing the right to inherit from your child?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And you would have no further financial responsibility for your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes.

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THE COURT: And also you would be losing the right to have custody of the child, do you understand that?

MS. [G.]: Yes, sir.

MR. [M.]: Yes, Your Honor.

THE COURT: The next – Strike that. Ms. Guinn [counsel for Dane County], are there questions you would like to ask?

MS. GUINN: Just for the record, Your Honor, I would like to make sure that the parents understand that if their parental rights are terminated after the second phase of the hearing, because they've pled no contest today if they lose at the second half, they will be found unfit. Just so they're aware of that. But before we get to that, just for the record, I believe that the Department and the guardian ad litem and the attorneys and the parents have been in communication with Cheyenne's foster parents and, at this point, the foster parents have indicated that they would like to continue contact between Cheyenne and her parents after the TPR, but I want it to be perfectly clear to the parents that should their parental rights be terminated, we can't guarantee that that's going to happen and that they won't be able to take that issue back into Court.

THE COURT: And is that something that you understand, Ms. [G.]?

MS. [G.]: Our lawyers already explained this, Judge.

THE COURT: And did you understand that as well, Mr. [M.]?

MR. [M.]: Yes, sir.

THE COURT: Ms. Doyle [guardian-ad-litem], is there anything you would like to ask?

MS. DOYLE: The only thing that I would just like to state is just to emphasize, and I'm sure the parents understand too because we've had a number of discussions because I have with their lawyers and I'm sure they have talked to their clients, by stipulating to these grounds, they are not doing that in exchange for this continued contact with Cheyenne. And I would like it if you would ask them this, that they understand that it is not an exchange, that they've made this decision to stipulate to grounds independently of whatever might occur with regard to communication in the future between Cheyenne and her foster parents and them.

THE COURT: Do you understand that, Ms. [G.]?

MS. [G.]: Yes, I do, Judge.

THE COURT: And do you agree with that?

MS. [G.]: Yes, Judge.

THE COURT: Mr. [M.]?

MS. DOYLE: Your Honor, may I just add, this is something that the foster

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parents have freely offered and I think will continue. I just want it known for the record this wasn't offered and they said okay then well, I think the parents understand that. I just want it clear on the record that the foster parents, this is their decision and they can choose to do this but it is not premised upon the parents' willingness to stipulate to grounds.

MS. BOSBEN [counsel for James]: Your Honor, Mr. [M.] just wanted to know if the visits would continue between now and the disposition. My understanding is they would because his rights have not technically been terminated yet. If they were, they wouldn't necessarily be.

THE COURT: The answer to your second part of the question is right, they're not – their parental rights have not, are not terminated.

MS. BOSBEN: Right.

THE COURT: And I would defer to the social worker as to the continued visitation.

MS. GUINN: Yes, Your Honor.

THE COURT: They will continue?

MS. BLANCK [social worker]: Visitation would continue, yes.

MS. BOSBEN: And then, sorry, as to Ms. Doyle's question?

MR. [M.]: No, there is no agreement with us, the foster parents and us about if our parental rights have been terminated, right.

THE COURT: Well, in entering a stipulation and pleas at this time, you are, I've already talked about the fact that you're waiving the right to have a jury decide the issues and those issues are No. 1, the issue about whether or not Cheyenne had been adjudged to be a child in need of protection and services and had been placed outside the home for a period of 6 months or longer. So you understand you're not contesting that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: Another issue that would be before the jury if this were to go to a jury is whether or not the Department made a reasonable effort to provide services ordered by the Court. Do you understand that?

MS. [G.]: Yes, Judge.

THE COURT: Mr. [M.]?

MR. [M.]: Yes, Your Honor.

THE COURT: All right. And the last issue that would be before the jury which wouldn't now if you waive the jury and enter your pleas or stipulation, is whether or not either of you have failed to meet conditions established, the conditions of return. Do you understand that's an issue that

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will now be waived at this point?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And, lastly, whether or not there would be a substantial likelihood that either of you will not meet the conditions of return within a 9-month period?

MS. [G.]: I understand, Judge.

MR. [M.]: I believe we can.

THE COURT: But you're waiving the right to make the State prove that?

MR. [M.]: Yes, Your Honor.

THE COURT: All right. Do you understand that?

MR. [M.]: Yes, Your Honor.

MS. GUINN: Just to clarify for the record, Your Honor, this is under the old TPR warnings so it would be 12 months instead of 9 months.

THE COURT: Okay. Thank you for the correction. And you understand that it's 12 months rather than 9?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

THE COURT: Ms. Fruth, do you believe you've had enough time to discuss these same topics with Ms. [G.]?

MS. FRUTH: Yes, sir, I have.

THE COURT: And Ms. Bosben, same question?

MS. FRUTH [sic]: Yes, Your Honor.

THE COURT: All right. Then I'm going to accept what is either labeled as a stipulation or pleas to the grounds phase and then we'll set this matter over for a dispositional hearing. Do you need to make any other findings, Ms. Guinn?

MS. GUINN: Yes, Your Honor. I would request a finding that the pleas were knowingly and freely and voluntarily entered and I just need to find out for the record if the attorneys and their parties are going to stipulate that the petition forms a factual basis for the Court to make a finding as to the continuing CHIPS ground or whether or not I need to have the worker testify as to grounds. The Court can make that independent determination.

THE COURT: Ms. Fruth?

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> MS. FRUTH: One moment, Your Honor. Your Honor, we would so stipulate.
>
> THE COURT: Thank you. Ms. Bosben?
>
> MS. FRUTH [sic]: We'll also stipulate, Your Honor.
>
> THE COURT: I guess I was thinking it rather than stating it. I am finding that the pleas are entered knowingly and voluntarily and that there is then a factual basis in support of the pleas. And how much time do you think will be needed for dispositional phase?

¶4 The court then proceeded to schedule the dispositional hearing with the attorneys. At the dispositional hearing, both James and Diane appeared with counsel and both testified. At the close of the dispositional hearing the court determined that it was in Cheyenne's best interest to terminate the parental rights of both James and Diane, and it entered an order accordingly.

¶5 Post-disposition, James and Diane each filed a motion to withdraw the plea each entered. Both contended that their pleas were not knowingly and voluntarily made because they did not know that the acceptance of their pleas would result in a finding of parental unfitness and the loss of their substantive due process right to parent their child. In addition, James asserted his plea was invalid because the court failed to make the inquiries and request the report about proposed adoptive parents required by WIS. STAT. § 48.422(7)(bm).

¶6 The circuit court concluded that both James and Diane had established a prima facie case for plea withdrawal on the ground that they were uninformed that they would be found unfit parents upon entry of their pleas. The court determined that a circuit court is obligated to include this in its colloquy, that this was not done, and that each parent had alleged he/she did not know this. After an evidentiary hearing on this ground, the court determined that the County had established by clear and convincing evidence that James knew he would be found an unfit parent as a result of his plea. The court made the same finding with respect to Diane.

¶7 With respect to the parents' contention on their substantive due process rights, the court concluded they had not made a prima facie case. The court reasoned that the termination of parental rights was only a potential outcome of a finding of unfitness and a circuit court had no obligation to advise them of a potential loss of a constitutional right.

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¶8 With respect to James' contention based on the court's failure to make the inquires and request the report required by WIS. STAT. § 48.422(7)(bm), the court concluded that James had not made a prima facie case because he did not allege that he did not know or understand this information.

¶9 Based on these rulings, the circuit court denied the motion of each party for withdrawal of his/her plea.

DISCUSSION

¶10 On appeal James and Diane each contend that the circuit court erred in concluding that the court was not obligated to inform each that the plea would result in the loss of the substantive due process right of each to parent Cheyenne. A correct ruling on this issue, they assert, leads to the conclusion that they did make a prima facie case that their pleas were not knowing and voluntary. James makes the additional argument that the court erred in its ruling with respect to WIS. STAT. § 48.422(7)(bm) because his knowledge and understanding is irrelevant to the obligation imposed on the court and the County in this subsection.

I. Knowing and Voluntary Plea—James and Diane

¶11 Prior to accepting a plea of no contest to a ground for termination of parental rights, the circuit court must undertake a personal colloquy with the parent in accordance with WIS. STAT. § 48.422(7). § 48.422(3); ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. Subsection (7) provides:

> (7) 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 and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
>
> (bm) Establish whether a proposed adoptive parent of the child has been

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identified....

(br) Establish whether any person has coerced a birth parent or any alleged or presumed father of the child in violation of s. 48.63(3)(b)5. Upon a finding of coercion, the court shall dismiss the petition.

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

¶12 In addition, the court must ensure that the parent knows the constitutional rights that he or she is waiving by entering such a plea. ***Jodie W.***, 293 Wis. 2d 530, ¶25.

¶13 When parents allege that their no-contest plea was not knowing or voluntary, the principles and analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), apply. ***Jodie W.***, 293 Wis. 2d 530, ¶24 n.14. Under ***Bangert*** parents must make a prima facie showing by establishing that the court failed to inform them of their rights and alleging that they did not understand the rights that they were waiving. ***Id.***, ¶26. Once the parent makes this showing, the burden shifts to the petitioner to prove that the parent made his plea knowingly, voluntarily, and intelligently. ***Id.***

¶14 Whether a parent has established a prima facie case because of a deficiency in the colloquy presents a question of law, which this court reviews de novo. ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122. To the extent the interpretation of a statute is involved, that is also a question of law. ***Oneida County DSS v. Nicole W.***, 2007 WI 30, ¶9, 299 Wis. 2d 637, 728 N.W.2d 652.

¶15 James and Diane contend that they have a fundamental right to parent their child, a right protected by the substantive due process clause of the United States Constitution, and they lose this right once they are found unfit. They assert that, because of this and because a finding of unfitness is required once the court accepts their pleas, the court was obligated to inform them before accepting their plea that, upon the finding of unfitness, they would lose their fundamental right to parent their child. They disagree with the circuit court's analysis that this loss does not occur until their parental rights are terminated and is therefore only a potential loss at the time they enter their pleas. They assert that, even though their parental rights cannot be terminated

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until after the dispositional hearing, they have lost their fundamental right to parent their child upon the acceptance of their plea.

¶16 An analysis of this issue requires an examination of the substantive and procedural components of the constitutional right to parent one's child and the manner in which the legislature has chosen to protect those rights by statute.

¶17 As James and Diane assert, a parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. ***Mrs. R. v. Mr. and Mrs. B.***, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981); ***L.K. v. B.B.***, 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983). Because termination of parental rights interferes with a fundamental liberty interest, the State must establish that a parent is unfit before terminating his or her parental rights. ***Mrs. R.***, 102 Wis. 2d at 136.[3]

¶18 WISCONSIN STAT. § 48.415 sets forth various grounds for termination of parental rights, and § 48.424(4) requires that the circuit court find the parent unfit upon finding that one of those grounds exists.[4] In the context of a plea, once the court accepts a no contest plea at the grounds stage, the parent must be found unfit. ***Therese S.***, 314 Wis. 2d 493, ¶9. In this first phase, often referred to as the "grounds phase," the "parent's rights are paramount ... the burden is on the government, and the parent enjoys a full complement of procedural rights." ***Sheboygan County DHHS v. Julie A.B.,*** 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402.

¶19 After a finding of unfitness, the proceeding moves to the second phase, the dispositional hearing, where the court determines whether termination of parental rights is in the child's best interests based on the factors prescribed in WIS. STAT. § 48.426. ***Id.***, ¶28. "The outcome of this hearing is not pre-determined, but the focus shifts to the interests of the child," because the prevailing factor considered by the court is the best interests of the child. ***Id.***; § 48.426(1)-(2). At the dispositional hearing the court may enter an order terminating parental rights, § 48.427(3), or it may dismiss the petition "if it finds that the evidence does not warrant

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the termination of parental rights." § 48.427(2).

¶20 Thus, while it may be true that, as a matter of constitutional law, once a parent has been found unfit, it would be permissible for a court to immediately terminate parental rights, Wisconsin statutory law does not permit that. There must be a dispositional hearing after which the court has the authority to dismiss the petition notwithstanding a finding of unfitness. Indeed, WIS. STAT. § 48.424(4) expressly provides that "[a] finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2)." Not until the court enters an order terminating parental rights, if that occurs, does the parent lose the right to parent his or her child. This is clear if we posit a situation in which there is a finding of unfitness but, at the dispositional phase, the court decides the evidence does not warrant termination of parental rights and dismisses the petition. There would be no question in that case that, after dismissal, the parent had the fundamental right, as a matter of constitutional law, to parent his or her child.

¶21 Turning to the facts in this case, the court here ascertained that James and Diane understood that they were waiving the right to have the County prove, before a jury, each of the elements of the CHIPS ground, which the court described. The court also ascertained that each understood that in the next phase the emphasis would be on the child's best interests, and the court could determine that it would be in Cheyenne's best interests to terminate the parental rights of one or both parents. The court then specified all the rights each would lose if his/her parental rights were terminated and ascertained that each understood those. There was additional discussion emphasizing that, while the foster parents were willing to allow them to have contact with Cheyenne after their parental rights were terminated, they had no right to this and the foster parents could change their mind. The court ascertained they understood this.

¶22 This colloquy effectively ascertained that James and Diane each understood that, after the entry and acceptance of their plea, the only issue that would remain would be Cheyenne's best interests and that the court could decide that it was in her best interests to terminate the right of each to parent her.

¶23 In addition, a court is obligated to ascertain that a parent understands that

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acceptance of their plea will result in a finding of unfitness. ***Therese S.***, 314 Wis. 2d 493, ¶10. Although the circuit court here did not do this in its colloquy with James and Diane, the court found each understood this, and neither appeals on this ground.

¶24 Because Wisconsin statutory law does not permit a court to terminate parental rights upon a finding of unfitness without completing the dispositional phase, we see no rationale for requiring a court to inform a parent that a finding of unfitness results in the automatic loss of the constitutional right to parent. This is confusing information, given that a parent does not lose this right under Wisconsin statutory law until an order is entered terminating his or her parental rights. What is important for a parent to understand is that, with the acceptance of his or her plea, the parent no longer has the right to have the State prove unfitness, there will be a finding of unfitness upon acceptance of their plea, and the only issue that remains is the best interest of the child, which the court could decide requires a termination of parental rights. The colloquy here (apart from the absence of reference to the finding of unfitness) ascertained that James and Diane each understood this. Knowledge that, as a matter of constitutional law, a court *could* terminate parental rights upon the acceptance of a plea and a finding of unfitness is not a meaningful addition to the knowledge that a Wisconsin parent should have in order to enter a knowing and voluntary plea, given that this is not permitted in Wisconsin.

¶25 Our conclusion is supported by the supreme court's analysis of a plea in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. There the circuit court ascertained that the parent understood the following: (1) by waiving the fact-finding hearing he was agreeing not to contest the specific allegations relating to each element of the CHIPS ground for termination; (2) if he did contest the allegations, the county would have to prove the facts with clear and convincing evidence; and (3) he still had the right to contest the termination of his parental rights at the dispositional hearing. ***Id.***, ¶¶46-48 The circuit court also established that no promises or threats were made to elicit this waiver. ***Id.***, ¶48. The supreme court concluded that this colloquy was sufficient to show that the parent "understood the nature of the acts alleged in the petition and the potential disposition and that he voluntarily, and with understanding, waived

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his right to contest the fact-finding hearing." ***Id.***, ¶49.[5] There is no suggestion that the colloquy was deficient because the court did not explain and make sure the parent understood that, as a result of the plea, he would lose his substantive due process right to parent his child.

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II. Failure to Comply with WIS. STAT. § 48.422(7)(bm)—James

¶26 WISCONSIN STAT. § 48.422(7)(bm) provides in full:

> (7) Before accepting an admission of the alleged facts in a petition, the court shall:
>
> ....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. If a proposed adoptive parent of the child has been identified and the proposed adoptive parent is not a relative of the child, the court shall order the petitioner to submit a report to the court containing the information specified in s. 48.913(7). The court shall review the report to determine whether any payments or agreement to make payments set forth in the report are coercive to the birth parent of the child or to an alleged [or] [6] presumed father of the child or are impermissible under s. 48.913(4). [Footnote added.] Making any payment to or on behalf of the birth parent of the child, an alleged or presumed father of the child or the child conditional in any part upon transfer or surrender of the child or the termination of parental rights or the finalization of the adoption creates a rebuttable presumption of coercion. Upon a finding of coercion, the court shall dismiss the petition or amend the agreement to delete any coercive conditions, if the parties agree to the amendment. Upon a finding that payments which are impermissible under s. 48.913 (4) have been made, the court may dismiss the petition and may refer the matter to the district attorney for prosecution under s. 948.24(1). This paragraph does not apply if the petition was filed with a petition for adoptive placement under s. 48.837 (2).

¶27 The required contents of the report are:

> Report to the court; contents required. The report required under sub. (6) shall include a list of all transfers of anything of value made or agreed to be made by the proposed adoptive parents or by a person acting on their behalf to a birth parent of the child, an alleged or presumed father of the child or the child, on behalf of a birth parent of the child, an alleged or presumed father of the child or the child, or to any other person in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents or the adoption of the child by the proposed adoptive parents. The report shall be itemized and shall show the goods or services for which payment was made or agreed to be made. The report shall include the dates of each payment, the names and addresses of each attorney, doctor, hospital, agency or other person or organization receiving any payment from the proposed adoptive parents or a person acting on behalf of the proposed adoptive parents in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents or the adoption of the child by the proposed adoptive parents.

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WIS. STAT. § 48.913(7).

¶28 James asserts his plea was invalid because, before accepting his plea, the court did not establish whether there was a proposed adoptive parent and did not order the County to submit the report required by WIS. STAT. § 48.422(7)(bm). He contends the circuit court erred in dismissing his motion on this ground under a ***Bangert*** analysis because this provision is not directed to informing a parent of his or her rights. Rather, he asserts, this subsection imposes an obligation on the court, before accepting a plea, to order the County to submit the prescribed report if a proposed adoptive parent has been identified who is not a relative of the child, and the court's failure to do this entitles him to withdraw his plea.

¶29 The County does not rely on the circuit court's analysis, implicitly conceding that the ***Bangert*** framework is not applicable. Instead, the County responds that James was presumably aware before the plea hearing of the foster mother's willingness to adopt Cheyenne, was informed of it at the dispositional hearing, and at no time asked that the report be provided. The County contends that James does not claim he was prejudiced and therefore he is not entitled to withdraw his plea. The County relies on ***Steven H.***, 233 Wis. 2d 344. There, the supreme court concluded that the circuit court erred in failing to hear testimony in support of the allegations in the petition after the parent stated he was not contesting them, as required by WIS. STAT. § 48.422(3). However, the supreme court held the parent was not entitled to relief on this ground because he was not prejudiced. ***Id.***, ¶¶56-60.

¶30 James replies that the record does not show that he was aware before he entered the plea of the foster mother's willingness to adopt Cheyenne and that "to date" the County has not submitted the required report and the circuit court has not made the determination required by WIS. STAT. § 48.422(7)(bm). Therefore, he contends, this court cannot conclude James was not prejudiced by the error.

¶31 We agree with James that the record does not show compliance with WIS. STAT. § 48.422(7)(bm), but we are not persuaded that he is entitled to withdraw his plea as a result. James' argument overlooks the significant fact that the report required by § 48.422(7)(bm) is to

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disclose transfers of anything of value made or agreed to be made by or on behalf of the proposed adoptive parent *to James*. *See* § 48.913(7). The evident purpose is to ensure that James is not entering a plea because of such transfers or promises. The court is also required to "[e]stablish whether any promises or threats were made to elicit an admission," § 48.422(7)(b), which can be accomplished by addressing the parent entering the plea. Subsection (7)(bm) provides additional protection from coercion that might arise from the proposed adoptive parent giving or promising something of value to the birth parent, which the birth parent might not disclose to the court.

¶32 If James did not know there was a proposed adoptive parent before he entered his plea, then it is difficult to see how he could have received or been promised anything of value from or on behalf of the proposed adoptive parent. If he did know there was a proposed adoptive parent when he entered his plea, then he must know whether or not he received or was promised something of value from or on behalf of that individual. However, he does not state whether he did or not. His position, as we understand it, is that, regardless of whether he received or was promised anything, he is entitled to withdraw his plea because the court did not have this information at the time he entered his plea. But he does not present a developed argument explaining why this result is required either by the statute or case law or is necessary to protect his rights or interests. In the absence of a more developed argument, we conclude James is not entitled to withdraw his plea solely because the court, before accepting his plea, did not comply with WIS. STAT. § 48.422(7)(bm).

¶33 We emphasize that our conclusion does not alter the fact that circuit courts and petitioners are obligated to comply with WIS. STAT. § 48.422(7)(bm) before the court accepts a plea.

CONCLUSION

¶34 We affirm the circuit court's denial of James' and Diane's motions for post-disposition relief and we affirm the order terminating their parental rights.

By the Court.—Orders affirmed.

Aug 1/4/6

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

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

[2] We hereby sua sponte consolidate the two appeals for purposes of disposition.

[3] The fundamental liberty interest at stake also requires procedural protections in the proceeding to terminate parental rights. *See* ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶¶22-23, 255 Wis. 2d 170, 648 N.W.2d 402. The requirements of procedural due process are not at issue on this appeal.

[4] Although WIS. STAT. § 48.424(4) requires a finding of unfitness upon a finding that one of the statutory grounds exists, a finding that one of the grounds exists is not conclusive on the issue of whether the substantive constitutional standard for termination has been met. Because termination of parental rights interferes with the fundamental liberty interest of parenting one's child, the substantive grounds for termination must be narrowly tailored to serve the compelling governmental interest of protecting children from unfit parents. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. Even where there is no dispute that one of the statutory grounds exist, application of that statutory ground may violate the substantive due process right of a parent. *See, e.g.,* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶43, 271 Wis. 2d 51, 678 N.W.2d 831 (concluding that § 48.415(7), "Incestuous Parenthood," as applied to a victim of incest perpetrated by her father is not narrowly tailored to advance a compelling governmental interest and therefore violates her right to substantive due process.) Neither James nor Diane contends that the CHIPS ground, § 48.415(2), as applied to them, violates their right to substantive due process.

[5] ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, was decided before we held in ***Oneida DSS v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122, that, in order for a no contest plea at the "ground stage" to be knowingly entered, parents must understand that acceptance of their plea will result in a finding of unfitness.

[6] WISCONSIN STAT. § 48.913(4) provides: "Other payments prohibited. The proposed adoptive parents of a child or a person acting on behalf of the proposed adoptive parents may not make any payments to or on behalf of a birth parent of the child, an alleged or presumed father of the child or the child except as provided in subs. (1) and (2)."

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP000321

In re the termination of parental rights to Desmond F., a person under the age of 18:

Brown County Department of Human Services,
Petitioner-Respondent,

v.

Brenda B.,
Respondent-Appellant-Petitioner,

Brian K.,
Respondent.

ON APPEAL OF AN ORDER TERMINATING PARENTAL RIGHTS AND AN ORDER DENYING MOTION TO WITHDRAW PLEA TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS ENTERED IN THE BROWN COUNTY CIRCUIT COURT BRANCH VII, THE HONORABLE JUDGE TIMOTHY A. HINKFUSS PRESIDING

BRIEF AND APPENDIX OF PETITIONER-RESPONDENT

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BRIEF AND APPENDIX OF PETITIONER-RESPONDENT

STATEMENT OF THE ISSUE

DID THE CIRCUIT COURT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING BRENDA'S MOTION TO WITHDRAW HER NO CONTEST PLEA THAT GROUNDS EXISTED TO TERMINATE HER PARENTAL RIGHTS WITHOUT AN EVIDENTIARY HEARING?

Both the circuit court and the Court of Appeals answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioner-Respondent, the Brown County Department of Human Services (the Department), requests oral argument of this case and publication of this Court's decision.

STATEMENT OF THE CASE

The Department agrees with the Respondent-Appellant-Petitioner's statement of the case.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING BRENDA'S MOTION TO WITHDRAW HER NO CONTEST PLEA THAT GROUNDS EXISTED TO TERMINATE HER PARENTAL RIGHTS WITHOUT AN EVIDENTIARY HEARING.

On appeal, Brenda B. (Brenda) asserts that the circuit court erroneously exercised its discretion by denying her post-disposition motion without an evidentiary hearing. The Department disagrees with this assertion.

Brenda's post-disposition motion concerns alleged deficiencies in the plea colloquy. Brenda asserts that the circuit court failed to conform to its plea-taking duties in two respects. First, Brenda alleges that the circuit court did not establish that Brenda understood the potential dispositions pursuant to Wis. Stat. §48.422(7)(a). Second, Brenda alleges that the circuit

court did not adequately inform her of the forfeiture of the constitutional right to parent.

Before accepting a parent's no contest plea at the grounds stage of a termination of parental rights proceeding, the circuit court must engage the parent in a personal colloquy to determine that the plea is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions pursuant to Wis. Stat. §48.422(7)(a). Oneida County DSS v. Therese S., 2008 WI App 159, ¶5, 314 Wis.2d 493, 497-98, 762 N.W.2d 122, 125. Additionally, the parent must have knowledge of the constitutional rights given up by the plea. Id.

When parents allege that their no contest plea was not knowing or voluntary, the principles and analysis set forth in State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12, apply. Kenosha County DHS v. Jodie W., 2006 WI 93, ¶24 n.14, 293 Wis.2d 530, 546 n.14, 716 N.W.2d 845, 853 n.14. First, the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing. Therese S. at ¶6. If the parent makes a prima facie showing, the burden then shifts to the county to demonstrate by clear and

convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition. Id.

At the Motion Hearing conducted on March 10, 2010, the circuit court found that (1) the plea colloquy adequately set forth the dispositional options and (2) that a circuit court is not required by statutory law or case law to explicitly state that a parent is losing their constitutional right to parent their child. (76:8-14). The circuit court further ordered that an evidentiary hearing was not necessary since Brenda did not make a prima facie showing and therefore failed to satisfy the first prong of the Bangert analysis. (76:15).

The Department contends that Brenda's post-disposition motion must (1) make a prima facie showing of a violation of Wis. Stat. §48.422(7)(a) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that she did not know or understand the information that should have been provided at the plea hearing before an evidentiary hearing is required. State v. Brown, 2006 WI 100, ¶39, 293 Wis.2d 594, 619, 716 N.W.2d 906, 918 (See also Bangert at 274).

The Department contends that the record clearly reflects that the plea colloquy was sufficient. If the

parent alleges that they did not understand some aspect of the plea colloquy but the transcript shows that the circuit court's treatment of the subject was "unassailable," the parent's motion for a hearing cannot be granted on the basis of a deficiency in the transcript. Brown at ¶64. The circuit court denied the post-disposition motion after reviewing the transcript and determining that there was no such deficiency. (76:10-14).

Whether a parent has established a prima facie case because of a deficiency in the plea colloquy presents a question of law, which the Supreme Court reviews de novo. Therese S. at ¶7. To the extent the interpretation of a statute is involved, that is also a question of law. Oneida County DSS v. Nicole W., 2007 WI 30, ¶9, 299 Wis.2d 637, 646, 728 N.W.2d 652, 657.

The Department will address each of Brenda's challenges to the plea colloquy.

A. BRENDA WAS INFORMED OF THE POTENTIAL DISPOSITIONS PURSUANT TO WIS. STAT. §48.422(7)(a).

Wis. Stat. §48.422 is applicable to all petitions for termination of parental rights and is entitled "Hearing on the petition." Wis. Stat. §48.422(3) reads as follows:

> "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)."

Wis. Stat. §48.422(7)(a) reads as follows:

> "Address the parties present and determine that the admission is voluntary with understanding of the nature of the acts alleged in the petition *and the potential dispositions*." (emphasis added).

The Department contends that the circuit court did inform Brenda of the potential dispositions. Wis. Stat. §48.427, entitled "Dispositions," states at subsection (1) that after receiving evidence related to the disposition, the court shall enter one of the dispositions specified in the statute. Therese S. at ¶15.

In Therese S., the Court of Appeals concluded that, at the very least, a circuit court must inform the parent that at the second stage of the termination process, the court will hear evidence related to the disposition and then will either dismiss the petition under subsection (2) or terminate parental rights under subsection (3). Id. at ¶16. Additionally, in order for the circuit court's explanation of potential dispositions to be meaningful to the parent, the parent must be informed of the statutory standard the court will apply at the second stage. Id. at ¶16. That is, the circuit court must inform the parent that the best interests of the child shall be the

prevailing factor considered by the court in determining the disposition. Id.

Brenda asserts that the circuit court must inform the parent of all the potential dispositions, including the additional statutory sub-dispositions, before accepting a no contest plea. The Department disagrees with this assertion. In Therese S., the Court of Appeals declined to adopt the expansive approach proffered by the parent, which would require circuit courts to inform parents in detail of all potential outcomes, including all alternatives to termination, prior to accepting a plea of no contest to a termination petition. Id. at ¶17.

The Department agrees with the Court of Appeals, which made a comparison with the criminal plea context. In the criminal plea context, Bangert requires the circuit court to notify defendants of the direct consequences of their plea. Therese S. at ¶10 (*See also* Brown at ¶35). The Department contends that the direct consequence of entering a no contest plea to a termination petition is that the circuit court will either dismiss the petition or terminate parental rights. The Department contends that it is sufficient for the circuit court, without the use of a court form, to inform the parent of only the two primary dispositions as they relate to the direct effect

termination has on the parent. Brown County DHS v. Brenda B., No. 2010AP321, unpublished slip op. ¶11 (WI App June 2, 2010). While Wis. Stat. §48.427 lists several additional dispositions under subsections (3m)-(4), those options pertain to the effect on the child and only apply if the court first terminates parental rights under subsection (3). Id.; Therese S. at ¶15 n.7.

Brenda also asserts that the language relied upon by the Department regarding primary dispositions in Therese S. is dicta; however, fails to further develop that argument. The Department contends that this language is central to the Therese S. case and is not dicta. When an appellate court intentionally takes up, discusses, and decides a question germane to a controversy, such a decision is not dicta but is a judicial act of the court which it will thereafter recognize as a binding decision. State v. Sanders, 2007 WI App 174, ¶25, 304 Wis.2d 159, 173, 737 N.W.2d 44, 51. The appellate court discussed what the circuit court must inform the parent and then declined to adopt the expansive approach proffered by the parent. Therese S. at ¶17. The Department contends that the purpose of this discussion was to guide the circuit court on remand and was not dicta.

It is clear from the record that the potential dispositions and statutory standard were sufficiently explained to Brenda during the plea colloquy as follows:

> **THE COURT:** [N]ot whether…your parental rights should be terminated. That's ultimately my decision in the disposition hearing. I can either grant the petition to terminate your parental rights or dismiss the petition to terminate your parental rights… . Do you understand that? (60:11).
>
> **[BRENDA]:** Yes. (60:11).
>
> **THE COURT:** I can grant the petition at a dispositional hearing or I can dismiss the petition at a dispositional hearing. Those are the two alternatives and by case law I have to explain to you that those are the alternatives. The standard that I use at a dispositional hearing is different than the standard at a fact-finding hearing. The standard is the best interest of the child. So at the dispositional hearing I make my decisions based upon the best interest of the child after I consider different factors… . Do you understand the factors that I need to consider using the best interests of the child standard? (60:19-20).
>
> **[BRENDA]:** Yes. Ah ha. (60:20).
>
> **THE COURT:** Disposition in this case would be whether I terminate your parental rights or whether I dismiss the petition saying to the County I'm dismissing it. I'm not terminating your parental rights. You are not giving up that right to have that dispositional hearing. Do you understand that? (60:21).
>
> **[BRENDA]:** Yes. (60:21).
>
> **MR. COLLINS:** Do you understand that by giving up your right to fight that allegation you could lose your parental rights to Desmond [F.] at the dispositional hearing? (60:28).
>
> **[BRENDA]:** Yes. (60:28).

> **MR. FROELICH:** And then part two would be the disposition where the Judge, Judge Hinkfuss, would ultimately get to decide whether or not it's in the best interests of the child to terminate your parental rights? (60:31).
>
> **[BRENDA]:** Yes. (60:31).
>
> **MR. FROELICH:** However, you do wanna make it clear that you want to object to the termination of your parental rights and you would like to have a disposition hearing to be scheduled at a later date so the Judge can actually decide what is in the child's best interests; terminate your parental rights or not terminate your parental rights. You understand that? (60:33).
>
> **[BRENDA]:** Yes. (60:34).

After reviewing the transcript, the Department contends that the circuit court was correct in finding that Brenda understood the potential dispositions and the statutory standard that would be applied at the disposition hearing. Therefore, Brenda has failed to make a prima facie showing that the plea colloquy was deficient as to the potential dispositions.

B. THE CIRCUIT COURT WAS NOT REQUIRED TO INQUIRE INTO BRENDA'S UNDERSTANDING OF THE FORFEITURE OF HER CONSTITUTIONAL RIGHT TO PARENT.

Brenda asserts that she has a fundamental right to parent her child, a right protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution, and the circuit court should have

informed her that she was waiving that right before accepting her no contest plea. The Department disagrees with this assertion.

An analysis of this issue requires an examination of the substantive and procedural components of the constitutional right to parent one's child and the manner in which the legislature has chosen to protect those rights by statute. Dane County DHS v. James M., Nos. 2009AP2038, 2009AP2039, unpublished slip op. ¶16 (WI App March 18, 2010).

A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. Id. at ¶17 (*See also* Mrs. R. v. Mr. and Mrs. B., 102 Wis.2d 118, 136, 306 N.W.2d 46, 55; L.K. v. B.B., 113 Wis.2d 429, 447-48, 335 N.W.2d 846, 855). Because termination of parental rights interferes with a fundamental liberty interest, the petitioner must establish that a parent is unfit before terminating his or her parental rights. Id. (*See also* Mr. and Mrs. B. at 136).

Wis. Stat. §48.415 sets forth various grounds for termination of parental rights, and Wis. Stat. §48.424(4)

requires that the circuit court find the parent unfit upon finding that one of those grounds exists. Id. at ¶18. Once the circuit court accepts a no contest plea at the grounds stage, the parent must be found unfit. Id. (*See also* Therese S. at ¶9). At the grounds stage, the parent's rights are paramount, the burden is on the government, and the parent enjoys a full complement of procedural rights. Id. (*See also* Sheboygan County DHHS v. Julie A.B., 2002 WI 95, ¶24, 255 Wis.2d 170, 185, 648 N.W.2d 402, 409).

After a finding of unfitness, the proceeding moves to the second stage, the disposition hearing, where the circuit court determines whether termination of parental rights is in the child's best interests based on the factors prescribed in Wis. Stat. §48.426. Id. at ¶19 (*See also* Julie A.B. at ¶28). The outcome of this hearing is not predetermined, but the focus shifts to the interests of the child, because the prevailing factor considered by the court is the best interests of the child. Id. At the disposition hearing, the circuit court may enter an order terminating parental rights or it may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights. Id.

The Department disagrees with Brenda's assertion that she lost her fundamental right to parent her child upon the

acceptance of her no contest plea. While it may be true that, as a matter of constitutional law, once a parent has been found unfit, it would be permissible for a court to immediately terminate parental rights; Wisconsin statutory law does not permit that. Id. at ¶20. There must be a disposition hearing after which the circuit court has the authority to dismiss the petition notwithstanding a finding of unfitness. Id. Indeed, Wis. Stat. §48.424(4) expressly provides that "a finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2)." Id. Not until the circuit court enters an order terminating parental rights, if that occurs, does the parent lose the right to parent his or her child. Id. This is clear in a situation where there is a finding of unfitness but, at the dispositional phase, the circuit court decides the evidence does not warrant termination of parental rights and dismisses the petition. Id. There would be no question in that situation that, after dismissal, the parent had the fundamental right, as a matter of constitutional law, to parent his or her child. Id.

Turning to the facts of this case, the circuit court here ascertained that Brenda was ready to take her GED exam and had no difficulty reading, writing, and understanding the English language. (60:3-5). The circuit court

informed Brenda that she should let the court know if she did not understand anything during the plea colloquy. (60:7). Brenda understood that she was waiving the right to have the Department prove, before a jury or the court, each of the elements of the continuing need of protection or services ground. (60:10-11). The circuit court then described the continuing need of protection or services ground in great detail and encouraged Brenda to interrupt if she had any questions. (60:12-17).

The circuit court ascertained that Brenda understood that, after the entry and acceptance of her plea, the court could either grant the petition or dismiss the petition at the disposition hearing. (60:19). The circuit court emphasized that the standard used in making this determination would be the best interests of the child and discussed the factors that the circuit court was required to consider. (60:20).

The circuit court also specified all the rights that Brenda would lose if her parental rights were terminated and ascertained that she understood those rights. (60:9-11).

In its plea colloquy with Brenda, the circuit court explained that a plea of no contest to a termination petition resulted in a finding of unfitness as follows:

> **THE COURT:** [I]f you make a no contest plea and I accept your plea…I have to make a finding of parental unfitness. Do you understand that? (60:18).
>
> **[BRENDA]:** Yes. (60:18).

Brenda subsequently confirmed she understood that she was admitting that she was an unfit parent and could lose her parental rights to the child at the disposition hearing. (60:28). The Department agrees with the circuit court that neither statutory law nor case law requires the circuit court to additionally state that a parent is losing their constitutional right to parent their child. (76:13). Therefore, Brenda has failed to make a prima facie showing that the plea colloquy was deficient in that respect.

CONCLUSION

The Department contends that the transcript clearly demonstrates that the circuit court's plea colloquy was sufficient. Therefore, Brenda has failed to make a prima facie showing of a violation of Wis. Stat. §48.422(7)(a) or other court-mandated duties. It is unnecessary for the circuit court to hold an evidentiary hearing when a parent fails to first present a prima facie showing. Therese S. at ¶4 n.2 (*See also* Brown at ¶40).

The Department respectfully requests that the decision of the Court of Appeals, the circuit court's denial of

Brenda's motion for post-disposition relief, and the order terminating her parental rights be affirmed.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 18 pages.

Dated this 2nd day of November, 2010.

_____

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CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with s. 809.19(2). This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that I did deposit a true and correct copy of the Petitioner-Respondent's Brief in the United States mail, by first-class mail, properly enclosed in a postpaid envelope bearing sender's name and address, and addressed to the following persons at their proper post office address as indicated.

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2010AP321 Cir. Ct. No. 2009TP38

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRENDA B.,

RESPONDENT-APPELLANT,

BRIAN K.,

RESPONDENT.

APPEAL from orders of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Brenda B. appeals orders terminating her parental rights to her son, Desmond F., and denying her postdisposition motion. She contends her motion presented a prima facie case she did not knowingly and intelligently enter her no contest plea to the grounds portion of the petition. Specifically, Brenda argues the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent. We conclude the court was not required to advise Brenda of the additional statutory sub-dispositions or of her constitutional right to parent. We therefore affirm.

BACKGROUND

¶2 Brown County filed a petition to terminate Brenda's parental rights alleging she failed to assume parental responsibility and Desmond was in continuing need of protection or services. Brenda entered a no contest plea to the continuing need ground and the County dismissed the other ground. The court ultimately concluded the plea was knowingly and intelligently made. After a contested dispositional hearing, the court terminated Brenda's parental rights to Desmond.

¶3 Brenda filed a postdisposition motion arguing the plea colloquy was deficient because the court inadequately informed her of the potential dispositions and failed to inform her she was waiving her constitutional right to parent. Further, the motion alleged Brenda was unaware of this information. The court denied Brenda's motion without conducting an evidentiary hearing.

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

DISCUSSION

¶4 Prior to accepting a plea of no contest to a termination petition, the circuit court is required to engage the parent in a personal colloquy in accordance with WIS. STAT. § 48.422(7). ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶¶24-25, 293 Wis. 2d 530, 716 N.W.2d 845. That statute provides in part:

> (7) 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 ....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. ...
>
> (br) Establish whether any person has coerced a birth parent ....
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

WIS. STAT. § 48.422(7) (emphasis added). Additionally, the parent must have knowledge of the constitutional rights given up by the plea. ***Jodie W.***, 293 Wis. 2d 530, ¶25 (citing ***State v. Bangert***, 131 Wis. 2d 246, 265-66, 389 N.W.2d 12 (1986)).

¶5 When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Under that analysis, the parent must make a prima facie showing that the circuit court violated its mandatory duties and

must allege the parent did not know or understand the information that should have been provided at the hearing. ***Id.*** If a prima facie showing is made, the burden then shifts to the county to demonstrate that the parent knowingly and intelligently waived the right to contest the allegations in the petition. ***Id.*** Whether Brenda has presented a prima facie case is a question of law we decide independently of the circuit court. *See* ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122.

¶6 We first address Brenda's argument that the court inadequately informed her of the potential dispositions set forth in WIS. STAT. § 48.427, which provides in part:

> (1) After receiving any evidence related to the disposition, the court shall enter one of the *dispositions* specified under subs. (2) to (4) .... [(Emphasis added.)]
>
> (1m) ....
>
> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:
>
> 1. A county department authorized to accept guardianship under s. 48.57(1)(e).
>
> 3. A child welfare agency licensed under s. 48.61(5) to accept guardianship.
>
> 4. The department.

> 5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.
>
> 6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.
>
> (am) Transfer guardianship and custody of the child to a county department authorized to accept guardianship under s. 48.57(1)(hm) for placement of the child for adoption by the child's foster parent or treatment foster parent, if the county department has agreed to accept guardianship and custody of the child and the foster parent or treatment foster parent has agreed to adopt the child.
>
> (b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.
>
> (c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.
>
> (3p) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub. (3m)(a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.
>
> (4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

WISCONSIN STAT. § 48.428, referenced at § 48.427(4), in turn, indicates:

> (1) A court may place a child in sustaining care if the court has terminated the parental rights of the parent or parents of the child or has appointed a guardian for the child under s. 48.831 and the court finds that the child is unlikely to be adopted or that adoption is not in the best interest of the child.
>
> (2)(a) Except as provided in par. (b), when a court places a child in sustaining care after an order under s. 48.427 (4), the court shall transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare

agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am) and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, this licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3).

(b) When a court places a child in sustaining care after an order under s. 48.427 (4) with a person who has been appointed as the guardian of the child under s. 48.977 (2), the court may transfer legal custody of the child to the county department, the department, in a county having a population of 500,000 or more, or a licensed child welfare agency, transfer guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), and place the child in the home of a licensed foster parent, licensed treatment foster parent, or kinship care relative with whom the child has resided for 6 months or longer. Pursuant to such a placement, that licensed foster parent, licensed treatment foster parent, or kinship care relative shall be a sustaining parent with the powers and duties specified in sub. (3). If the court transfers guardianship of the child to an agency listed in s. 48.427 (3m) (a) 1. to 4. or (am), the court shall terminate the guardianship under s. 48.977.

....

(6)(a) Except as provided in par. (b), the court may order or prohibit visitation by a birth parent of a child placed in sustaining care.

(b)1. Except as provided in subd. 2., the court may not grant visitation under par. (a) to a birth parent of a child who has been placed in sustaining care if the birth parent has been convicted under s. 940.01 of the first-degree intentional homicide, or under s. 940.05 of the 2nd-degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated.

1m. Except as provided in subd. 2., if a birth parent who is granted visitation rights with a child under par. (a) is convicted under s. 940.01 of the first-degree intentional homicide, or under s. 940.05 of the 2nd-degree intentional homicide, of the child's other birth parent, and the conviction has not been reversed, set aside or vacated, the court shall issue an order prohibiting the birth parent from having visitation with the child on petition of the child, the

> guardian or legal custodian of the child, or the district attorney or corporation counsel of the county in which the dispositional order was entered, or on the court's own motion, and on notice to the birth parent.
>
> 2. Subdivisions 1. and 1m. do not apply if the court determines by clear and convincing evidence that the visitation would be in the best interests of the child. The court shall consider the wishes of the child in making that determination.

¶7 Brenda argues it was insufficient to confirm her understanding of only the two primary dispositions set forth at WIS. STAT. §§ 48.427(2) and (3), providing that either the termination petition would be dismissed or her parental rights would be terminated. Rather, she asserts the court was required to confirm her understanding of "the full range of options" specified under subsecs. (2) through (4).[2] Additionally, if Brenda is correct, we conclude her argument would compel a court to provide further information. We are confident a reasonable layperson would have no understanding of "sustaining care" under subsec. (4). Thus, a court would also be required to confirm a parent's understanding of, at least, the portions of WIS. STAT. § 48.428 set forth above regarding the sustaining care provided for as a sub-disposition under § 48.427(4).

¶8 Brenda cites no case in support of her interpretation of WIS. STAT. §§ 48.422(7)(a) and 48.427. Nor does she develop a statutory interpretation argument, aside from an observation that § 48.422(7) refers to "the potential dispositions" and a bare assertion that "the plain language of [§] 48.422(7)(a) trumps" the County's interpretation that the sub-dispositions need not be addressed because they only apply after the court terminates the parent's rights.

[2] While Brenda refers to "the full range of options," she inexplicably mentions only WIS. STAT. § 48.427(3m), without acknowledging subsecs. (3p) or (4).

To the extent Brenda is arguing the statutes unambiguously require a court to confirm a parent's understanding of both the primary and sub-dispositions, we disagree.

¶9 In ***Therese S.***, 314 Wis. 2d 493, ¶¶14-17, we concluded that "at the very least" a circuit court must confirm a parent's understanding of the two primary dispositions under WIS. STAT. §§ 48.427(2) and (3). As Brenda aptly points out, however, because the circuit court there failed to address even the two primary dispositions, it was unnecessary to determine, and we did not determine, whether the additional sub-dispositions must also be addressed as a general rule. *See* ***Therese S.***, 314 Wis. 2d 493, ¶¶15, 15 n.7, 22 (indicating, "of relevance *here*," and referring only generally to "the potential dispositions specified under WIS. STAT. § 48.427") (emphasis added). We did, however, reject Therese's broader argument that circuit courts must inform parents of all potential outcomes and alternatives to termination, as required in voluntary termination cases. *See* ***T.M.F. v. Children's Serv. Soc'y***, 112 Wis. 2d 180, 196, 332 N.W.2d 293 (1983). We did so because of the significant difference between voluntary and involuntary terminations, namely, that parents are seeking to terminate their rights in the former and have the option to stop the proceedings altogether. *See* ***Therese S.***, 314 Wis. 2d 493, ¶17.

¶10 We further noted, "While WIS. STAT. § 48.427 lists several additional dispositions under subsecs. (3m)-(4), those options only apply if the court first terminates parental rights under subsec. (3)," ***id.***, ¶15 n.7, and observed that Therese's proposed rule would be "unduly burdensome." ***Id.***, ¶17. Those observations are equally relevant here.

¶11 Only the two primary dispositions relate to the effect of termination on the parent—the parent either retains or loses their child. The sub-dispositions, on the other hand, pertain only to the effect on the child, addressing who will have guardianship and custody in the event the parent's rights are terminated as a primary disposition. To the extent those sub-disposition issues bear on the parent's decision to plead no contest, they are adequately addressed under WIS. STAT. §§ 48.422(7)(b) and (7)(bm). Those paragraphs require the court to ascertain whether any promises have been made to the parent and whether a proposed adoptive parent has been identified.

¶12 Additionally, it would be not merely burdensome, but practically impossible, to convey a full understanding of the court's disposition options upon termination. As our lengthy recitation of the alternatives at the outset of our analysis is intended to demonstrate, the alternatives are many and complex.

¶13 Further, as in ***Therese S.***, 314 Wis. 2d 493, ¶11, we find it helpful to make a comparison with the criminal plea context. There, the defendant must be apprised of the maximum penalty he or she faces upon conviction, but not of every possible sentencing option available to the court. *See* ***id.***, ¶11 n.4 (comparing WIS. STAT. §§ 48.422(7) and 971.08(1), referring to "potential dispositions" and "potential punishment," respectively). In the termination of parental rights context, termination is the maximum "punishment." Thus, by analogy, the parents must understand they may lose their child as a result of their no contest plea, but need not have a complete understanding of every possible alternative available to the court should it determine termination is in the child's best interest.

¶14 We now address Brenda's argument that the circuit court failed to inform her she was waiving her constitutional right to parent. Brenda correctly

observes this issue was left unresolved in ***Therese S.***, 314 Wis. 2d 493, ¶21. She declines, however, to acknowledge the issue was recently resolved—although, not definitively—in a consolidated appeal, ***Dane County DHS v. James M.***, Nos. 2009AP2038, 2009AP2039, unpublished slip op. (WI App Mar. 18, 2010).[3] We know Brenda was aware of this case because she commences her argument by copying-and-pasting paras. 17-19 of that decision.

¶15 It appears the County also knew of the ***James M.*** decision. The County's entire argument consists of paras. 15-23 copy-and-pasted from that decision, save for the substitution of the relevant names and facts. Yet, the County omits citation to ***James M.***, representing the reasoning as its own.[4]

¶16 In any event, neither party adds anything to the discussion presented in ***James M.***, and we discern no reason to depart from its holding that parents need not be informed they are waiving their constitutional right to parent by pleading no contest to the grounds for termination. We therefore adopt the thorough reasoning set forth in that case as our own. *See* ***id.***, ¶¶15-24. A copy of the ***James M.*** decision is available on the Wisconsin courts website at http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=48077.

By the Court.—Orders affirmed.

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[3] A one-judge opinion may be cited for its persuasive value, but is not precedent. WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09).

[4] "A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it." WIS. STAT. RULE 809.23(3)(b) (Sup. Ct. Order No. 08-02, 2009 WI 2, eff. 7-1-09). Where, however, parties parrot significant portions of such a case, if permissible under the rule, we suggest they acknowledge it and provide citation and a copy of the decision. *See* WIS. STAT. RULE 809.23(3)(c) (Sup. Ct. Order, *supra*).

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

COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP2038
2009AP2039

Cir. Ct. No. 2008TP59

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2009AP2038

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES M.,

RESPONDENT-APPELLANT.

NO. 2009AP2039

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DIANE G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] James M. and Diane G. are the parents of Cheyenne M. and the parental rights of each were terminated. Both appeal, contending that their respective pleas to the ground for termination were not knowing and voluntary because the court did not inform them and they did not understand that the plea would result in the loss of their substantive due process right to parent their child. In addition, James contends that his plea was invalid because the court did not perform a mandatory duty under WIS. STAT. § 48.422(7)(bm) (2007-08), which provides that, before accepting a plea, the court in certain circumstances must request and review a report on payments made to the child's parents by the proposed adoptive parents. For the following reasons, we reject these arguments and affirm.[2]

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

[2] We hereby sua sponte consolidate the two appeals for purposes of disposition.

BACKGROUND

¶2 On June 12, 2008, the Dane County Department of Human Services filed a petition seeking to terminate the parental rights of James and Diane to Cheyenne, born May 31, 2004. The petition alleged two grounds: that Cheyenne was a child in need of protection and services (CHIPS) under WIS. STAT. § 48.415(2), and that each parent had failed to assume parental responsibility under § 48.415(6). On January 20, 2009, both parents appeared with counsel for pretrial motions. Each attorney informed the court that her client wished to enter a plea to the grounds for termination and obtain a date for the dispositional hearing in which each parent wished to participate. Counsel for Dane County advised the court that it wished to voluntarily dismiss the failure-to-assume ground and proceed only on the CHIPS ground. Both James' attorney and Diane's attorney said they had no objection.

¶3 The court then engaged in the following colloquy with James and Diane.

> THE COURT: All right. Then I started to explain to the parents that I'm going to go through the plea colloquy and if you could answer first, Ms. [G.], and Mr. [M.] second. Let me ask the parents then, and point out that the petition alleges in the first ground for parental rights, the second one now being dismissed, that Cheyenne [M.] was adjudged to be a child in need of protection and service on September 15, 2006, that she had been placed outside her parental home on March 17, 2006, and that she has continued in placement outside her parental home by Court order since September 15, 2006. To that allegation how do you plead?
>
> MS. [G.]: No contest, Your Honor.
>
> MR. [M.[: No contest.
>
> THE COURT: Do you understand that with a plea of no contest that you are not contesting the State's ability to

prove the facts stated in the petition at least with respect to Count 1?

MS. [G.]: Yes, Your Honor.

MR. [M.]: No contest.

THE COURT: But do you understand that that relieves the State from having to prove those allegations regarding the finding of CHIPS in the time period that Cheyenne has been out of the parental home?

MR. [M.]: Yes.

THE COURT: And by entering into this stipulation or plea, do you understand that you're waiving your right to have a jury decide this issue, the first phase which is the grounds phase?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: Is that something that you've had enough time to discuss with your attorney? We'll go with Ms. [G.] first.

MS. [G.]: Just since we got here today. I haven't really had time to think about it, it was like five minutes ago.

THE COURT: Well, I know that you've been discussing this with your attorneys for 40 minutes. Are you indicating that you need more time?

MS. [G.]: I'm not really sure. I told them I would do whatever they thought was right so I guess it's okay.

THE COURT: Ms. Fruth [counsel for Diane], would you like – Were you going to say something?

MS. FRUTH: Just that, Your Honor, in the last, I don't know how many weeks, we've kind of gone over the different issues in the case, the different conditions of return, the evidence and things like that. So while I'm respectfully not trying to disagree with her, I think these are issues that have sort of been in play for some time. And, as I said, I'm not trying to disagree with what Ms. [G.] is saying.

THE COURT: Ms. [G.], how old are you?

MS. [G.]: I'll be 50 in February.

THE COURT: Mr. [M.]?

MR. [M.]: I'll be 55 January 29th, this month.

THE COURT: What is your highest level of education or last grade completed?

MS. [G.]: 12, Your Honor.

MR. [M.]: 12.

THE COURT: Are you, either of you under any psychiatric treatment at this time?

MS. [G.]: No, Your Honor.

MR. [M.]: No.

THE COURT: Have you consumed any alcohol or, any alcohol or drugs in the last 24 hours?

MS. [G.]: No, Your Honor.

MR. [M.]: No, Your Honor.

THE COURT: How about medication?

MS. [G.]: No, Your Honor.

MR. [M.]: Just what my doctors prescribe me, high blood pressure medicine, antidepressants.

THE COURT: Ms. [G.]?

MS. [G.]: No, Your Honor.

THE COURT: Does that medication, Mr. [M.], affect your ability to understand what you're doing today?

MR. [M.]: No, it doesn't.

THE COURT: And you both read and write English; is that correct?

MR. [M.]: Yes.

MS. [G.]: Yes.

THE COURT: Okay. Let me ask Ms. [G.] to respond first.

MR. [M.]: I'm sorry, Your Honor.

THE COURT: That's okay, it's just for the court reporter's benefit in taking it down. And do you understand that the purpose of today's hearing was originally to hear arguments on pretrial motions?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes.

THE COURT: And I think I've asked you and maybe I haven't but I'll ask again then, have you, do you understand that the first phase, the grounds phase is a jury trial phase? Do you understand that?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

THE COURT: And do you understand that you're waiving that phase of the hearing today?

MS. [G.]: Yes, Judge.

MR. [M.]: I'm doing what my lawyer talked to me about.

THE COURT: Well, but do you agree with what your lawyer is recommending?

MR. [M.]: Yes, I do.

THE COURT: And you understand that the second phase that would be conducted in this case would be a phase that is, that the main emphasis on that phase is what would be in Cheyenne's best interests?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

THE COURT: Do you understand that ultimately if the Court were to determine that it would be in Cheyenne's best interests to have your parental rights terminated, that you would be losing certain rights you would have? You would lose the right to have visitation with your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And you would also lose the right to have any information about your child including where she was living, where she was going to school or information about her health?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: You would also be losing the right to make any decisions for your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And your child would be losing the right to inherit from you?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And conversely you would be losing the right to inherit from your child?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And you would have no further financial responsibility for your child, do you understand that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes.

THE COURT: And also you would be losing the right to have custody of the child, do you understand that?

MS. [G.]: Yes, sir.

MR. [M.]: Yes, Your Honor.

THE COURT: The next – Strike that. Ms. Guinn [counsel for Dane County], are there questions you would like to ask?

MS. GUINN: Just for the record, Your Honor, I would like to make sure that the parents understand that if their parental rights are terminated after the second phase of the

hearing, because they've pled no contest today if they lose at the second half, they will be found unfit. Just so they're aware of that. But before we get to that, just for the record, I believe that the Department and the guardian ad litem and the attorneys and the parents have been in communication with Cheyenne's foster parents and, at this point, the foster parents have indicated that they would like to continue contact between Cheyenne and her parents after the TPR, but I want it to be perfectly clear to the parents that should their parental rights be terminated, we can't guarantee that that's going to happen and that they won't be able to take that issue back into Court.

THE COURT: And is that something that you understand, Ms. [G.]?

MS. [G.]: Our lawyers already explained this, Judge.

THE COURT: And did you understand that as well, Mr. [M.]?

MR. [M.]: Yes, sir.

THE COURT: Ms. Doyle [guardian-ad-litem], is there anything you would like to ask?

MS. DOYLE: The only thing that I would just like to state is just to emphasize, and I'm sure the parents understand too because we've had a number of discussions because I have with their lawyers and I'm sure they have talked to their clients, by stipulating to these grounds, they are not doing that in exchange for this continued contact with Cheyenne. And I would like it if you would ask them this, that they understand that it is not an exchange, that they've made this decision to stipulate to grounds independently of whatever might occur with regard to communication in the future between Cheyenne and her foster parents and them.

THE COURT: Do you understand that, Ms. [G.]?

MS. [G.]: Yes, I do, Judge.

THE COURT: And do you agree with that?

MS. [G.]: Yes, Judge.

THE COURT: Mr. [M.]?

MS. DOYLE: Your Honor, may I just add, this is something that the foster parents have freely offered and I

think will continue. I just want it known for the record this wasn't offered and they said okay then well, I think the parents understand that. I just want it clear on the record that the foster parents, this is their decision and they can choose to do this but it is not premised upon the parents' willingness to stipulate to grounds.

MS. BOSBEN [counsel for James]: Your Honor, Mr. [M.] just wanted to know if the visits would continue between now and the disposition. My understanding is they would because his rights have not technically been terminated yet. If they were, they wouldn't necessarily be.

THE COURT: The answer to your second part of the question is right, they're not – their parental rights have not, are not terminated.

MS. BOSBEN: Right.

THE COURT: And I would defer to the social worker as to the continued visitation.

MS. GUINN: Yes, Your Honor.

THE COURT: They will continue?

MS. BLANCK [social worker]: Visitation would continue, yes.

MS. BOSBEN: And then, sorry, as to Ms. Doyle's question?

MR. [M.]: No, there is no agreement with us, the foster parents and us about if our parental rights have been terminated, right.

THE COURT: Well, in entering a stipulation and pleas at this time, you are, I've already talked about the fact that you're waiving the right to have a jury decide the issues and those issues are No. 1, the issue about whether or not Cheyenne had been adjudged to be a child in need of protection and services and had been placed outside the home for a period of 6 months or longer. So you understand you're not contesting that?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: Another issue that would be before the jury if this were to go to a jury is whether or not the Department made a reasonable effort to provide services ordered by the Court. Do you understand that?

MS. [G.]: Yes, Judge.

THE COURT: Mr. [M.]?

MR. [M.]: Yes, Your Honor.

THE COURT: All right. And the last issue that would be before the jury which wouldn't now if you waive the jury and enter your pleas or stipulation, is whether or not either of you have failed to meet conditions established, the conditions of return. Do you understand that's an issue that will now be waived at this point?

MS. [G.]: Yes, Judge.

MR. [M.]: Yes, Your Honor.

THE COURT: And, lastly, whether or not there would be a substantial likelihood that either of you will not meet the conditions of return within a 9-month period?

MS. [G.]: I understand, Judge.

MR. [M.]: I believe we can.

THE COURT: But you're waiving the right to make the State prove that?

MR. [M.]: Yes, Your Honor.

THE COURT: All right. Do you understand that?

MR. [M.]: Yes, Your Honor.

MS. GUINN: Just to clarify for the record, Your Honor, this is under the old TPR warnings so it would be 12 months instead of 9 months.

THE COURT: Okay. Thank you for the correction. And you understand that it's 12 months rather than 9?

MS. [G.]: Yes, Your Honor.

MR. [M.]: Yes, Your Honor.

> THE COURT: Ms. Fruth, do you believe you've had enough time to discuss these same topics with Ms. [G.]?
>
> MS. FRUTH: Yes, sir, I have.
>
> THE COURT: And Ms. Bosben, same question?
>
> MS. FRUTH [sic]: Yes, Your Honor.
>
> THE COURT: All right. Then I'm going to accept what is either labeled as a stipulation or pleas to the grounds phase and then we'll set this matter over for a dispositional hearing. Do you need to make any other findings, Ms. Guinn?
>
> MS. GUINN: Yes, Your Honor. I would request a finding that the pleas were knowingly and freely and voluntarily entered and I just need to find out for the record if the attorneys and their parties are going to stipulate that the petition forms a factual basis for the Court to make a finding as to the continuing CHIPS ground or whether or not I need to have the worker testify as to grounds. The Court can make that independent determination.
>
> THE COURT: Ms. Fruth?
>
> MS. FRUTH: One moment, Your Honor. Your Honor, we would so stipulate.
>
> THE COURT: Thank you. Ms. Bosben?
>
> MS. FRUTH [sic]: We'll also stipulate, Your Honor.
>
> THE COURT: I guess I was thinking it rather than stating it. I am finding that the pleas are entered knowingly and voluntarily and that there is then a factual basis in support of the pleas. And how much time do you think will be needed for dispositional phase?

¶4 The court then proceeded to schedule the dispositional hearing with the attorneys. At the dispositional hearing, both James and Diane appeared with counsel and both testified. At the close of the dispositional hearing the court determined that it was in Cheyenne's best interest to terminate the parental rights of both James and Diane, and it entered an order accordingly.

¶5 Post-disposition, James and Diane each filed a motion to withdraw the plea each entered. Both contended that their pleas were not knowingly and voluntarily made because they did not know that the acceptance of their pleas would result in a finding of parental unfitness and the loss of their substantive due process right to parent their child. In addition, James asserted his plea was invalid because the court failed to make the inquiries and request the report about proposed adoptive parents required by WIS. STAT. § 48.422(7)(bm).

¶6 The circuit court concluded that both James and Diane had established a prima facie case for plea withdrawal on the ground that they were uninformed that they would be found unfit parents upon entry of their pleas. The court determined that a circuit court is obligated to include this in its colloquy, that this was not done, and that each parent had alleged he/she did not know this. After an evidentiary hearing on this ground, the court determined that the County had established by clear and convincing evidence that James knew he would be found an unfit parent as a result of his plea. The court made the same finding with respect to Diane.

¶7 With respect to the parents' contention on their substantive due process rights, the court concluded they had not made a prima facie case. The court reasoned that the termination of parental rights was only a potential outcome of a finding of unfitness and a circuit court had no obligation to advise them of a potential loss of a constitutional right.

¶8 With respect to James' contention based on the court's failure to make the inquires and request the report required by WIS. STAT. § 48.422(7)(bm), the court concluded that James had not made a prima facie case because he did not allege that he did not know or understand this information.

¶9 Based on these rulings, the circuit court denied the motion of each party for withdrawal of his/her plea.

DISCUSSION

¶10 On appeal James and Diane each contend that the circuit court erred in concluding that the court was not obligated to inform each that the plea would result in the loss of the substantive due process right of each to parent Cheyenne. A correct ruling on this issue, they assert, leads to the conclusion that they did make a prima facie case that their pleas were not knowing and voluntary. James makes the additional argument that the court erred in its ruling with respect to WIS. STAT. § 48.422(7)(bm) because his knowledge and understanding is irrelevant to the obligation imposed on the court and the County in this subsection.

I. Knowing and Voluntary Plea—James and Diane

¶11 Prior to accepting a plea of no contest to a ground for termination of parental rights, the circuit court must undertake a personal colloquy with the parent in accordance with WIS. STAT. § 48.422(7). § 48.422(3); ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. Subsection (7) provides:

> (7) 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 and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

> (bm) Establish whether a proposed adoptive parent of the child has been identified....
>
> (br) Establish whether any person has coerced a birth parent or any alleged or presumed father of the child in violation of s. 48.63(3)(b)5. Upon a finding of coercion, the court shall dismiss the petition.
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

¶12 In addition, the court must ensure that the parent knows the constitutional rights that he or she is waiving by entering such a plea. ***Jodie W.***, 293 Wis. 2d 530, ¶25.

¶13 When parents allege that their no-contest plea was not knowing or voluntary, the principles and analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), apply. ***Jodie W.***, 293 Wis. 2d 530, ¶24 n.14. Under ***Bangert*** parents must make a prima facie showing by establishing that the court failed to inform them of their rights and alleging that they did not understand the rights that they were waiving. ***Id.***, ¶26. Once the parent makes this showing, the burden shifts to the petitioner to prove that the parent made his plea knowingly, voluntarily, and intelligently. ***Id.***

¶14 Whether a parent has established a prima facie case because of a deficiency in the colloquy presents a question of law, which this court reviews de novo. ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122. To the extent the interpretation of a statute is involved, that is also a question of law. ***Oneida County DSS v. Nicole W.***, 2007 WI 30, ¶9, 299 Wis. 2d 637, 728 N.W.2d 652.

¶15 James and Diane contend that they have a fundamental right to parent their child, a right protected by the substantive due process clause of the

United States Constitution, and they lose this right once they are found unfit. They assert that, because of this and because a finding of unfitness is required once the court accepts their pleas, the court was obligated to inform them before accepting their plea that, upon the finding of unfitness, they would lose their fundamental right to parent their child. They disagree with the circuit court's analysis that this loss does not occur until their parental rights are terminated and is therefore only a potential loss at the time they enter their pleas. They assert that, even though their parental rights cannot be terminated until after the dispositional hearing, they have lost their fundamental right to parent their child upon the acceptance of their plea.

¶16 An analysis of this issue requires an examination of the substantive and procedural components of the constitutional right to parent one's child and the manner in which the legislature has chosen to protect those rights by statute.

¶17 As James and Diane assert, a parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. ***Mrs. R. v. Mr. and Mrs. B.***, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981); ***L.K. v. B.B.***, 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983). Because termination of parental rights interferes with a fundamental liberty interest, the State must establish that a parent is unfit before terminating his or her parental rights. ***Mrs. R.***, 102 Wis. 2d at 136.[3]

[3] The fundamental liberty interest at stake also requires procedural protections in the proceeding to terminate parental rights. *See* ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶¶22-23, 255 Wis. 2d 170, 648 N.W.2d 402. The requirements of procedural due process are not at issue on this appeal.

¶18 WISCONSIN STAT. § 48.415 sets forth various grounds for termination of parental rights, and § 48.424(4) requires that the circuit court find the parent unfit upon finding that one of those grounds exists.[4] In the context of a plea, once the court accepts a no contest plea at the grounds stage, the parent must be found unfit. ***Therese S.***, 314 Wis. 2d 493, ¶9. In this first phase, often referred to as the "grounds phase," the "parent's rights are paramount ... the burden is on the government, and the parent enjoys a full complement of procedural rights." ***Sheboygan County DHHS v. Julie A.B.,*** 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402.

¶19 After a finding of unfitness, the proceeding moves to the second phase, the dispositional hearing, where the court determines whether termination of parental rights is in the child's best interests based on the factors prescribed in WIS. STAT. § 48.426. ***Id.***, ¶28. "The outcome of this hearing is not pre-determined, but the focus shifts to the interests of the child," because the prevailing factor considered by the court is the best interests of the child. ***Id.***; § 48.426(1)-(2). At the dispositional hearing the court may enter an order

[4] Although WIS. STAT. § 48.424(4) requires a finding of unfitness upon a finding that one of the statutory grounds exists, a finding that one of the grounds exists is not conclusive on the issue of whether the substantive constitutional standard for termination has been met. Because termination of parental rights interferes with the fundamental liberty interest of parenting one's child, the substantive grounds for termination must be narrowly tailored to serve the compelling governmental interest of protecting children from unfit parents. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. Even where there is no dispute that one of the statutory grounds exist, application of that statutory ground may violate the substantive due process right of a parent. *See, e.g.,* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶43, 271 Wis. 2d 51, 678 N.W.2d 831 (concluding that § 48.415(7), "Incestuous Parenthood," as applied to a victim of incest perpetrated by her father is not narrowly tailored to advance a compelling governmental interest and therefore violates her right to substantive due process.) Neither James nor Diane contends that the CHIPS ground, § 48.415(2), as applied to them, violates their right to substantive due process.

terminating parental rights, § 48.427(3), or it may dismiss the petition "if it finds that the evidence does not warrant the termination of parental rights." § 48.427(2).

¶20 Thus, while it may be true that, as a matter of constitutional law, once a parent has been found unfit, it would be permissible for a court to immediately terminate parental rights, Wisconsin statutory law does not permit that. There must be a dispositional hearing after which the court has the authority to dismiss the petition notwithstanding a finding of unfitness. Indeed, WIS. STAT. § 48.424(4) expressly provides that "[a] finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2)." Not until the court enters an order terminating parental rights, if that occurs, does the parent lose the right to parent his or her child. This is clear if we posit a situation in which there is a finding of unfitness but, at the dispositional phase, the court decides the evidence does not warrant termination of parental rights and dismisses the petition. There would be no question in that case that, after dismissal, the parent had the fundamental right, as a matter of constitutional law, to parent his or her child.

¶21 Turning to the facts in this case, the court here ascertained that James and Diane understood that they were waiving the right to have the County prove, before a jury, each of the elements of the CHIPS ground, which the court described. The court also ascertained that each understood that in the next phase the emphasis would be on the child's best interests, and the court could determine that it would be in Cheyenne's best interests to terminate the parental rights of one or both parents. The court then specified all the rights each would lose if his/her parental rights were terminated and ascertained that each understood those. There was additional discussion emphasizing that, while the foster parents were willing to allow them to have contact with Cheyenne after their parental rights were

terminated, they had no right to this and the foster parents could change their mind. The court ascertained they understood this.

¶22 This colloquy effectively ascertained that James and Diane each understood that, after the entry and acceptance of their plea, the only issue that would remain would be Cheyenne's best interests and that the court could decide that it was in her best interests to terminate the right of each to parent her.

¶23 In addition, a court is obligated to ascertain that a parent understands that acceptance of their plea will result in a finding of unfitness. ***Therese S.***, 314 Wis. 2d 493, ¶10. Although the circuit court here did not do this in its colloquy with James and Diane, the court found each understood this, and neither appeals on this ground.

¶24 Because Wisconsin statutory law does not permit a court to terminate parental rights upon a finding of unfitness without completing the dispositional phase, we see no rationale for requiring a court to inform a parent that a finding of unfitness results in the automatic loss of the constitutional right to parent. This is confusing information, given that a parent does not lose this right under Wisconsin statutory law until an order is entered terminating his or her parental rights. What is important for a parent to understand is that, with the acceptance of his or her plea, the parent no longer has the right to have the State prove unfitness, there will be a finding of unfitness upon acceptance of their plea, and the only issue that remains is the best interest of the child, which the court could decide requires a termination of parental rights. The colloquy here (apart from the absence of reference to the finding of unfitness) ascertained that James and Diane each understood this. Knowledge that, as a matter of constitutional law, a court *could* terminate parental rights upon the acceptance of a plea and a finding

of unfitness is not a meaningful addition to the knowledge that a Wisconsin parent should have in order to enter a knowing and voluntary plea, given that this is not permitted in Wisconsin.

¶25 Our conclusion is supported by the supreme court's analysis of a plea in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. There the circuit court ascertained that the parent understood the following: (1) by waiving the fact-finding hearing he was agreeing not to contest the specific allegations relating to each element of the CHIPS ground for termination; (2) if he did contest the allegations, the county would have to prove the facts with clear and convincing evidence; and (3) he still had the right to contest the termination of his parental rights at the dispositional hearing. ***Id.***, ¶¶46-48 The circuit court also established that no promises or threats were made to elicit this waiver. ***Id.***, ¶48. The supreme court concluded that this colloquy was sufficient to show that the parent "understood the nature of the acts alleged in the petition and the potential disposition and that he voluntarily, and with understanding, waived his right to contest the fact-finding hearing." ***Id.***, ¶49.[5] There is no suggestion that the colloquy was deficient because the court did not explain and make sure the parent understood that, as a result of the plea, he would lose his substantive due process right to parent his child.

[5] ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, was decided before we held in ***Oneida DSS v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122, that, in order for a no contest plea at the "ground stage" to be knowingly entered, parents must understand that acceptance of their plea will result in a finding of unfitness.

II. Failure to Comply with WIS. STAT. § 48.422(7)(bm)—James

¶26 WISCONSIN STAT. § 48.422(7)(bm) provides in full:

> (7) Before accepting an admission of the alleged facts in a petition, the court shall:
>
> ....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. If a proposed adoptive parent of the child has been identified and the proposed adoptive parent is not a relative of the child, the court shall order the petitioner to submit a report to the court containing the information specified in s. 48.913(7). The court shall review the report to determine whether any payments or agreement to make payments set forth in the report are coercive to the birth parent of the child or to an alleged [or] presumed father of the child or are impermissible under s. 48.913(4).[6] [Footnote added.] Making any payment to or on behalf of the birth parent of the child, an alleged or presumed father of the child or the child conditional in any part upon transfer or surrender of the child or the termination of parental rights or the finalization of the adoption creates a rebuttable presumption of coercion. Upon a finding of coercion, the court shall dismiss the petition or amend the agreement to delete any coercive conditions, if the parties agree to the amendment. Upon a finding that payments which are impermissible under s. 48.913 (4) have been made, the court may dismiss the petition and may refer the matter to the district attorney for prosecution under s. 948.24(1). This paragraph does not apply if the petition was filed with a petition for adoptive placement under s. 48.837 (2).

¶27 The required contents of the report are:

> Report to the court; contents required. The report required under sub. (6) shall include a list of all transfers of anything

[6] WISCONSIN STAT. § 48.913(4) provides: "Other payments prohibited. The proposed adoptive parents of a child or a person acting on behalf of the proposed adoptive parents may not make any payments to or on behalf of a birth parent of the child, an alleged or presumed father of the child or the child except as provided in subs. (1) and (2)."

> of value made or agreed to be made by the proposed adoptive parents or by a person acting on their behalf to a birth parent of the child, an alleged or presumed father of the child or the child, on behalf of a birth parent of the child, an alleged or presumed father of the child or the child, or to any other person in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents or the adoption of the child by the proposed adoptive parents. The report shall be itemized and shall show the goods or services for which payment was made or agreed to be made. The report shall include the dates of each payment, the names and addresses of each attorney, doctor, hospital, agency or other person or organization receiving any payment from the proposed adoptive parents or a person acting on behalf of the proposed adoptive parents in connection with the pregnancy, the birth of the child, the placement of the child with the proposed adoptive parents or the adoption of the child by the proposed adoptive parents.

WIS. STAT. § 48.913(7).

¶28 James asserts his plea was invalid because, before accepting his plea, the court did not establish whether there was a proposed adoptive parent and did not order the County to submit the report required by WIS. STAT. § 48.422(7)(bm). He contends the circuit court erred in dismissing his motion on this ground under a *Bangert* analysis because this provision is not directed to informing a parent of his or her rights. Rather, he asserts, this subsection imposes an obligation on the court, before accepting a plea, to order the County to submit the prescribed report if a proposed adoptive parent has been identified who is not a relative of the child, and the court's failure to do this entitles him to withdraw his plea.

¶29 The County does not rely on the circuit court's analysis, implicitly conceding that the *Bangert* framework is not applicable. Instead, the County responds that James was presumably aware before the plea hearing of the foster mother's willingness to adopt Cheyenne, was informed of it at the dispositional hearing, and at no time asked that the report be provided. The County contends

that James does not claim he was prejudiced and therefore he is not entitled to withdraw his plea. The County relies on ***Steven H.***, 233 Wis. 2d 344. There, the supreme court concluded that the circuit court erred in failing to hear testimony in support of the allegations in the petition after the parent stated he was not contesting them, as required by WIS. STAT. § 48.422(3). However, the supreme court held the parent was not entitled to relief on this ground because he was not prejudiced. ***Id.***, ¶¶56-60.

¶30 James replies that the record does not show that he was aware before he entered the plea of the foster mother's willingness to adopt Cheyenne and that "to date" the County has not submitted the required report and the circuit court has not made the determination required by WIS. STAT. § 48.422(7)(bm). Therefore, he contends, this court cannot conclude James was not prejudiced by the error.

¶31 We agree with James that the record does not show compliance with WIS. STAT. § 48.422(7)(bm), but we are not persuaded that he is entitled to withdraw his plea as a result. James' argument overlooks the significant fact that the report required by § 48.422(7)(bm) is to disclose transfers of anything of value made or agreed to be made by or on behalf of the proposed adoptive parent *to James*. *See* § 48.913(7). The evident purpose is to ensure that James is not entering a plea because of such transfers or promises. The court is also required to "[e]stablish whether any promises or threats were made to elicit an admission," § 48.422(7)(b), which can be accomplished by addressing the parent entering the plea. Subsection (7)(bm) provides additional protection from coercion that might arise from the proposed adoptive parent giving or promising something of value to the birth parent, which the birth parent might not disclose to the court.

¶32 If James did not know there was a proposed adoptive parent before he entered his plea, then it is difficult to see how he could have received or been promised anything of value from or on behalf of the proposed adoptive parent. If he did know there was a proposed adoptive parent when he entered his plea, then he must know whether or not he received or was promised something of value from or on behalf of that individual. However, he does not state whether he did or not. His position, as we understand it, is that, regardless of whether he received or was promised anything, he is entitled to withdraw his plea because the court did not have this information at the time he entered his plea. But he does not present a developed argument explaining why this result is required either by the statute or case law or is necessary to protect his rights or interests. In the absence of a more developed argument, we conclude James is not entitled to withdraw his plea solely because the court, before accepting his plea, did not comply with WIS. STAT. § 48.422(7)(bm).

¶33 We emphasize that our conclusion does not alter the fact that circuit courts and petitioners are obligated to comply with WIS. STAT. § 48.422(7)(bm) before the court accepts a plea.

CONCLUSION

¶34 We affirm the circuit court's denial of James' and Diane's motions for post-disposition relief and we affirm the order terminating their parental rights.

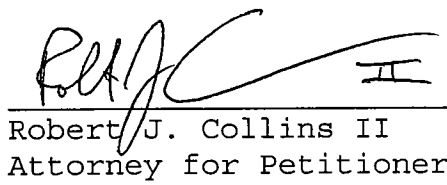
By the Court.—Orders affirmed.

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

CERTIFICATION

I hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of November, 2010.



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STATE OF WISCONSIN

I N S U P R E M E C O U R T

In re the Matter of the Termination of Parental Rights to Desmond F.
A Person under the age of 18:

BROWN COUNTY DEPARTMENT
OF HUMAN SERVICES,

Petitioner-Respondent,

v.

Case No. 2010AP00321

BRENDA B.

Respondent-Appellant-Petitioner,

BRIAN K.,

Respondent.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS DISTRICT THREE FROM AN ORDER INVOLUNTARILY TERMINATING PARENTAL RIGHTS AND AN ORDER DENYING MOTION TO WITHDRAW PLEA TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH 7, THE HONORABLE TIMOTHY A. HINKFUSS PRESIDING

RESPONDENT-APPELLANT-PETITIONER'S REPLY BRIEF

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STATE OF WISCONSIN

I N S U P R E M E C O U R T

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RESPONDENT-APPELLANT-PETITIONER'S REPLY BRIEF

Brenda submits the following as her reply brief in the above matter.

ARGUMENT

A COLLOQUY IN A NO CONTEST ADMISSION TO GROUNDS FOR TERMINATION OF PARENTAL RIGHTS SHOULD INCLUDE AN EXPLANATION OF ALL DISPOSITIONAL OPTIONS SET FORTH IN

SEC. 48.427 AND A WAIVER OF THE CONSTITUTIONAL RIGHT TO PARENT A CHILD.

A. This court should consider modifying the Court of Appeals decision in *Yasmine B.* to include additional requirements that are mandated by statute and this court's prior decisions.

Brown County's argument is that the Court of Appeals rationale for deciding In re Yasmine B., 2008 Wis. App. 159, 314 Wis.2d 493, 762 N.W.2d 122 was correct and that Judge Hinkfuss complied with the requirements of that decision. Brown County's brief pages 5-15. Brown County did not address the policy implications of a more rigorous plea colloquy in TPR cases that the Court of Appeals did in paragraphs 8-16 of its decision. It also did not address the issue of whether the portions of In re Yasmine B. which were not necessary to the facts of that case should be sustained by this court.

Neither Brenda nor Brown County are privy as to why this court granted Brenda's petition for review. However, Brenda believes that if this court was satisfied with the guidance In re Yasmine B. provided to trial courts in accepting admission to grounds for

TPR, it would not have granted Brenda's petition for review. Judge Hinkfuss clearly was aware of In re Yasmine B. when he accepted Brenda's admission (60: 11-22) and when he denied Brenda's motion to withdraw it (76: 8-14). The Court of Appeals district which authored In Re Yasmine B. was the same district that affirmed the trial court in this case. Oneida County, which was unsuccessful in In re Yasmine B., did not petition this court to review the decision.

Theresa S., who obtained a remand for an evidentiary hearing to withdraw her admission, did not have standing to petition this court for review. She was the prevailing party in the Court of Appeals. In re Yasmine B. was not an "adverse decision" to her simply because a less expansive rationale for reversal than she argued for was not accepted by the Yasmine B. court. See Rule 809.62(1g) which provides as follows:

> **809.62 Rule (Petition for review). (1g)**
>
> DEFINITIONS. In this section:
>
> (a) "Adverse decision" means a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review.

(b) "Adverse decision" includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief.

(c) "Adverse decision" does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief.

Controlling case law as to the required colloquy for accepting admissions to grounds for TPR was changed by Yasmine B. Prior to Yasmine B., the leading case was Waukesha County v. Steven H., 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. In Steven H., this court sustained a trial court's acceptance of a no contest admission from a TPR respondent. At the plea hearing, Steven H. was placed under oath and stated he was not contesting the allegations in the TPR petition which alleged continuing CHIPS pursuant to Sec. 48.415(2), Wis. Stats. Steven H., par 46. Steven H. was also advised of his statutory procedural rights in the proceeding. Steven H., par 47-49. This court agreed with the trial court's findings that the admission was knowing, intelligent and voluntary. Steven H., par 51. This court also upheld the no contest admission in spite of noncompliance with the requirements of Sec.

48.422(3) for testimony in support the admission because the record established that Steven H. was not prejudiced because of other issues in the case and Steven H.'s testimony at a post-dispositional hearing. Steven H., par 59-60. The Steven H. court did not address the issue of the extent potential dispositions or waiver of the constitutional right to parent needed to be discussed in a colloquy which have been raised in this case.

In Kenosha County v. Jodie W., 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, Jodie W. entered a no contest admission to grounds for TPR based on continuing CHIPS using a standardized plea form designed for admissions to both grounds and disposition in TPR cases to which she made many modifications. Jodie W., par 29-34. This court noted a discrepancy between a written denial of parental unfitness on the plea form and Jodie W.'s statements in the colloquy and held that the admission was not knowing, intelligent and voluntary. Jodie W., par 38. This court also

stated as follows regarding the requirements for a valid colloquy:

> 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.

Jodie W., par 25 (emphasis added).

In Yasmine B., which was decided after Jodie W., Theresa S., the mother, alleged the colloquy for her no contest admission was deficient because it failed to include that (1) she would be found unfit to parent as a result of the plea, (2) of the potential dispositions or that the dispositional decision would be governed by the child's best interests, and (3) she was waiving her constitutionally protected right to parent her child. Yasmine B., par 4. The Court of Appeals agreed the colloquy was deficient for failing to advise Theresa S. of both (1) and (2). Yasmine B., par. 10, 13-16. However, the Court of Appeals did not accept Theresa S.'s argument that she was entitled to be informed of *all* potential outcomes or her loss of the constitutional right to parent. Yasmine B., par. 17 and

21. As to the latter issue, the Court of Appeals disposed of the argument by stating:

> Therese's position on this matter was inconsistent from her postdisposition motion, to her initial appellate brief, to her reply brief. Ultimately, her focus settled on the parental unfitness finding and the best interests of the child standard. As we have already disposed of those issues, we need not address this argument further.

Yasmine B., par. 21.

Interestingly enough, the Yasmine B. court did not discuss the language in Jodie W. cited on pages 5 and 6 of this brief regarding the need for an explicit waiver of constitutional rights (other than citing it in passing in par. 5) and apply it to the constitutional right to parent. It is also clear from the procedural context of the case that the Yasmine B. court's opinions on the colloquy requirements for admissions to grounds for TPR were unnecessary for its ultimate disposition of that case. The challenged colloquy was already deficient because of other shortcomings.

Brown County repeated its argument that the Yasmine B. pronouncements regarding colloquy requirements were not mere *dicta*. Brown County brief,

page 8, citing State v. Sanders, 2007 WI App 174, par 25, 304 Wis.2d. 159, 737 N.W.2d 44. This court, unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court. The purpose of the supreme court is to oversee and implement the statewide development of the law. Cook v. Cook, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997). This court can and should overrule Yasmine B. to the extent that decision did not mandate a colloquy with parents that requires explanation of all the dispositional options and the waiver of the constitutional right to parent.

B. Requiring a more extensive colloquy in TPR cases where a parent seeks to not contest grounds for TPR would not be unduly burdensome.

The options available at disposition provided for in Sec. 48.427, Wis, Stats. which Brenda argues should have been included in her plea colloquy included:

> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.

(3) The court may enter an order terminating the parental rights of one or both parents.

(3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall do one of the following:

(a) Transfer guardianship and custody of the child pending adoptive placement to:

1. A county department authorized to accept guardianship under s. 48.57 (1) (e) or (hm).

3. A child welfare agency licensed under s. 48.61 (5) to accept guardianship.

4. The department.

5. A relative with whom the child resides, if the relative has filed a petition to adopt the child or if the relative is a kinship care relative.

6. An individual who has been appointed guardian of the child by a court of a foreign jurisdiction.

(b) Transfer guardianship of the child to one of the agencies specified under par. (a) 1. to 4. and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights or to a relative.

(c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian.

(3p) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has been appointed under s. 48.977, the court may enter one of the orders specified in sub.

(3m) (a) or (b). If the court enters an order under this subsection, the court shall terminate the guardianship under s. 48.977.

(4) If the rights of one or both parents are terminated under sub. (3), the court may enter an order placing the child in sustaining care under s. 48.428.

The Court of Appeals contended Sec. 48.428, Wis. Stats. was an additional disposition (App. 105-107 of brief-in-chief). However, it is Brenda's position that reference in a colloquy to "sustaining care" as set forth above in (4) as a disposition would be sufficient. Sec. 48.428 sets forth a variety of procedures governing sustaining care that go well beyond what Brenda believes constitutes a "disposition."

Voluntary termination of parental rights colloquies require more detailed explanations of dispositions than the Court of Appeals held was necessary in this case. Yasmine B., par. 17 citing T.M.F. v. Children's Service Society, 112 Wis.2d 180, 332 N.W.2d 293 (1983) and Sec. 48.41, Wis. Stats. However, Brenda would note that, unlike the procedures

used here, other cases such as Jodie W. included use of plea questionnaires patterned from such cases. It would not be particularly difficult to modify existing questionnaires from voluntary TPR cases and use them in TPR cases where parents choose not to contest grounds for TPR but contest disposition.

Circuit court forms JC-1636 and JC-1637 cited by Brenda in her brief-in chief may need to be amended. However, considering the awesome power wielded by courts in TPR cases, it is appropriate to require courts that accept admissions to grounds for TPR conduct a colloquy similar in length to those in a voluntary TPR and using procedures similar to those in criminal cases.

Similarly, an admission to grounds for TPR is waiver of a right protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. Mrs. R. v. Mr. and Mrs. B., 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981); L.K. v. B.B., 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983).

Including a couple of sentences to the colloquy and plea form regarding constitutional rights to insure a parent is aware of the loss of her fundamental right to parent her child upon the acceptance of her plea would not unduly burden the courts. A decision in Brenda's favor by this court will bolster public confidence in the administration of justice by providing procedural rules that insure to a greater degree than existing precedent that parties who admit to grounds for TPR do so with a fuller understanding of the implications of their pleas.

CONCLUSION

For the reasons stated above and in her brief-in-chief, Brenda asks this court to reverse the decision of the Court of Appeals, the order terminating Brenda's parental rights to Desmond and the order denying her motion to withdraw her plea to grounds for TPR and remand this matter to the trial court for an evidentiary hearing on Brenda's motion to withdraw her no contest plea to grounds for TPR.

Dated this 17th day of November, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has 14 pages.

Dated this 13th day of November, 2010.

LEN KACHINSKY

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of November, 2010.

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October 6, 2010

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Acting Clerk of Supreme Court

10AP321

In re: The interest of Desmond K. Farris
Brown County Case Number: 09 TP 38
L. C. #2009TP38

Mr. Voelker:

I am the Guardian ad Litem for Desmond K. Farris in the above-captioned matter.

As Guardian ad Litem, I am choosing not to participate in drafting a responsive brief pursuant to Wis. Stats. 809.19(8)(m) and Wis. Stats. 809.19(3)(a)(3) . I believe my ward's interests are adequately represented in the respondent's brief.

Thank you.

Peter R. Borchardt

PRB/aas

Enc

cc: Honorable Timothy A. Hinkfuss
Ms. Lisa Wilson
Attorney Jeffrey J. Cano
Attorney Robert J. Collins, II
Attorney Leonard D. Kachinsky