

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 6, 2017

Diane M. Fremgen
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. 2017AP158

Cir. Ct. No. 2014TP114

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO D.N., A PERSON UNDER THE
AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

J. M. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DAVID C. SWANSON and LAURA GRAMLING-PEREZ, Judges. *Affirmed.*

¶1 KESSLER, J.¹ J.M.W. appeals the order terminating his parental rights to his child, D.N. J.M.W. also appeals the order denying his postdisposition motion. We affirm.²

BACKGROUND

¶2 On May 9, 2014, the State filed a petition to terminate J.M.W.’s parental rights to D.N. on the grounds of failure to assume parental responsibility. After a series of pre-trial proceedings, J.M.W. stipulated to grounds for termination, thus waiving his right to a jury trial. Prior to accepting his stipulation, the circuit court conducted a plea colloquy with J.M.W. that addressed: (1) his understanding of the grounds alleged in the petition; (2) the sufficiency of his consultations with his attorney; (3) his understanding of the trial rights waived; (4) his right to contest the TPR in a separate trial on the dispositional phase of the termination proceedings; (5) the automatic finding of unfitness that resulted from his stipulation to the existence of grounds; and (6) the absence of any threats or inducements in exchange for his stipulation to the grounds. The circuit court found that J.M.W.’s stipulation to the alleged TPR grounds and trial waiver was knowing, voluntary and intelligent.

¶3 The jury trial for the mother remained on the calendar for the following week. The parties agreed to put off the “prove up” against J.M.W. until after the mother’s jury trial. The consensus was that if the State lost the jury trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The Honorable David C. Swanson entered the order terminating J.M.W.’s parental rights. The Honorable Laura Gramling-Perez entered the order denying J.M.W.’s postdisposition motion.

on the mother's grounds, the issue of the father's grounds would be moot because the State would not proceed to terminate one parent's rights without the possibility of terminating both. After the jury found grounds for terminating the mother's parental rights on December 18, 2014, the court scheduled the dispositional hearing without addressing the "prove up" of the grounds as to J.M.W.

¶4 Following the mother's trial, the circuit court proceeded to disposition over the course of multiple hearings.³ In the middle of disposition, the State informed the circuit court that it still needed to address the "prove up" against J.M.W. J.M.W.'s counsel asked for a moment to confer with his client, then told the circuit court that they were ready to proceed with the prove up. The State acknowledged that confusion over the proceedings ensued following a judicial change and recognized that the proceedings were taking place out of order, but asked the court to "find there is clear and convincing evidence that [J.M.W.] failed to assume parental responsibility for [D.N.]." Counsel for J.M.W. did not object. The court found that the State proved that J.M.W. failed to assume parental responsibility and found J.M.W. unfit. Disposition continued, and the circuit court ultimately found termination to be in D.N.'s best interest.

¶5 J.M.W. filed a Notice of Intent to Pursue Post Disposition Relief, a Notice of Appeal, and a remand motion. The matter was remanded to the circuit court to address the postdisposition motion after which, J.M.W. filed a motion to withdraw his stipulation. He alleged three errors: (1) he was not advised of the potential dispositions available in a TPR case, nor was he informed the focus of the disposition hearing would be on the best interests of the child; (2) the court did

³ Several hearings were held, in part, because the judge presiding over the matter was appointed to this court and another judge took over the case.

not determine whether a factual basis existed for his stipulation; and (3) the court did not ascertain whether an adoptive resource had been identified for the child and did not order the Division of Milwaukee Child Protective Services to provide a report containing the information specified in WIS. STAT. § 48.913(7). Following a hearing, the circuit court denied J.M.W.’s motion to withdraw his stipulation. This appeal follows.

DISCUSSION

¶6 On appeal, J.M.W. argues that the “[c]ircuit court did not have competency to proceed to disposition without first making a specific ‘finding’ under § 48.424 that J.M.W. was ‘unfit,’ determining that a factual basis existed for J.M.W.’s admission, establishing that an adoptive resource had been identified as required by WIS. STAT. § 48.422(7)(bm) and ordering the State to provide a report containing the information specified in WIS. STAT. § 48.913(7).” In essence, J.M.W. contends that because the termination proceedings occurred out of order, the court failed to comply with the statutory requisites of WIS. STAT. § 48.422(7) and lacked the competency to conduct a disposition hearing. Accordingly, he argues, the order terminating his parental rights should be vacated. Because we conclude that J.M.W. waived his right to raise a competency argument, we disagree.

¶7 “Whether a particular failure to comply with a statutory mandate implicates the circuit court’s competency depends upon an evaluation of the effect of noncompliance on the court’s power to proceed in the particular case before the court.” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶10, 273 Wis. 2d 76, 681 N.W.2d 190. “Many errors in statutory procedure have no effect on the circuit court’s competency. Only when the failure to abide by a statutory mandate

is ‘central to the statutory scheme’ of which it is a part will the circuit court’s competency to proceed be implicated.” *Id.* (citation omitted). A party’s ability to raise a competency challenge can be waived if the party fails to raise the challenge in the circuit court. *See id.*, ¶27.

¶8 Here, J.M.W. did not raise the issue of the circuit court’s competency at the circuit court level during the pendency of the TPR proceedings or at the remand hearing. Indeed, when the State recognized during disposition that a prove up for J.M.W. had yet to be done, the circuit court asked J.M.W.’s counsel whether he objected to conducting the prove up at that point. Counsel did not object. J.M.W.’s postdisposition motion requesting withdrawal of his stipulation alleges that the circuit court failed to: advise him of potential dispositions; advise him that the purpose of disposition was to determine the best interest of his child; determine whether a factual basis existed for his stipulation; and ascertain whether an adoptive resource had been identified for the child. However, the motion did not allege that the circuit court’s alleged errors resulted in a lack of competency to proceed to disposition. Moreover, J.M.W.’s motion failed to allege how he was prejudiced by the procedural irregularities. Accordingly, we conclude that J.M.W. waived his right to challenge the circuit court’s competency.

By the Court—Orders affirmed.

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

