

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT X
Case No. XXXXAPXXXX-NM

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

BAY COUNTY DEPARTMENT OF
HUMAN SERVICES,

Petitioner-Respondent,

v.

JOHN S.,

Respondent-Appellant.

On Appeal from the Final Order Terminating Parental
Rights Entered in the Circuit Court for Bay County,
the Honorable Grover Cleveland, Presiding

NO-MERIT REPORT PURSUANT TO
WIS. STAT. RULE 809.107(5m)

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

ISSUES PRESENTED

1. Whether John S.'s plea of no contest to the alleged ground of abandonment in the petition for termination of parental rights, Wis. Stat. § 48.415(1)(a)2., was entered knowingly, intentionally and voluntarily?
2. Whether the trial court misused its discretion at the dispositional hearing in ordering the termination of parental rights?

STATEMENT OF THE CASE

Respondent-Appellant John S. appeals pursuant to Wis. Stat. Rules 809.107(5m) and 809.32, and *Brown County v. Edward C.T.*, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998), from the final order terminating his parental rights to Jackie S. under, entered in the circuit court for Bay County, the Honorable Grover Cleveland presiding. (40).

The case was commenced on October 5, 2009, with the filing of a petition seeking to terminate John's parental rights to his daughter, Jackie, on the grounds that John had abandoned the child for three months or longer and that John had failed to assume parental responsibility for the child. (3). John initially requested a substitution of judge (7; 8; 9), and subsequently entered a denial to the petition (45:3), with the court finding good cause for a continuance of the fact-finding hearing. (45:5-11).

On the scheduled hearing date, John's counsel informed the court that a settlement agreement had been reached in which John would stipulate to the alleged ground of abandonment and the petitioner, the Bay County

Department of Human Services (“the County”), would move to dismiss the alleged ground of failure to assume parental responsibility. (47:4). The court then engaged in a personal colloquy with John; John answered questions by the attorneys and ultimately entered a plea of no contest. (47:5-15). The court accepted John’s plea, (47:15), and found good cause to continue the dispositional hearing until April 8, 2010. (47:20-22).

At the scheduled dispositional hearing, the trial court received testimony and determined that termination of parental rights was in the best interests of the child, resulting in the entry of a written final order of termination. (39; 40; 48).

This appeal is taken from the final order terminating parental rights. (40).

ARGUMENT

- I. John’s Plea of No Contest to the Alleged Ground of Abandonment in the Petition for Termination of Parental Rights, Wis. Stat. § 48.415(1)(A)2., was Entered Knowingly, Intelligently and Voluntarily.

The procedure to be followed in accepting a plea of no contest to a petition for the termination of parental rights is set forth in Wis. Stat. § 48.422,¹ which provides in relevant part as follows:

¹ All statutory references are to the 2007-2008 edition unless otherwise indicated.

48.422 Hearing on the petition.

* * *

(3) 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).

* * *

(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.

(c) 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 agreements to make payments set forth in the report are coercive to the birth parent of the child or to an alleged to presumed father of the child or are impermissible under s. 48.913(4). * * *

The ground of abandonment for the involuntary termination of parental rights under Wis. Stat. § 48.415(1)(a)2., in particular, consists of two essential

elements: (1) that the child had been placed outside the parent's home by a court order containing the statutory termination of parental rights notice, and (2) that the parent had failed to visit or communicate with the child for a period of 3 months or longer. *Wis. J. I.-Children: No. 313* (2009) (“Involuntary Termination of Parental Rights: Abandonment: Placement and Failure to Communicate for Three Months [Wis. Stat. § 48.415(1)(a)2.]”).

In this case, counsel believes that the trial court record as a whole is sufficient to justify the acceptance of John's plea of no contest to the alleged ground of abandonment under § 48.415(1)(a)2.

First, the trial court engaged in a personal colloquy with John and received sworn testimony from John at the hearing on the petition. (47:5-15).

John stated that he had read the petition and understood the alleged ground of abandonment, and John admitted that he had not communicated with Jackie for a period of approximately one year. (47:5-7, 12). John also acknowledged that he understood the potential dispositions and his rights at a fact-finding hearing. (47:7-12). Finally, John asserted that he was acting voluntarily and that his decision was not influenced by any payments. (47:5, 10-13).

The trial court arguably erred by accepting John's plea without establishing whether a proposed adoptive parent had been identified and without ordering the County to submit a report containing the information specified in Wis. Stat. § 48.913(7). But counsel does not believe that this omission is a fatal defect because John and the proposed adoptive parent both gave testimony at the dispositional hearing and no claim was raised that any improper payments had been made or agreed to be made. (48:4-24, 91-94). *Cf. Evelyn C.R. v.*

Tykila S., 2001 WI 110, ¶¶ 3, 32-36, 246 Wis. 2d 1, 7, 21-22, 629 N.W.2d 768 (error committed at the fact-finding hearing was harmless by virtue of evidence presented at the dispositional hearing).

For these reasons, undersigned counsel believes that the trial court record as a whole was sufficient to accept John's plea of no contest.

II. The Trial Court Did Not Misuse its Discretion at the Dispositional Hearing.

At the dispositional hearing, the trial court shall consider such factors as the likelihood of the child's adoption, the age and health of the child, the nature of the child's relationships with its natural parents or other family members, the wishes of the child and the duration of the child's separation from its natural parents. Wis. Stat. § 48.426(3). The prevailing factor is the best interests of the child. § 48.426(2).

The determination whether to terminate parental rights is a matter for the trial court's discretion. *Jerry M. v. Dennie L.M.*, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). On appeal, the court's decision will not be overturned unless there has been an erroneous exercise of discretion. *Id.*

In this case, John was serving a three-year prison sentence at the time of the dispositional hearing and he requested that Jackie be placed with his mother, who is a licensed foster parent in the State of Illinois. (48:41-42, 73-74, 91-94).

However, the trial court was informed that Jackie had a serious health issue which required continuous monitoring, and that the proposed adoptive parent was an experienced

professional nurse who had acted as a successful temporary foster parent to Jackie for more than two years. (48:4-13). The court further found that John's mother's testimony exhibited a number of credibility problems. (48:107-08).

As a result, Judge Cleveland found that the termination of parental rights was in the child's best interests. (48:110-12).

Under these circumstances, undersigned counsel believes that the trial court's final order terminating John's parental rights to Jackie was rationally based upon the facts of record and the applicable legal standards. Therefore, the trial court did not misuse its discretion at the dispositional hearing.

CONCLUSION

For the reasons stated above, undersigned counsel believes that further appellate proceedings would be frivolous and without arguable merit within the meaning of Wis. Stat. Rules 809.107(5m) and 809.32, and counsel asks this court to enter an order relieving him from further professional responsibility in this case.

Dated this 23rd day of July, 2010.

Respectfully submitted,

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATION IN COMPLIANCE
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 23rd day of July, 2010.

Signed:

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 23rd day of July, 2010.

Signed:

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant