

OFFICE OF THE CLERK

JAN 16 2018



Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215

P.O. Box 1688

MADISON, WI 53701-1688

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Web Site: www.wicourts.gov

January 12, 2018

To:

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* Additional Parties listed on Page Three

You are hereby notified that the Court has entered the following order:

No. 2016AP1180

State v. K.H. L.C.#2015TP67

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, K.H., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

REBECCA GRASSL BRADLEY, J., did not participate.

ANN WALSH BRADLEY, J. (*dissenting*). The petition for review presents the following issue:

Does a court violate a parent's right to fundamental due process when it establishes the factual basis for the parent's no contest plea after, rather than before, the colloquy and denies the parent the ability to challenge the factual basis?

K.H.'s counsel asserts that in termination of parental rights cases, the Children's Division of the Milwaukee County Circuit Court "routinely utilizes a constitutionally impermissible procedure to establish the factual basis for a no contest plea by establishing the factual basis for the plea after the plea colloquy" (emphasis added).¹

According to K.H.'s counsel, after a parent enters a no-contest plea, the court then engages in a "prove up" hearing. During this "prove up" hearing, a social worker is called as a witness and provides testimony in addition to the allegations contained in the petition to provide a factual basis for the parent's plea. The parent is not permitted to challenge or cross-examine during the "prove up" testimony.

K.H.'s counsel alleges that this procedure requires entering a plea on facts not yet known, in violation of a parent's due process rights. Specifically, counsel argues that due process is violated when a parent enters a no contest plea prior to the basis of that plea being established, and on the basis of facts not set forth in the petition.

One of the most drastic actions that a court can take is to terminate parental rights. In re Termination of Parental Rights to Jayton S., 2001 WI 110, ¶20, 246 Wis. 2d 1, 629 N.W.2d 768. This case presents a significant constitutional issue about a procedure allegedly employed in this and other termination of parental rights cases.²

I do not know how many other cases there may be currently winding their way through the appellate process. What I do know, however, is that we should not "end run" this constitutional issue by denying the petition for review yet discussing the procedure with one side or even both sides of this case.

State supreme courts function in an institutional manner. Legal controversies are brought before us in cases and we respond in written opinions or orders. If a case presents a significant issue of constitutional law, we should take the case and decide the issue.

Some may think that there are alternatives to the way appellate courts should respond when faced with a constitutional issue such as this. Why not write a letter to the presiding judge, asking that the procedure be addressed? Or send a court administrator or a member of the court to discuss the procedure with the judges and others?

Our job is not to mediate cases that involve questioned procedures. Rather, our job is to decide constitutional issues that are properly presented.

¹ The State apparently does not dispute that the procedure outlined in K.H.'s petition for review occurs routinely in Milwaukee County.

² A similar objection to this procedure was raised in State v. M.W., No. 2016AP2045 & 2016AP2046, unpublished slip op. (Wis. Ct. App. July 11, 2017), pet. for rev. denied Jan. 12, 2018.

Because this petition for review presents a significant question of constitutional law,³ I would grant the petition.

Accordingly, I respectfully dissent.

I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Diane M. Fremgen
Acting Clerk of Supreme Court

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³ Wisconsin Stat. § 809.62(1r)(a) provides: "Criteria for granting review. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered: A real and significant question of federal or state constitutional law is presented. . . ."

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You are hereby notified that the Court has entered the following order:

No. 2016AP2076

State v. A.S.F. L.C.#2014TP249

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, A.S.F., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

ANN WALSH BRADLEY, J. (*dissenting*). The petition for review presents the following issue: Was it error and against public policy for the trial court to consider and rely on

the statements of the foster parent that she would allow contact between A.S.F. and her child if A.S.F.'s parental rights were terminated?¹

In State v. Margaret H., 2000 WI 42, 234 Wis. 2d 606, ¶30, 610 N.W.2d 475, we explained that "[i]n its discretion, the court may afford due weight to an adoptive parent's stated intent to continue visitation with family members. . . ." However, we cautioned that although a circuit court may choose to consider the future probability of the foster parent's promise, "such promises are legally unenforceable once the termination and subsequent adoption are complete." Id. Accordingly, "[t]he circuit court may within its discretion consider [a foster parent's] good faith promise, but it should not be bound to hinge its determination on that legally unenforceable promise." Id.

Here, when considering whether it would be harmful to the child to sever the relationship with biological family members, the circuit court discussed the fact that the foster mother testified at length that she was very willing to continue relationships with both parents and their extended families. The circuit court relied on the fact that a lot of work had been done to maintain those relationships and that the circuit court believed the parties would be willing and able to continue those relationships outside of court. It concluded, "[b]ased on [the] foster mom's stated intention to continue these family relationships, the [c]ourt does grant the termination of parental rights in this case."

A.S.F. asserts not only did the circuit court consider the statements of the foster parent, but the court also hinged its determination on the legally unenforceable promise of continued contact with the biological family. Because we could develop the law by providing further guidance to circuit courts regarding the use of such foster parent statements, I would accept the petition for review.²

Accordingly, I respectfully dissent.

I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Diane M. Fremgen
Acting Clerk of Supreme Court

¹ Similar issues are also raised in the petitions for review in State v. M.W., No. 2016AP2045 & 2016AP2046, unpublished slip op. (Wis. Ct. App. July 11, 2017), pet. for rev. denied Jan. 12, 2018; State v. V.C., No. 2016AP2077, unpublished slip op. (Wis. Ct. App. July 11, 2017), pet. for rev. denied Jan. 12, 2018.

² Wisconsin Stat. § 809.62(1r)(c) provides: "Criteria for granting review. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered: . . . A decision by the supreme court will help develop, clarify or harmonize the law"

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No. 2016AP2076

APPENDIX B

State v. A.S.F. L.C.#2014TP249

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You are hereby notified that the Court has entered the following order:

Nos. 2016AP2045 State v. M.W. L.C.#s2015TP114 & 2015TP115
& 2016AP2046

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, M.W., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

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January 12, 2018

Nos. 2016AP2045

State v. M.W. L.C.#s2015TP114 & 2015TP115

& 2016AP2046

ANN WALSH BRADLEY, J. (*dissenting*). This petition for review presents substantially the same issues as the petitions for review in State v. K.H.¹ and State v. A.S.F.,² which are also denied today.

For the reasons set forth in my dissents in the orders denying those petitions for review, I likewise would grant the petition for review here.

Accordingly, I respectfully dissent.

I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Diane M. Fremgen
Acting Clerk of Supreme Court

¹ No. 2016AP1180, unpublished slip op. (Wis. Ct. App. July 25, 2017), pet. for rev. denied Jan. 12, 2018.

² No. 2016AP2076, unpublished slip op. (Wis. Ct. App. July 11, 2017), pet. for rev. denied Jan. 12, 2018.