

NOTICE
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2018 IL App (5th) 180184-U

NO. 5-18-0184

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

In re M.B., a Minor)
(The People of the State of Illinois,)
Petitioner-Appellee,)
v.) No. 17-JA-242
M.B.,) Honorable
Respondent-Appellant).) Martin J. Mengarelli,
Judge, presiding.

NO. 5-18-0291

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re M.B., a Minor)
(The People of the State of Illinois,)
Petitioner-Appellee,)
v.) No. 17-JA-242
Emily B., Christopher O., and Shawn N.,)

Respondents-Appellees)	
)	
(Braden H. and Andrea H., Intervenors-)	Honorable
Appellees; The Department of Children and)	Martin J. Mengarelli,
Family Services, Appellant)).)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Order granting State’s motion to voluntarily dismiss its juvenile petition for adjudication of neglect and wardship reversed where no determination was made on the record whether the dismissal served the best interests of the minor, the minor’s parents, and the community. Remanded with directions.

¶ 2 The respondent, M.B., and the Department of Children and Family Services (Department) appeal the March 15, 2018, order of the circuit court of Madison County that granted, without prejudice, the State’s motion for a voluntary dismissal of its juvenile petition for an adjudication of neglect and wardship of M.B. For the following reasons, we reverse and remand with directions for the circuit court to enter an order extending the stay of M.B.’s removal from the foster parents’ home until all proceedings below are concluded, to conduct a hearing on the merits of the State’s motion for a voluntary dismissal of its petition for adjudication of neglect and wardship, to make a finding on the record whether a dismissal of the State’s petition would serve the best interests of M.B., M.B.’s parents, and the community, and to enter an order establishing guardianship of M.B.

¶ 3

FACTS

¶ 4 At the outset, we note that this is an expedited appeal, pursuant to Illinois Supreme Court Rule 311(a) (eff. July 1, 2018), because it involves the custody of an unemancipated minor. The decision was due to be filed on August 20, 2018. However, the decision is being issued beyond this date for good cause, as motions for extensions of time resulted in delays of the progression of this case. See Ill. S. Ct. R. 311(a)(5) (eff. July 1, 2018). Once the briefing schedule was complete, the case was placed on the oral argument docket and argued before this court on October 30, 2018. We now issue our disposition.

¶ 5 M.B. was born on October 18, 2017. On October 24, 2017, the State filed a “Juvenile Petition” (petition) pursuant to the Juvenile Court Act of 1987 (Act) (705 ILCS 405/1-1 *et seq.* (West 2016)). The petition alleged that M.B. was neglected by being a newborn infant whose blood, urine, or meconium contains methamphetamine or a metabolite of the same (*id.* § 2-3(1)(c)), evinced by: (1) M.B.’s mother admitted to using methamphetamine throughout her pregnancy; (2) M.B.’s mother tested positive for methamphetamine at M.B.’s birth; and (3) M.B. exhibited withdrawal symptoms following her birth which were not a result of medical treatment administered to her or her mother. See *id.*

¶ 6 The petition further alleged that M.B. was neglected by being a minor under 18 years old whose parents do not provide the proper support, education, medical, or other care for her well-being, including food, clothing, or shelter (*id.* § 2-3(1)(a)), evinced by: (1) M.B.’s mother is addicted to substances which impair her ability to adequately care

for M.B.; (2) M.B.'s mother admitted to using methamphetamine during her pregnancy and tested positive for it at M.B.'s birth; (3) M.B.'s father fails to provide care, support, or concern for M.B.; (4) M.B.'s father fails to establish paternity; and (5) M.B.'s mother was previously found an unfit parent.

¶ 7 The petition further alleged that M.B. was neglected by being in an environment injurious to her welfare (*id.* § 2-3(b)), evinced by: (1) M.B.'s mother was previously found an unfit parent; (2) M.B.'s mother is addicted to substances which impair her ability to adequately care for M.B.; (3) M.B.'s mother admitted to methamphetamine use during pregnancy and tested positive for it at M.B.'s birth; and (4) M.B.'s parents have an extensive criminal history. The petition requested, *inter alia*, that M.B. be adjudged a neglected minor and a ward of the court.

¶ 8 An affidavit of unknown residence of M.B.'s putative father, Shawn Noser,¹ was also filed on October 24, 2017. The circuit court entered an order on the same date, finding probable cause for the filing of the petition, awarding temporary custody of M.B. to the Department, and granting the Department power to place M.B. in foster care. Supervised visitation was granted to M.B.'s mother. The order noted that a diligent search for M.B.'s putative father, Shawn Noser, had been conducted but was fruitless. Accordingly, Noser received no notice and was not present. The following day, M.B. was placed with foster parents Braden and Andrea H. (foster parents), intervenors-appellees in this case.

¹The affidavit actually names "Shawn Nozier" as a putative father. However, the spelling of his last name was subsequently corrected to "Noser."

¶ 9 On November 28, 2017, and December 11, 2017, letters were filed in the circuit court that were written by Marci and Brian Bennett, who in both letters requested the circuit court to place M.B. with them because they had adopted M.B.'s older sister four years earlier and they wanted the girls to grow up together. On November 29, 2017, a letter was filed in the circuit court that was written by M.B.'s mother, who requested the circuit court to place M.B. with the Bennetts so she could be with her sister.²

¶ 10 On December 4, 2017, the foster parents filed a petition for leave to intervene, pursuant to section 1-5 of the Act (705 ILCS 405/1-5 (West 2016)). The petition alleged that the foster parents have cared for M.B. in their home since October 25, 2017, and they have substantial concerns regarding M.B.'s best interests. The petition requested the circuit court to grant standing and intervenor status to the foster parents, pursuant to section 1-5(2)(d) of the Act (*id.* § 1-5(2)(d)). On December 12, 2017, M.B.'s mother signed a final and irrevocable consent for the foster parents to adopt M.B.³

¶ 11 Also on December 12, 2017, the Department filed a motion to dismiss the petition, alleging that it is in M.B.'s best interests for the circuit court to recognize the private adoption agreement between M.B.'s mother and the foster parents and to dismiss the petition. The same date, the circuit court entered orders, granting the foster parents' petition for leave to intervene and denying the Department's motion to dismiss. The

²At a subsequent hearing on the foster parents' emergency motion to stay removal, M.B.'s mother testified that she signed this letter only because, in exchange, the Bennetts allowed her to see her older daughter who she had not seen in four years. She expressed regret for signing the letter and her true desire for the foster parents to adopt M.B.

³We note that the consent states that it will be void if the Department Guardianship Administrator refuses to consent to the adoption by the foster parents.

circuit court further ordered notice to all parties for an adjudicatory/dispositional hearing scheduled for January 18, 2018.

¶ 12 On January 3, 2018, the Bennetts filed a motion to intervene and remove the Department as M.B.'s guardian. The motion alleged that the Department had failed to act in M.B.'s best interests and requested that M.B. be placed in the Bennetts' custody. On January 18, 2018, the circuit court entered an order continuing the adjudicatory/dispositional hearing to February 27, 2018, and ordering notice of the same to all parties. Affidavits of unknown residence were filed on January 29, 2018, regarding Christopher Korte and Christopher Ostresh,⁴ both putative fathers of M.B., in addition to Noser.

¶ 13 On February 13, 2018, the State filed an "Amended Juvenile Petition" (petition), identifying Shawn Noser as the "first putative father" and Christopher Ostresh as the "legal father."⁵ On February 26, 2018, the foster parents filed an emergency motion to stay removal, in which they alleged that they expected to receive a formal notice from the Department the following day, of M.B.'s removal from their home and her placement with the Bennetts. Meanwhile, on February 27, 2018, the circuit court entered an order, continuing the adjudicatory/dispositional hearing to April 17, 2018, and ordering notice of the same to all parties.

⁴The affidavit actually names "Christopher Ostrich" as a putative father. However, the spelling of his last name was subsequently corrected to "Ostresh."

⁵Christopher Korte, putative father previously mentioned in the affidavit of unknown residence, was not mentioned in the petition.

¶ 14 On March 9, 2018, the Bennetts filed a motion to voluntarily dismiss their motion to intervene and remove the Department as M.B.’s guardian, indicating that they no longer wished to proceed. Also on March 9, 2018, the foster parents filed a petition for guardianship, pursuant to section 2-27 of the Act, which authorizes the court to “place the minor in the custody of a suitable relative or other person as legal custodian or guardian.” 705 ILCS 405/2-27(1)(a) (West 2016).⁶ On March 12, 2018, the Department filed a response and objection to the foster parents’ emergency motion to stay removal in which it alleged that, as expected, the foster parents indeed received from the Department, on February 27, 2018, a 14-day notice that M.B. would be removed from their home and placed with her sibling at the Bennetts’ home. The Department’s response further acknowledged that the foster parents had requested a clinical placement review. After a hearing, the circuit court entered an order on March 12, 2018, granting the foster parents’ emergency motion to stay removal and ordering M.B. to remain in the foster parents’ care “until final determination of clinical placement review including any and all appeals that may be taken from said review.”

¶ 15 On March 15, 2018, the State filed a motion for a voluntary dismissal, without prejudice, of the petition, and requested the circuit court to simultaneously grant the appointment of the foster parents as M.B.’s guardians. In the motion, the State indicated that on December 12, 2017, M.B.’s mother had signed the final and irrevocable consent to adoption by the foster parents, and that on the same date, the Department filed its own

⁶We note that the record reflects probate proceedings were instituted regarding M.B.’s adoption by the foster parents. In that proceeding, the foster parents also filed a petition for temporary and plenary guardianship. However, there is nothing in our record reflecting the status of that petition.

motion to dismiss the State's petition and to allow the foster parents and M.B.'s mother to proceed with the adoption.

¶ 16 On March 15, 2018, the circuit court entered an order granting the State's motion for a voluntary dismissal of the petition, indicating that there would be no further settings in the case, and ordering the clerk to close the file. The guardian *ad litem* (GAL) in the case filed a motion to reconsider on March 20, 2018, emphasizing that the petition that the circuit court dismissed had alleged M.B. to be abused or neglected, and that, to date, there had been no adjudication or dispositional hearing in the case. The GAL further stated that the circuit court granted the State's motion to voluntarily dismiss its petition without notice to any of the parties, without hearing any evidence or testimony, and without entering an order establishing guardianship of M.B. The circuit court denied the motion to reconsider. The GAL filed a timely notice of appeal on behalf of M.B.

¶ 17 Subsequently, on April 13, 2018, the Department filed a motion to vacate the order granting the State's voluntary dismissal of the petition, along with a supplemental petition to reinstate wardship. On April 27, 2018, the circuit court denied the Department's motion for a lack of jurisdiction due to the GAL's pending appeal. The Department filed a timely notice of appeal. This court entered an order on June 25, 2018, consolidating the two appeals.

¶ 18 ANALYSIS

¶ 19 The issue on appeal is whether the circuit court erred by granting the State's motion to voluntarily dismiss the petition. "When we review the trial court's ruling on a motion to dismiss, the standard of review is *de novo*." *Bouton v. Bailie*, 2014 IL App

(3d) 130406, ¶ 7. Here, the appellants argue that the circuit court erred by granting the State's motion to dismiss the petition without first conducting a hearing to determine whether dismissal would be in M.B.'s best interests.

¶ 20 The Illinois Supreme Court held in *In re J.J.*, 142 Ill. 2d 1, 9 (1991), that “when the State moves to dismiss a petition alleging abuse of a minor, the circuit court shall consider the merits of the motion and determine, on the record, whether dismissal is in the best interests of the minor, the minor’s family, and the community.” Doing so facilitates “[t]he overriding purpose of the Juvenile Court Act.” *Id.* at 8. Although *In re J.J.* involved a separation of powers issue and the circumstances preceding the filing of the motion to dismiss in that case differ from those in this case, the analysis in *In re J.J.* regarding the Act and the duties of both the State and the circuit court to ensure “that, at each step of the wardship adjudication process, the best interests of the minor, the minor’s family[,] and the community are served” (*id.* at 8-9), applies to this case.

¶ 21 Here, the circuit court granted the State’s motion to voluntarily dismiss its petition without determining, on the record, whether dismissing the petition was in the best interests of M.B., M.B.’s family, and the community. Moreover, as aptly indicated by the appellants, there was no certificate of proof that the parties received notice of the State’s motion for voluntary dismissal. This violates Illinois Supreme Court Rule 104(b) (eff. Jan. 1, 2018), which requires a written motion to contain a certificate of service reflecting service on all parties. We emphasize that, included in the State’s motion for voluntary dismissal was a request for the circuit court to grant the foster parents’ petition for guardianship. However, the petition for guardianship was never ruled on, thereby leaving

M.B. with no guardian to make decisions on her behalf while any adoption proceedings are pending.⁷

¶ 22 The State argues that the circuit court engaged in the fact-finding and best-interest analysis that was contemplated by *In re J.J.* at the hearing on the foster parents' emergency motion to stay removal, which occurred only three days before the State filed its motion to voluntarily dismiss the petition. We disagree. At the hearing on the emergency motion to stay removal, the majority of the focus was directed toward whether the preference of placing M.B. with her sibling was determinative in the court's ruling on the motion. The purpose of the hearing was for the court to decide whether M.B. should stay in her current placement with the foster parents or be moved to the Bennetts' home where her sibling resided while a clinical placement review was pending.

¶ 23 At the time of the hearing on the emergency motion to stay removal, the State's motion to voluntarily dismiss the petition had not been filed and the adjudicatory/dispositional hearing was scheduled to take place on April 17, 2018. The parties could not and should not have been expected to attend a hearing concerning a foster care placement and to be prepared to present evidence at such a hearing on whether the best interests of M.B., M.B.'s parents, and the community would be served by a dismissal of the petition when the motion for dismissal of the petition had not yet been filed. Moreover, section 1-3(4.05) of the Act contains the factors the circuit court must consider before making a best-interest determination. See 705 ILCS 405/1-3(4.05) (West

⁷As noted above, there was a petition filed by the foster parents in the adoption proceeding requesting guardianship of M.B. However, we have no record of the disposition of that petition.

2016). There are many more factors in this list besides the residence of any siblings with the minor (see *id.*) which, again, was the primary focus at the hearing on the emergency motion to stay removal. Accordingly, we reject the argument that the circuit court engaged in the analysis contemplated by *In re J.J.* at the hearing on the emergency motion to stay removal.

¶ 24 In granting the State's motion to voluntarily dismiss the petition without first making a determination on the record whether the dismissal served the best interests of the minor, the minor's parents, and the community, the circuit court did not meet the requirements set forth by the supreme court. See *In re J.J.*, 142 Ill. 2d at 9. Accordingly, we reverse the order granting the State's motion to voluntarily dismiss the petition and remand with directions for the circuit court to conduct a hearing on the merits of the State's motion for a voluntary dismissal of its petition for adjudication of neglect and wardship.⁸ We further direct the circuit court to make a finding on the record whether a dismissal of the State's petition would serve the best interests of M.B., M.B.'s parents, and the community, and to enter an order appointing a guardianship of M.B. while the proceedings below are pending.⁹ Further, pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), in order to ensure that there is no interference with M.B.'s stability during the pendency of the proceedings on remand, we direct the circuit court to

⁸An evidentiary hearing on remand will allow the circuit court to receive evidence of the current status of the adoption proceedings and to address, if necessary, any issue with the irrevocable consent to adopt that may arise due to its contingency on the Department's approval.

⁹As noted above, there was a petition filed by the foster parents in the adoption proceeding requesting guardianship of M.B. However, because we have no record of the disposition of that petition, we consider this direction to be necessary.

enter an order extending the stay of M.B.'s removal from the foster parents' home until all proceedings below are concluded.

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, we reverse the March 15, 2018, order of the circuit court of Madison County and remand with directions for the circuit court to conduct a hearing on the merits of the State's motion for a voluntary dismissal of its petition for adjudication of neglect and wardship, to make a finding on the record whether a dismissal of the State's petition would serve the best interests of M.B., M.B.'s parents, and the community, to enter an order establishing the guardianship of M.B. while the proceedings below are pending, and to enter an order extending the stay of M.B.'s removal from the foster parents' home until all proceedings below are concluded.

¶ 27 Reversed and remanded with directions.