

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2007

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. 2007AP1297
2007AP1298**

**Cir. Ct. Nos. 2006TP121
2006TP122**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

BEATRICE S. O.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

BEATRICE S. O.,

RESPONDENT-APPELLANT.

APPEAL from orders¹ of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 CURLEY, P.J.² Beatrice S. O. appeals the dispositional orders that terminated her parental rights to Maiandrea W. and Patricia W. Beatrice argues that the trial court erroneously exercised its discretion when it terminated her parental rights to her daughters because termination was not in their best interests due to the substantial relationship the girls shared with their maternal grandmother and one of their two other siblings. Because the trial court reviewed all the relevant factors listed in WIS. STAT. § 48.426 (2003-04), which govern dispositional hearings, and, in doing so, found that the one factor, the potential severance of the girls' relationship with their grandmother and sibling Jabari, favoring a guardianship over a termination was outweighed by the factors that favored termination, the trial court properly exercised its discretion.³ Accordingly, this court affirms.

I. BACKGROUND.

¶2 Maiandrea, born September 23, 1998, and Patricia, born November 16, 1999, are the third and fourth of Beatrice's four children. Beatrice was married to Andre W. when the girls were born. Beatrice has two older children as the result of other relationships. The two girls, along with one other sibling, were

¹ These matters were consolidated by this court on June 14, 2007, for purposes of briefing and disposition.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06).

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

placed in protective custody in May 2002 after the police discovered that Beatrice was leaving the children home alone. The oldest child in the household was then five years old. The girls were found to be children in need of protection or services (CHIPS) on February 4, 2003, and that order was extended annually. The girls have not lived with Beatrice since the date they were originally detained.

¶3 On April 6, 2006, the State petitioned the court to terminate the parental rights of both Beatrice and Andre W. to the two girls. Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427. Andre W. never made an appearance. Beatrice contested the petition, but after she failed to attend two court hearings and two depositions, the trial court found both Andre W. and Beatrice to be in default. The trial court then took testimony that supported the trial court's decision that grounds existed to terminate both Beatrice and Andre W.'s parental rights as set forth in WIS. STAT. § 48.415.

¶4 However, because Emma O., the maternal grandmother became involved in the litigation and brought some heretofore unknown information to the trial court's attention regarding Emma O.'s relationship with the children, the trial court expressed concern over two of the enumerated factors found in WIS. STAT. § 48.426 that the trial court is required to consider in reaching its determination as to the best interests of the child in a termination of parental rights case. Specifically, after learning of the involvement of the maternal grandmother, the

trial court was concerned about § 48.426(3)(c), which reads: “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.” In addition, the trial court was not convinced that § 48.426(3)(f) was satisfied, which states:

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.

Unless convinced that these factors weighed in the State’s favor, the trial court indicated it would require a guardianship rather than a termination. Beatrice had been advocating that a guardianship be created for the girls in lieu of a termination.

¶5 Rather than immediately determining the dispositional phase of the case, as would be the normal progression as set forth in WIS. STAT. § 48.427, the trial court requested that the parties brief their positions relating to the factors it was concerned with and set a date for the dispositional hearing to be continued. At the continued dispositional hearing, the trial court permitted the State to supplement the record by calling additional witnesses. During several hearings, the trial court heard from the foster parents, social workers and Emma O. The foster parents explained to the court that their relationship with Emma O. had been quite good until the termination petition was filed. In fact, Emma O. played a role in their being selected as the foster parents. Despite this erosion in their relationship, the foster parents testified that they were committed to foster the girls’ relationship with Emma O. and Jabari, their brother, including visitation if the termination were permitted.

¶6 The trial court also learned of Emma O.'s interest in having placement of the children and the history behind her request. Emma O. originally had temporary placement of Patricia but she moved out of state, and due to what appears to have been bureaucratic snafus, by the time her home was approved for placement, the decision was made not to relocate the girls to her new home because of the length of time they had spent in the foster home. In addition, as time passed, there was a concern that Emma O., who was approaching seventy years of age, could not handle the special needs of Maiandrea, who has significant physical and mental handicaps. Against this background, a determination was also made not to split up the placement of the two girls, and the foster parents were approached about a possible adoption. Emma O. was understandably upset when she learned of the termination proceedings and the plan for the foster parents to adopt because she had been told that the children would be placed with her. As a result, once the termination was filed, the relationship between Emma O. and the foster parents deteriorated. Testimony reflected that the two girls also had a relationship with Jabari, and that their grandmother facilitated this relationship.

¶7 After hearing from the witnesses and hearing the arguments of counsel, the trial court reaffirmed its earlier findings that Andre W. had abandoned the children and that both Beatrice and Andre W. were unfit to parent because of the continuing nature of the CHIPS proceedings. The trial court then, on the record, considered all the relevant factors listed in WIS. STAT. § 48.426⁴ and

⁴ WISCONSIN STAT. § 48.426(3) provides:

FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(continued)

determined that there were substantial relationships between the two girls and their grandmother and one sibling, and that a severing of that relationship would be harmful to the girls. However, the trial court accepted the testimony of the foster parents, particularly the foster mother's testimony that they would continue to promote these relationships and continue to permit visitation. After analyzing the other § 48.426 factors, the trial court decided that termination of Andre W. and Beatrice's parental rights to the girls would be in the girls' best interests. Following this determination, Beatrice appealed.

II. ANALYSIS.

¶8 Beatrice claims that the trial court erroneously exercised its discretion when it severed her parental rights to Maiandrea and Patricia because one of the factors listed in WIS. STAT. § 48.426 guiding the trial court's disposition

(a) The likelihood of the child's adoption after termination.

(b) 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.

(c) 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.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) 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.

when determining the best interests of the children is whether the children have substantial relationships with other family members and whether the severing of those relationships would be harmful to them. She submits that because the trial court found that the girls have a substantial relationship with Emma O. and Jabari, and that severing their legal relationships with these family members would harm the girls, the trial court erroneously exercised its discretion by terminating her parental rights. This court disagrees.

¶9 Whether circumstances warrant termination of parental rights is within the circuit court's discretion. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, this court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. See *Rock County DSS v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). The trial court's decision does not constitute an erroneous exercise of discretion where the court made findings on the record, based its decision on the standards and factors found in WIS. STAT. § 48.426, and explained the basis for its disposition. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶10 Besides pointing to the trial court's determination that the severance of these relationships would be harmful to the children in claiming that the trial court's decision to terminate her parental rights was an erroneous exercise of discretion, Beatrice cites language found in *State v. Margaret H.*, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, as support for her position that promises of the foster parents to continue relationships with biological family members after the termination of parental rights should be given little weight.

¶11 In *Margaret H.*, the trial court determined that, due to the substantial relationship the twin boys had with their grandmother, termination of the parental rights of the mother was not in their best interest. *Id.*, ¶10. This court reversed the trial court. The supreme court affirmed our decision to remand the case for further proceedings. The supreme court disagreed with this court's interpretation of WIS. STAT. § 48.426(3)(c) and our finding that the trial court erred when it assumed the twins' relationship with their birth family would be severed if parental rights were terminated. *Margaret H.*, 234 Wis. 2d 606, ¶¶1, 40. Beatrice implicitly relies on the following language in *Margaret H.* to support her argument that promises of adoptive resources should not be given great weight by the trial court:

In this case, the court may certainly choose to examine the probability that [the foster mother] will be faithful to her promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete. See Patricia A. Hintz, Comment, *Grandparents' Visitation Rights Following Adoption: Expanding Traditional Boundaries in Wisconsin*, 1994 Wis. L. Rev. 483, 503 (1994). The circuit court may within its discretion consider her good faith promise, but it should not be bound to hinge its determination on that legally unenforceable promise.

Margaret H., 234 Wis. 2d 606, ¶30.

¶12 While this court finds *Margaret H.* to be instructive, the facts here are clearly distinguishable. There, the trial court made its determination solely on one factor.

While it is within the province of the circuit court to determine where the best interests of the child lie, the record should reflect adequate consideration of and weight to each factor. The record here reveals that the circuit court failed to apply the best interests of the child standard and did not consider other pertinent factors besides Wis. Stat. § 48.426(3)(c). Although an evaluation of substantial relationships and the harm of a legal severance is indeed

critical to the court's determination, exclusive focus on any one factor is inconsistent with the plain language of Wis. Stat. § 48.426(3).

Margaret H., 234 Wis. 2d 606, ¶35. Here, the trial court examined all the relevant facts listed in § 48.426 and determined that the one factor not favoring termination was outweighed by the other factors that did favor termination. “And I believe the fact that that factor comes down in favor of not terminating is outweighed by all of the other factors including the [foster] mother’s promise under oath and the [foster] father’s promise under oath that they will continue to allow grandma to have a relationship.” Moreover, *Margaret H.* permits the trial court to consider the promises of the adoptive parent in reaching its decision. “In its discretion, the court may afford due weight to an adoptive parent’s stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor.” *Margaret H.*, 234 Wis. 2d 606, ¶29.

¶13 This court has reviewed the trial court’s assessment of the various factors and its ultimate decision that termination was in the best interests of the girls. The trial court spent a considerable amount of time on this matter and was well-informed on the background of the case and came to a conclusion that a reasonable judge could reach. Consequently, the trial court properly exercised its discretion and this court affirms.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4 (2005-06).

