

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2008

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 No. 2007AP2925

Cir. Ct. No. 2007TP17

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CHRISTOPHER P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

¶1 DYKMAN, J.¹ Christopher P. appeals from an order terminating his parental rights to his daughter, Amanda. Christopher P. contends that the termination questionnaire he completed before the hearing and the colloquy that occurred at the hearing do not establish that he gave informed and voluntary consent to terminate his parental rights, which WIS. STAT. § 48.41(2) requires. Christopher P. contends that for this reason, and because the court did not consider the dispositional standards and factors in WIS. STAT. § 48.426(3), the termination order must be vacated. We disagree. We conclude that the trial court correctly found that Christopher P.'s consent was informed and voluntary. Therefore, we affirm the order to terminate his parental rights. However, the record does not show that the trial court considered the dispositional factors in § 48.426(3). Accordingly, we affirm in part, reverse in part, and remand to the trial court for further findings and conclusions as to these factors.

Background

¶2 Amanda was born was born on September 25, 2000. After Amanda's biological mother voluntarily terminated her parental rights on October 10, 2000, Christopher P. was adjudicated Amanda's father. In April 2001, when Amanda was seven months old, Christopher P. received custody of Amanda.

¶3 Amanda was removed from Christopher P.'s home on September 15, 2006, due to allegations that he sexually abused her. On September 18, 2006, a child in need of protection or services (CHIPS) petition was filed pursuant to WIS.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

STAT. § 48.13(3). At an October 10, 2006 hearing, which Christopher P. did not attend because he was on a probation hold, the trial court found Amanda to be a child in need of protection or services and placed her with Christopher P.'s sister, Jennifer.

¶4 Wood County filed a petition to terminate Christopher P.'s parental rights on July 19, 2007. On August 1, 2007, in preparation for the voluntary termination hearing that would occur on August 16, Wood County social worker Heather Utecht prepared a court report. The report stated that Utecht met with Christopher P. twice and that Christopher P. told her that he wanted to terminate his parental rights so that Amanda could have stability in her life. The report concluded that Christopher P. had verbally agreed to voluntarily terminate his parental rights.

¶5 On August 3, 2007, Utecht presented Christopher P. with a termination of parental rights questionnaire. The questionnaire lists alternatives to termination:

10. I understand that there are certain alternatives to the termination of my parental rights. I can maintain custody of the child. That should I have custody and not be employed that various agencies can provide aid to me in the caring of the child. This aid can be in the form of financial assistance and also in the form of other assistance regarding the care of the child.

11. I further understand that should I not be able to care for the child at this time, I could place the child in foster care until such time I felt I was able to care for the child.

¶6 Utecht read the questionnaire out loud to Christopher P., and they discussed the contents. Christopher P.'s defense attorney in the criminal case attended the meeting but did not make any comments except for clarifying that

Christopher P. was signing the document to acknowledge that it was read to him. Christopher P. signed the questionnaire, and Utecht signed as a witness.

¶7 On August 16, 2007, the trial court held a voluntary termination hearing. Christopher P. appeared without counsel, but the attorney representing him in the criminal case was present. The court asked Christopher P., in a series of questions, if he understood the various legal rights he would give up if he terminated his parental rights, and Christopher P. answered “yes” to each question. The court asked Christopher P. about his mental health and education, and Christopher P. and the judge discussed the sexual assault charges and Christopher P.’s confinement.

¶8 The guardian ad litem expressed his opinion that “it’s in Amanda’s best interest to have her father’s rights terminated.” The court discussed the importance of Christopher P.’s comprehending the termination questionnaire, confirmed that Christopher P. had no questions on the provisions that Utecht had read to him, and emphasized Christopher P.’s agreeing to terminate his parental rights under the belief that it was in the best interests of Amanda. The court then ordered termination.

¶9 The county presented a consent of termination form and an affidavit providing information that Amanda could use to contact Christopher P. if she so chose. The court had Christopher P. read through the termination form. The form concluded with a clause stating that Christopher P. was making the termination of parental rights decision on his own free will, without promises or threats. Christopher P. signed and dated the consent of termination form in front of the judge.

¶10 Christopher P. then read the affidavit to the judge, they discussed the contents and purpose of the affidavit, and the judge emphasized that after termination Christopher P. would not have the option of contacting Amanda, even if she had the option of contacting him. After this, Christopher P. signed the affidavit in front of the judge.

¶11 The court then had Christopher P. read through a postdisposition notice of his right to appeal and discussed this with Christopher P. Christopher P. signed the form in front of the court. Throughout the hearing, the court asked Christopher P. questions to confirm that he understood the proceedings.

¶12 In a letter to the trial court dated August 23, 2007, Christopher P. appealed the termination, writing “I have had time to think about what I am doing. I do not feel that it is the right decision for me to give up my rights.”

Discussion

¶13 An appellate court reviews a trial court’s ultimate determination in a termination of parental rights proceeding for a proper exercise of discretion. *State v. Margaret H.*, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475. “[T]he appellate court should give weight to the trial court’s decision, although the trial court’s decision is not controlling.” *In the Interest of D.L.S.*, 112 Wis. 2d 180, 188, 332 N.W. 2d 293 (1983) (citation omitted). A proper exercise of discretion occurs when the trial court applies the correct standard of law to the facts at hand. *Margaret H.*, 234 Wis. 2d 606, ¶32. The appropriate legal standard in a petition to terminate parental rights is “the best interests of the child.” *Id.*, ¶11. *See also* WIS. STAT. § 48.426(2). This standard is “the polestar for the court in a dispositional hearing, and a failure to apply that standard is an error of law.”

Sheboygan County D.H.H.S. v. Julie A.B., 2002 WI 95, ¶4, 255 Wis. 2d 170, 648 N.W.2d 402.

The Questionnaire and the Trial Colloquy Establish Christopher P.'s Voluntary and Informed Consent

¶14 The supreme court has “set forth the basic information the circuit court must ascertain to determine on the record whether consent is voluntary and informed” in a termination of parental rights case. *D.L.S.*, 112 Wis. 2d at 196.

The six factors are:

1. the extent of the parent’s education and the parent’s level of general comprehension;
2. the parent’s understanding of the nature of the proceedings and the consequences of termination, including the finality of the parent's decision and the circuit court’s order;
3. the parent’s understanding of the role of the guardian ad litem (if the parent is a minor) and the parent’s understanding of the right to retain counsel at the parent’s expense;
4. the extent and nature of the parent’s communication with the guardian ad litem, the social worker, or any other adviser;
5. whether any promises or threats have been made to the parent in connection with the termination of parental rights;
6. whether the parent is aware of the significant alternatives to termination and what those are.

Id. at 196-97.

¶15 Christopher P. contends that the colloquy did not address three of these factors: Christopher P.’s understanding of the nature of the proceedings, the extent and nature of Christopher P.’s communication with Utecht, and whether or

not Christopher P. was aware of the significant alternatives to termination. In support of this, Christopher P. cites the supreme court's observation in *D.L.S.* that the record there was replete with responses to "leading and complex questions." *Id.* at 189.

¶16 The trial court questioned Christopher P. numerous times on his understanding of the procedural aspects and the consequences of the termination, including Christopher P.'s right to appeal and the legal rights that he would be giving up if he were to consent to termination of his parental rights.

¶17 In *D.L.S.* "[s]everal exchanges in the record cast doubt on the assumption that [the parent's] affirmative answers reveal her understanding of the proceedings, her rights, or the alternatives available to her." *Id.* However, while the parent in *D.L.S.* was fifteen years old at the time of the termination of parental rights hearing, Christopher P. was twenty-five years old. *See id.* Also, while in *D.L.S.* the hearing occurred on the same day that the termination petition was filed, Christopher P.'s hearing occurred twenty-eight days after the termination petition was filed. *See id.* at 183.² Christopher P., being older and having had more time to contemplate the termination of parental rights before it became final, was in a better position to give voluntary and informed consent.

¶18 Furthermore, while the trial court record in *D.L.S.* does not demonstrate that the parent had the educational level or ability to understand the questions and explanations addressed to her, the trial court judge asked

² Christopher also had almost two weeks between the time that he reviewed and signed the termination questionnaire and the hearing to ponder the questionnaire's contents and the consequences of terminating his parental rights.

Christopher P. about his education and had Christopher P. read various documents out loud, confirming Christopher P.'s ability to discern the contents. *See id.* at 189. At various points Christopher P. volunteered information to the judge, such as when he clarified that his defense attorney was present at the review and signing of the termination questionnaire but did not discuss the questionnaire with him. This indicates that Christopher P. was alert and comprehended the proceedings.

¶19 Christopher P. and the social worker reviewed the termination questionnaire together and discussed its contents before Christopher P. signed it. The questionnaire that Christopher P. reviewed and signed lists alternatives to termination, including retaining custody, seeking financial aid and child care assistance, and placing the child in foster care.

¶20 At the hearing, the judge asked Christopher P. about what occurred when he and the social worker reviewed the questionnaire, emphasizing the importance of Christopher P.'s comprehending it. He confirmed that Christopher P. had had no questions about the questionnaire and that his defense attorney had been present at the signing.

¶21 In summary, the trial court ascertained Christopher P.'s understanding of the nature of the proceedings, the extent and nature of his communication with the social worker, and whether or not he was aware of the significant alternatives to termination. The trial court's inquiry into the factors that indicate voluntariness was "searching and penetrating." *See In the Interest of A.B.*, 151 Wis. 2d 312, 319, 444 N.W.2d 415 (Ct. App. 1989). We conclude that the trial court adequately addressed the six factors necessary to find voluntary and

informed consent. *See D.L.S.*, 112 Wis. 2d at 196-197. Accordingly, we affirm the order to terminate parental rights.³

The Trial Court Failed to Consider the Dispositional Factors in WIS. STAT. § 48.426(3)

¶22 Once a voluntary termination of parental rights occurs, “the judge may proceed immediately to a disposition of the matter after considering the standards specified in § 48.426.” WIS. STAT. § 48.41(1). We review the trial court’s interpretation of a statute de novo. *Robin K. v. Lamanda M.*, 2006 WI 68, ¶13, 291 Wis. 2d 333, 718 N.W.2d 38. “The court should explain the basis for its disposition, on the record, by alluding specifically to the factors in Wis. Stat. § 48.426(3) and any other factors that it relies upon in reaching its decision.” *Julie A.B.*, 255 Wis. 2d 170, ¶30.

¶23 The six factors are:

(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.

³ Christopher P. argues that a questionnaire cannot remedy a deficient colloquy. Since we conclude that the colloquy was not deficient, we need not reach this issue.

(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.

WIS. STAT. § 48.426(3).

¶24 The court is required to allude specifically to these factors, on the record. *Julie A.B.*, 255 Wis. 2d 170, ¶30. Both parties concede, and we agree, that the record contains no discussion of WIS. STAT. § 48.426(3) or the six dispositional factors. The parties agree, as do we, that a remand is necessary. We remand the dispositional factors issue to the trial court for findings and conclusions.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

