

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2010

A. John Voelker
Acting 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. 2010AP1215
2010AP1216**

**Cir. Ct. Nos. 2008TP118
2008TP119**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAQUITA B.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAQUITA B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Jaquita B. appeals from orders terminating her parental rights to Atrue B. and Imani B. She argues that the trial court erroneously exercised its discretion when it determined that termination of her parental rights was in the children's best interests.² We affirm.

BACKGROUND

¶2 Jaquita is the biological mother of Atrue, born in October 1998, and Imani, born in August 1999. Imani and Atrue were first removed from Jaquita's care in 2000, when Imani was less than one year old and Atrue was two years old. They were placed outside of Jaquita's care for approximately two and a half years, and were then returned to her.

¶3 Imani and Atrue were again removed from Jaquita's care in 2005, due to Jaquita's physical abuse of them. The boys began living with foster mother Anita W. in May 2006.

¶4 As a result of the physical abuse allegations, Jaquita was charged criminally with two counts of child abuse, intentionally causing harm, contrary to WIS. STAT. § 948.03(2)(b) (2005-06). Pursuant to a plea bargain, the charges were reduced to two counts of misdemeanor battery, to which Jaquita pled guilty. As a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The boys' father voluntarily consented to termination of his parental rights. The termination of his rights will not be addressed in this appeal.

result of the criminal charges, Jaquita was denied the right to visit both Imani and Atrue for over a year.

¶5 On November 10, 2006, a CHIPS dispositional order was entered. It outlined conditions that Jaquita was required to meet before her children could be returned to her. Ultimately, the State filed a petition to terminate Jaquita's parental rights because she had not met the conditions for the return of her children as outlined in the CHIPS order, and it was unlikely that she would do so within the next nine months. *See* WIS. STAT. § 48.415(2)(a).

¶6 On January 12, 2009, Jaquita stipulated to the ground of continuing CHIPS. *See id.* The trial court made a finding that the ground was established and the matter proceeded to a dispositional hearing.

¶7 At the dispositional hearing, the State introduced evidence indicating that the children were doing well with Anita and that Jaquita could not adequately meet the children's needs. The trial court found that while adoption was not currently an option, a sustaining care agreement, with Anita as the sustaining foster parent, was in the children's best interests. The trial court terminated Jaquita's parental rights. This appeal follows.

DISCUSSION

¶8 At issue is the trial court's determination, at the dispositional phase of the case, that termination was in the children's best interests. An appellate court will sustain the trial court's ultimate determination if there is a proper exercise of discretion. *State v. Margaret H.*, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475. "A proper exercise of discretion requires the [trial] court to apply the correct standard of law to the facts at hand." *Id.*

¶9 A trial court's consideration of the children's best interests is guided by WIS. STAT. § 48.426(3), which provides:

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

- (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.

I. The trial court's decision.

¶10 The trial court found that each of the six factors in WIS. STAT. § 48.426(3) either weighed in favor of terminating Jaquita's parental rights, or at least did not weigh against termination. First, the trial court considered the likelihood that each child would be adopted. *See* § 48.426(3)(a). The State presented testimony that the children were doing well in their foster home with Anita. Although Anita was not an approved adoptive resource due to her

husband's incarceration,³ the trial court recognized that without termination there could be no possibility of adoption.

¶11 Second, the trial court considered the age and health of the children. *See* WIS. STAT. § 48.426(3)(b). It noted that the boys have mental health and behavioral problems, as well as health needs that need “to be met on a regular basis.” The trial court was unconvinced that Jaquita adequately addressed the boys' needs when they were younger, and it found that she had not subsequently acquired the knowledge and skills that will be necessary to adequately address their needs as they enter their teenage years. The trial court concluded that this factor weighed in support of termination because “[t]here is no time to wait” for Jaquita to show an ability to care for the boys, noting, “The waiting is over.”

¶12 Third, the trial court considered whether the children have a substantial relationship with their parents or other family members, and whether severing the relationships would be harmful. *See* WIS. STAT. § 48.426(3)(c). The trial court recognized that the boys have substantial relationships with Jaquita and her family. It also noted the boys' strong relationships with Anita and with one another. It found that the most consistent relationship both boys had had for ten years was with one another, and it found that “separating them ... wouldn't make a lot of sense and would be harmful to them.” The court also heard testimony from Anita and from the Bureau of Milwaukee Child Welfare that Anita is willing to continue visitation and contact with the boys' other siblings and biological parents,

³ According to May 2009 testimony by the case worker from the Bureau of Milwaukee Child Welfare, the only barrier to Anita becoming an adoptive resource is that she “is currently married and her husband is currently incarcerated.” At the continued dispositional hearing in January 2010, Anita testified that her husband had been released from prison, that the two were separated and that Anita intended to pursue a divorce in the future.

as she had done in the past. The trial court determined that the relationships the children had with their biological family would likely “continue in some form or fashion.” It found that the boys will be in a more stable environment with Anita, who serves as their “anchor,” and it implied that the boys’ relationships with one another and others would be best served by that stability.

¶13 The fourth factor the trial court considered was the wishes of the children. *See* WIS. STAT. § 48.426(3)(d). While Imani indicated that he wished to stay with his foster mother, Atrue expressed a desire to return to Jaquita. The boys’ relationship with their mother was described as confusing, because while they loved their biological mother, they felt safer with Anita. Jaquita suggested that it would be in the best interests of the boys to follow each of their desires, but the trial court disagreed. As noted above, the trial court expressed concern about severing the boys’ relationship with one another. Furthermore, the trial court recognized that “what a child wants may not mean what that child needs,” and emphasized that the court needed “to look out for what they need.”

¶14 The fifth factor the trial court considered was the duration of the separation between Jaquita and the children. *See* WIS. STAT. § 48.426(3)(e). The trial court noted that substantial time had passed—the children had spent the last four years with Anita, and they had also been out of their mother’s care earlier in their lives. In fact, the children had been with Anita for “as much time as they [had] spent with the mother.” The trial court implied that this “fairly lengthy time period” also weighed in favor of termination.

¶15 Finally, the trial court considered the sixth factor: whether each 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 [each] child’s

current placement, the likelihood of future placements and the results of prior placements.” *See* WIS. STAT. § 48.426(3)(f). The court discussed the success each boy had ultimately found in foster care, as well as problems Jaquita had in caring for the boys. It found that having the boys in a sustaining care arrangement offered the best hope for permanency. The trial court stated:

“I’m just not convinced that [Jaquita’s] situation would be [any more] permanent than the one with [Anita].

As a matter of fact, I think the opposite. I think that [with Anita] they will be able to have a more permanent relationship, a more permanent placement, and that’s what I have to look out for: [s]tability for them.”

¶16 After considering the statutory factors, the trial court found that terminating Jaquita’s parental rights and establishing a sustaining care contract with Anita as the caregiver was in the children’s best interests.

II. Jaquita’s challenges to the decision.

¶17 On appeal, Jaquita challenges the trial court’s consideration of three statutory factors: WIS. STAT. § 48.426(3)(a), (d) and (f). We consider each challenge in turn.

¶18 First, Jaquita contends that “adoption was clearly not contemplated,” and that the trial court thereby failed to properly consider WIS. STAT. § 48.426(3)(a). As noted, Anita was not an approved adoptive resource at the time of trial. Jaquita implies that if the trial court had properly analyzed this factor, it would have found it in opposition to termination.

¶19 We disagree. We have carefully examined the record and we conclude that the trial court did in fact properly contemplate the children’s likelihood of adoption and rationally concluded that that factor, at the very least,

did not weigh against termination. The trial court acknowledged that adoption was not an immediate option, but it also noted that under a sustaining care agreement, it could order the agency to provide the services needed to address the boys' problems. Thus, the boys and Anita would have support that would not otherwise be guaranteed. The trial court also recognized that "if there[']s ever going to be a possibility of [adoption], the parents' rights would have to be terminated before they can be adopted." The court recognized that once the rights were terminated, adoption "is a possibility, and I guess we hope that can happen." We reject Jaquita's argument that the trial court failed to properly consider or weigh the children's likelihood of adoption.

¶20 Second, Jaquita argues that the trial court only gave "lip service to statutorily mandated goals of permanency" and stability for the children because the court did not adequately consider the option of guardianship. She states: "When adoption is not being contemplated, the relevant statutes present dispositional options, including guardianship under [WIS. STAT.] § 48.977, or 'sustaining care' under [WIS. STAT.] § 48.428." Jaquita faults the trial court for accepting the State's argument that a sustaining care agreement would be better than a guardianship. Jaquita explains that when the trial court asked the State "why a guardianship would not be the better method to achieve permanence and stability for these boys[,] ... the State merely set forth its position that a sustaining care contract could provide such permanence without offering any explanation whatsoever. The Court accepted this."

¶21 We reject Jaquita's contention. The trial court asked the State about doing a guardianship order instead of a termination, and the State replied that guardianship would not be as permanent because the mother could petition to terminate the guardianship at any point. The State argued that "sustaining care

provided that permanency” that the trial court sought. The trial court’s acceptance of this argument was reasonable and supported by testimony from numerous witnesses who testified about barriers to returning the boys to Jaquita and the boys’ need to know that their living arrangement would be stable.

¶22 The trial court further noted that Jaquita had not demonstrated the parental capacity to offer the boys the stability they need. The trial court reasoned that:

[This] is what I have to look out for: Stability for them so that they can wake up and be like no matter what, this is where I am. This is my rock. This is where I go off [every day]. This is where I come back [every day], good or bad, this is it. There is no more thinking about me going somewhere else. This is where I am.

¶23 The trial court’s findings are supported by testimony from the case manager from the Bureau of Milwaukee Child Welfare who testified that it would actually be detrimental to move the boys from Anita’s home. She stated: “They need to know that this is their home. They don’t need anything to interrupt that. They have come so far in the last three years that ... I think we would probably be back to square one with them.”

¶24 Jaquita argues that the trial court should not have found that a sustaining care agreement with Anita was viable, because within the last year Anita had contemplated giving up the boys. However, the trial court complimented Anita for being willing to ask the Bureau for additional assistance with the boys’ significant needs, including respite care, which was then provided. The trial court also noted that Anita testified she was willing to care for the boys long-term, and in recent months she had not even used the extra respite care offered to her. Thus, after considering guardianship as an option, the trial court

determined that a sustaining care agreement with Anita, as opposed to guardianship, was best suited to accomplish the goals of permanency and stability. We discern no erroneous exercise of discretion in the trial court's consideration of this factor.

¶25 Jaquita's third challenge to the trial court's exercise of discretion is her assertion that "at the very least," the trial court erred in failing to grant Atrue's wish to return to his biological mother. (Capitalization and bolding omitted.) She states that "[as] an eleven-year-old, Atrue is clearly capable of knowing where he wants to live." She argues that Atrue's wish, which was openly acknowledged by Anita, was flatly denied by the trial court, in error. We disagree.

¶26 WISCONSIN STAT. § 48.426 requires the trial court to consider all of the listed factors in assessing if termination is appropriate. The factors "serve to guide courts in gauging whether termination is the appropriate disposition" and "exclusive focus on any one factor is inconsistent with the plain language of WIS. STAT. § 48.426(3)." *Margaret H.*, 234 Wis. 2d 606, ¶¶34-35. Furthermore, "[t]he best interests of the child is the polestar of all determinations under ch. 48, the Children's Code." *Margaret H.*, 234 Wis. 2d 606, ¶33.

¶27 The trial court considered Atrue's stated wish to return to his biological mother. However, the trial court found that wish to not be in the best interests of either Atrue or Imani because it would ultimately lead to their separation from one another. It also noted that it would not be appropriate to rely solely on Atrue's wishes, as eleven-year-old children "don't know all of the possible scenarios. They don't have the cognitive ability to be able to figure out how this is going to play out." The trial court properly weighed this factor.

¶28 In summary, having reviewed the testimony, the arguments and the trial court's decision, we conclude that the trial court considered the appropriate factors and did not erroneously exercise its discretion when it concluded that termination was in the boys' best interests. The trial court's decision reflects that it fully considered and analyzed the relevant facts, and that its ultimate determination that termination was in the boys' best interests was based on a reasonable rationale. Accordingly, we affirm.

By the Court.—Orders affirmed.

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

