

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1441

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO DARRYL T.-H. AND DURRELL T.-H.,
PERSONS UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER,

DARRYL T.-H. AND DURRELL T.-H.,

APPELLANTS,

V.

MARGARET H.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Reversed and cause remanded for further
proceedings.*

FINE, J. Darryl T.-H. and Durrell T.-H., twin boys born in February of 1993, appeal, by their guardian *ad litem*, the trial court's order dismissing the State's petition to terminate the parental rights of their birth mother, and placing them in the home of their maternal grandmother. We reverse and remand for further proceedings.

I.

Although this case was prosecuted as a termination-of-parental rights matter, it is, in essence, a custody dispute between the grandmother of Darryl and Durrell on the one hand, and Debra G., the children's foster mother on the other. No one disputes the trial court's finding that the twins' birth mother abandoned the children and, therefore, as recited in the trial court's order, "[g]rounds exist to terminate" her parental rights to the twins. *See* § 48.415(1)(a)2, STATS.

The children started out their lives with their birth mother, who was then living with her mother. According to the testimony of a Milwaukee County social worker, the children's birth mother "left the children unattended in the home of the maternal grandmother." In June of 1993, when they were four months, one week old, the twins were removed from the grandmother's home and placed with their birth mother's sister. The children stayed with their aunt until early February of 1994, when, at the age of one year, they went to live in a foster home. They stayed in the foster home until mid-July, when they were placed in a different foster home. They stayed in this second foster home about a week, when they were moved again to a third foster home. They stayed in this third foster home until March of 1998, when, at age five, they were placed with Debra G., the foster mother with whom they were living at the time of the hearing on November

20, 1998. Debra G. was forty-one at the time of the hearing. She wants to adopt the twins.

The trial court heard testimony from two psychologists, two social workers, the grandmother, Debra G., and the aunt in whose home the twins once stayed. The psychologists and social workers agreed that the twins should continue to live with Debra G., and that she should be permitted to adopt them. The essence of their recommendation was that the children, who suffered from Reactive-Attachment and Attention-Deficit disorders, had bonded with Debra G., and that she was more capable of addressing their special needs than was the grandmother. Thus, the psychologist who evaluated the twins and both women told the trial court that “the grandmother may not have an accurate assessment of the extent of these boys’ special needs and ability to respond to them effectively.”¹

¹ The psychologist, in the course of his evaluation of the grandmother, Debra G., and the children, noted a difference in the children’s interaction with the two women:

Both were at ease in the presence of Debra and alternated sitting on her lap. Eye contact was good and there were signs of affection and rapport. The children did refer to Debra as, “Momma.” Debra left her seat to interact with the boys directly as they were interested in exploring examiner’s office. There was playful tickling and they later talked about school motivational problems and also religious matters. Debra set appropriate limits as needed, and the children were responsive to this. One boy was distressed as to the possibility of not being able to remain with Debra at the end of the observation. The quality of interaction was felt to be good.

Darryl was somewhat resistive to going in to see the grandmother, and required a degree of encouragement on the part of the foster mother to do so. The boys initially sat at some distance from her and Margaret preferred to stay in the chair. She did instruct them to come, and they did respond to this. She seemed to be firm and attentive to them. She directed them to recite the alphabet, which they did, and later spell their names. She was clearly in control in the situation, yet not as affectionate or playful. At one point, they [*sic*] boys attempted to leave and the grandmother instructed them to come back. She did bring out some paper and had the boys print their names. She

(continued)

The psychologists and social workers all opined that the twins needed stability in their lives, and that that stability would be best provided by Debra G. There was general agreement, however, that it was also in the twins' best interest to maintain their relationship with their birth mother's family, mainly the grandmother and the twins' siblings who were living with the grandmother. Debra G. also agreed, and testified that she would help the children to keep that relationship even though her own personal relationship with the grandmother was "strained."

Although the grandmother was originally slated to be the twins' primary caregiver, and was made the twins' guardian in February of 1995, her apartment was too small to accommodate the twins and the five children who were living with her. Ultimately, in April of 1996, the procedures to find the twins a permanent home kicked in. *See* § 48.38, STATS. (permanency planning). The grandmother was told in open court in April of 1996 that if she were not prepared to make what the court records refer to as "significant progress" in assuming care for the twins that the permanency plan would then move to the termination of her daughter's parental rights to the twins and adoption. When the grandmother still could not take the children, an "adoptive resource" was sought. In mid-March of 1998, one of the social workers who testified at the termination-of-parental rights hearing told the grandmother that such a resource had been found. This spurred the grandmother to action, and she put a down payment on a house, for which, she testified, she had, with much effort, been saving. The social worker opined that

remarked as to the need for them to improve their penmanship. She did engage them in playing tic-tac-toe. The boys relaxed as time progressed. He did refer to the foster mother as "Mom" in Margaret's presence. One of the boys attempted to open her purse to explore, and she limited him from doing so. Upon departure, the foster mother did encourage the boys to return to give their grandmother a hug and kiss. One of them was reluctant to do so.

the grandmother's delay in getting larger quarters made him believe that the grandmother was not "as committed" to the twins as was the foster mother.

In an impassioned plea to the trial court, the grandmother, who was sixty-two at the time of the hearing, steadfastly asserted that she had a right to the twins because they belonged to her:

They are my grandchildren. They ain't anybody else's. They're mine, and I want them with their brothers and their sisters, and I want them with me.... We are a family, and we need to be together as a family, and I'm sorry if it took me too long, and I don't apologize for it. I did the best I could, and I'm going to keep on doing the best I can. Those are my grandchildren.

The trial court issued a brief oral decision in which he praised the foster mother for being a "godsend" for the twins:

I want you to realize that your efforts, the efforts of your family do not go unrecognized by this Court. And I am certain that you will have a lasting and lifelong imprint on the lives of these children.

But when I weigh that against the efforts of [the grandmother], the fact that she is the grandmother and guardian of these children, and although the record is -- evidence on both sides of the issue on whether or not the relationship is substantial, this Court finds that it is a substantial relationship, and I also find it would be harmful to these boys to sever that relationship. [The grandmother] never wavered in her desire or her love for her grandchildren. She has had many difficulties to overcome. When I first came on the bench, it never occurred to me that there are people out there who can essentially walk away from their children -- and I've seen a lot of that -- but this is not that kind of a case.

Although the mother clearly has abandoned or failed to assume parental responsibility for these boys -- and that's more of an indication of the effects of drugs on our society, how it can even corrupt and essentially take certain innate instincts of parenting and caring and loving and essentially throw that all away -- but [the grandmother] has been trying.

She has made every attempt to put herself in a position and at this time I just can't take that away from her.

II.

Once grounds to terminate a person's parental rights have been found to exist, the decision whether to actually terminate is vested within the trial court's sound discretion. *Brandon S. S. v. Laura S.*, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993); *Gerald O. v. Cindy R.*, 203 Wis.2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). A trial court's discretionary decision withstands reversal on appeal if the trial court applies the relevant facts to the correct legal standard in a reasonable way. *Brandon S. S.*, 179 Wis.2d at 150, 507 N.W.2d at 107 ("The exercise of discretion requires a rational thought process based on examination of the facts and application of the relevant law."). We review *de novo* whether the trial court has applied the correct legal standard. *Kerkvliet v. Kerkvliet*, 166 Wis.2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

The parties do not dispute the trial court's finding that grounds exist to terminate the mother's parental rights to the twins. Section 48.426(2), STATS., mandates that "[t]he best interests of the child shall be the prevailing factor considered in determining" whether to terminate a person's parental rights to that child. Indeed, "the best interests of the child is the polestar of all determinations under ch. 48." *Brandon S. S.*, 179 Wis.2d at 149, 507 N.W.2d at 107. Section 48.426(3), STATS., sets out the factors that must be considered:

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.

The trial court's brief oral decision considered the following:

1. That "it would be harmful to these boys to sever" the "substantial relationship" between the twins and the grandmother.
2. That the grandmother "never wavered in her desire or her love for her grandchildren."
3. That the grandmother "has had difficulties to overcome."
4. That the grandmother "has been trying" to help the children.
5. That the grandmother "has made every attempt to put herself in a position" to help the children.

And, as a consequence, the trial court opined that it "just can't take that away from her."

The trial court's oral decision reveals that it considered the feelings, efforts, and desires of the grandmother as paramount. The only nod to the children was the trial court's conclusion that it was not in their interests to "sever" their relationship with their grandmother and their siblings. But that point was conceded by all, including Debra G. Significantly, the trial court's focus on what

we have denominated as point one in its expressed rationale is, on its face, wrong; no one—not Debra G., not any of the psychologists, not any of the social workers, and not even the grandmother opined that either termination or continued placement with Debra G. would *sever* the twins’ relationships with their blood relatives. Thus, absent some support in the record, and we perceive none, the trial court’s apparent assumption that the twins’ relationships with their blood relatives *would* be severed is “clearly erroneous.” *See* RULE 805.17(2), STATS.

The trial court is in the best position to evaluate the evidence in this type of fact-intensive, emotion-laden case. *See Brandon S. S.*, 179 Wis.2d at 150, 507 N.W.2d at 107 (“A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court.”); *Minguey v. Brookens*, 100 Wis.2d 681, 688–689, 303 N.W.2d 581, 584 (1981). Accordingly, we decline the invitation of the twins by their guardian *ad litem* to decide this case as a matter of law, and remand it to the trial court for further proceedings. *See Minguey*, 100 Wis.2d at 689, 303 N.W.2d at 584. Upon remand, the trial court must consider the twins’ best interests as paramount, even if those interests supplant its natural sympathy for the grandmother and her feeling that problems can be best dealt with inside the blood-family. Whether this is true in this case or not is a decision for the trial court to make—guided by the criteria set out in § 48.426(3), STATS.

By the Court.—Order reversed and cause remanded for further proceedings.

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

