COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2453
99-2454
99-2455
99-2456

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

No. 99-2453

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOWARD A.,

RESPONDENT-APPELLANT.

No. 99-2454

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KAYTLENE N.A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOWARD A.,

RESPONDENT-APPELLANT.

No. 99-2455

IN RE THE TERMINATION OF PARENTAL RIGHTS TO TATIANNIA L.A., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOWARD A.,

RESPONDENT-APPELLANT.

No. 99-2456

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

HOWARD A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and causes remanded with directions.*

¶1 DEININGER, J.[1] Howard A. appeals four orders, each of which terminated his parental rights to one of his children. He claims the orders must be reversed for one or more of the following reasons: (1) the proceedings to terminate his parental rights were defective because "federal and state statutes pertaining to Indian children" were not followed; (2) "the verdict failed to support" the termination of parental rights (TPR); (3) the trial court erred by not conducting a separate TPR trial for each of the children; (4) the trial court erred in admitting evidence regarding sexual abuse of the children; and (5) the trial court erred in failing to dismiss the petition regarding Alchilseaya for noncompliance with statutory notice requirements. We find no merit in any of Howard's claims of error. Nonetheless, for the reason we discuss below, we vacate the orders terminating Howard's parental rights and direct the trial court to determine on remand whether Howard's rights should be terminated, after considering the result of TPR proceedings regarding the children's mother, Rosemary A.

BACKGROUND

¶2 The La Crosse County Department of Human Services petitioned the court to terminate the parental rights of both parents, Howard and Rosemary A., to these four children. Proceedings on the four petitions were conducted jointly in the trial court. Rosemary filed a separate and earlier appeal of the TPR orders,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

which we addressed in ***La Crosse County Department of Human Services v. Rosemary S.A.***, Nos. 99-2038, 99-2039, 99-2040, 99-2041, unpublished slip op. (Wis. Ct. App. Oct. 21, 1999). The following factual summary is taken from that opinion:

> On May 28, 1998, La Crosse County filed petitions for the termination of the parental rights (TPR) of Rosemary and Howard A. to each of their four daughters, who now range in age from four to ten years. The children had previously been found to be in need of protections or services (CHIPS), and they had been placed outside the parental home since 1995. The four petitions were tried together to a twelve-person jury. Each of the four special verdicts asked four questions of the jury relating to the allegations concerning grounds under § 48.415(2), STATS., for terminating Rosemary's parental rights:
>
> > Question 1: Has [child's name] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of one year or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
> >
> > Question 2: Did the La Crosse County Department of Human Services make a diligent effort to provide the services ordered by the court?
> >
> > Question 3: Has Rosemary … failed to demonstrate substantial progress toward meeting the conditions established for the return of [child's name] to Rosemary['s] … home?
> >
> > Question 4: Is there a substantial likelihood that Rosemary … will not meet these conditions within the 12 month period following the conclusion of this hearing?

> The trial court inserted a "yes" answer to question 1 on each verdict, and the jury answered "yes" to questions 2, 3 and 4, but the jury's answers were not unanimous. On question 2, jurors Hanson and Sparks dissented; on questions 3 and 4, jurors Hanson and Holzer dissented[3]….
>
> [3] Questions 5 and 6 on each verdict inquired whether Howard had failed to demonstrate substantial progress toward meeting the conditions for return, and whether there was a substantial likelihood that Howard would not meet the conditions within twelve months following the hearing. The jury answered both questions 5 and 6, relating exclusively to Howard, "yes" with no dissenters.
>
> Following the clerk's reading of the verdicts, the court asked the jury, "[i]f these are the verdicts as you have reached them, would you please raise your right hands?" The court reported that "[a]ll 12 jurors have in fact raised their hands," and it then excused the jurors. Rosemary did not request that the jury be polled, nor did she object to the dismissal of the jurors, or otherwise question the validity of the verdicts [nor did Howard do any of these things]. At the conclusion of the proceedings, the court found, "based on the verdicts[,] that each parent is unfit as that relates to each of the children in the verdicts," and it scheduled the cases for disposition.
>
> Prior to the dispositional hearing, Rosemary [and Howard] moved for an order setting aside the verdict with respect to Alchilseaya, or alternatively, changing the answer to question 1 of that verdict to "no," on the grounds that an order extending Alchilseaya's CHIPS disposition had not contained the statutorily required parental TPR warning. The court denied this motion.…

Id. at ¶¶2-5. The court entered orders terminating Howard's rights to all four children, and he now appeals those orders. The guardian ad litem (GAL) for the four children joins the County in arguing that the orders should be affirmed.

¶3 It is important to an understanding of some of the issues Howard raises in this appeal to note briefly our disposition in Rosemary's appeal. Because the same ten jurors did not agree on all four verdict answers necessary to support a termination of Rosemary's rights, we reversed the TPR orders as they applied to her and remanded for a new trial as to whether grounds existed to terminate her rights. *See* ***Rosemary S.A.***, Nos. 99-2038, 99-2039, 99-2040, 99-2041 at ¶3. We also concluded, however, that the absence of the TPR notice and warning from one of three CHIPS orders relating to Alchilseaya did not require dismissal of the TPR petition relating to her, and that proceedings on that petition could continue with those on the other three petitions on remand. *See* ***id.*** at ¶14. Additional background facts will be presented in the discussion which follows.

ANALYSIS

I. The federal Indian Child Welfare Act and related state statutes.

¶4 Howard claims that there are "various references to the children's Indian heritage in the record." He then cites numerous provisions of the federal Indian Child Welfare Act, 25 U.S.C. §§ 1902-1963, and various Wisconsin statutes relating thereto. *See, e.g.,* WIS. STAT. §§ 48.028, 48.255(1)(cm), 48.42(1)(d) (1997-98).[2] Howard goes on to argue that the TPR orders must be reversed because notices of the proceedings were not given to tribal agents, and because various standards and safeguards required by federal law in proceedings relating to Indian children were not followed.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 The problem with Howard's first claim of error is that his opening brief is the first occasion in over five years of court proceedings involving these children that any claim is made that these children are subject to the Indian Child Welfare Act. Howard acknowledges that the TPR petitions allege that each child "is not subject to the federal Indian Child Welfare Act," and he admits that "trial counsel did not … raise the Indian child element" in the trial court. Nonetheless, he argues that the absence of a "determination on the record" that the federal act did not apply, and/or the failure to apply it, constitute "plain error" requiring a reversal of the TPR orders. We disagree.

¶6 Howard's attempt to raise the issue of potential noncompliance with state and federal Indian Child Welfare provisions presents a classic demonstration of why this court will only rarely consider issues raised for the first time on appeal. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). Had Howard raised the issue in the trial court, the parties would have had the opportunity to make a factual record regarding any claim the children might have to tribal membership, as well as of the County's efforts, if any, to comply with any state and federal statutes that may apply to the children in this regard. And, if it had been established that tribal notification or other procedural steps were required, these steps could have been accomplished before continuing with the TPR proceedings. But, since the issue of compliance with the Indian Child

Welfare provisions is first raised in this court, none of this was done, and accordingly, we will not address the issue further.[3]

II. The verdict supporting termination of Howard's rights.

¶7 Howard appears to make two distinct claims of error regarding the verdict as it applies to him: (1) because both his and Rosemary's rights were terminated in a single proceeding, the defect in the verdict relating to Rosemary requires that the verdict relating to him also be set aside; and (2) the federal Indian Child Welfare Act requires that the verdicts be unanimous. We have already disposed of the second claim by determining that any claim of error relating to noncompliance with federal or state Indian Child Welfare provisions is not properly before us. We thus turn briefly to Howard's claim that the entire verdict must fall because of the failure of the same five-sixths of the jurors to agree on a verdict with respect to Rosemary.

¶8 The first two questions on each verdict, inquiring as to the out-of-home CHIPS placements of the children and the County's diligence in providing court-ordered services, applied to both parents. Questions 3 and 4 related exclusively to Rosemary, and questions 5 and 6 related exclusively to Howard. These questions inquired, with respect to each parent, whether he or she had made progress in meeting conditions for the return of each child, and whether there was

[3] Our application of the waiver rule should not be taken to mean that we believe there is merit to Howard's claim of error regarding the Indian Child Welfare issue. To the contrary, we agree with the County and the GAL that the fleeting references in the record to Rosemary's Native American ancestry fall well short of a showing that either parent were members of any tribe or band, or that any of the children were members or eligible therefor, which are the prerequisites for triggering the Indian Child Welfare provisions. *See, e.g.,* WIS. STAT. § 48.981(1)(cs).

a substantial likelihood that the conditions would be met within twelve months following the trial. The court inserted "yes" answers to the first question on each verdict. The jury answered the second question "yes" with two dissenting jurors, and the "yes" answers to questions 5 and 6 were unanimous. Thus, the same ten jurors agreed to each of the findings necessary to establish the grounds for terminating Howard's parental rights under WIS. STAT. § 48.415(2).

¶9 WISCONSIN STAT. § 805.09(2) provides as follows: "A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions." This requirement was met with respect to the four questions relevant to the claim against Howard, and the fact that the five-sixths verdict requirement was not met on the allegations against Rosemary does not invalidate the verdict relating to Howard:

> It is well established in Wisconsin law that this statute requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim.… Thus a verdict must be reviewed on a claim-by-claim basis rather than as a whole.… Dissents important to one claim may be immaterial to another when the verdict is reviewed in this fashion.

Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983) (citations omitted).

¶10 Howard argues, however, that since he and Rosemary are married and live together, and thus parent the children together, it is improper to sustain a verdict finding grounds to terminate his rights in the absence of a valid verdict to support the termination of Rosemary's rights. In making this argument, Howard

confuses proof of the facts necessary to establish the grounds for terminating his rights with the discretionary decision of the court to order his rights terminated. *See* ***Waukesha County Dept. of Soc. Serv. v. C.E.W.***, 124 Wis. 2d 47, 60-61, 368 N.W.2d 47 (1985). The County established to the jury's satisfaction that grounds under WIS. STAT. § 48.415(2) exist to terminate Howard's rights, and we will not set aside that determination. As we discuss at the conclusion of this opinion, however, whether Howard's parental rights should be ordered terminated when Rosemary's rights have not been is a matter for the trial court to decide on remand.

III. Joinder of the four petitions for trial.

¶11 Although Howard finds a "quasi-criminal component" in TPR proceedings, and thus urges us to apply both the criminal and the civil statutes governing joinder and severance of claims, we conclude that only the civil statutes and precedents apply. *See* ***C.E.W.***, 124 Wis. 2d at 53. WISCONSIN STAT. § 805.05 provides as follows:

> (1) CONSOLIDATION. (a) When actions which might have been brought as a single action under s. 803.04 are pending before the court, it may order a joint hearing or trial of any or all of the claims in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> ….
>
> (2) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

WISCONSIN STAT. § 803.04(1), in turn, permits the joinder of parties when claims asserted involve "any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action…."

¶12 Our inquiry regarding the joinder/severance issue is twofold: we must first decide the legal question of whether consolidation of the four petitions for trial was permissible, and if so, we then consider whether the trial court properly exercised its discretion in permitting a joint trial instead of separate ones for each child. *See* ***S.D.S. v. Rock County Dept. of Soc. Serv.***, 152 Wis. 2d 345, 360-62, 448 N.W.2d 282 (Ct. App. 1989). Howard does not argue that the four petitions *could not* have been joined for trial under WIS. STAT. § 805.05(1), only that they *should not* have been because of the prejudice to Howard in doing so. Thus, we review only the trial court's exercise of discretion in denying Howard's motion for separate trials on each petition. We will not disturb a discretionary decision unless the trial court applied the wrong law, failed to consider the relevant facts, or reached a result that a reasonable judge could not have reached. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). The trial court did none of these things.

¶13 In denying Howard's severance motion, the trial court said:

> I guess from my perspective, all of the evidence, if not all, certainly the vast vast majority of the evidence, regarding one of the children is going to be relevant and cover the same situations as with other -- the other children.

> The sexual assaults or the allegations of sexual assaults or other inappropriate sexual behavior on behalf of the children can be handled in one of two ways that is different than separating each case as far as trying them separately, and that is as has been mentioned, a motion in limine or a jury instruction to enlighten the jury as to -- as to the purpose that that particular evidence can be used for. I think it would be a waste of everybody's time if these were tried separately.
>
> The one thing about prejudice, of course, is that in every trial one side is trying to bring in evidence that is prejudicial to the other side. That is the nature of the beast. The question is whether or not that is undue prejudice or if the prejudice is outweighed by some other factors, or outweighs other factors. And certainly in this particular case I don't find that that's the case.
>
> I think also it is artificial to separate them when, in fact, when we talk about the elements of what has to be proven; in other words, have the parents made -- complied with the court orders, and the court orders are identical in each case, and is there a showing that there is a likelihood that they would not meet the conditions for the return within the time limit established by law. The evidence is going to be identical in each case, or certainly closely identical.
>
> So economically as well as practically there is no reason to sever them and there is no showing of undue prejudice.

¶14 We agree with the County and the GAL that the trial court properly weighed the relevant considerations, and we cannot conclude that it erred in consolidating the four petitions for a single trial. *Cf.* ***S.D.S.***, 152 Wis. 2d at 362 (concluding that the use of separate verdicts and proper instructions can erase potential prejudice from trying TPR petitions against both parents in a single trial). Howard concludes his challenge to the joinder of the petitions by asserting that "[t]here are a lot of problems in here that are very odd and very strange." We will

not set aside the trial court's thoughtful resolution of the joinder/severance issue on the basis of Howard's generalized claim of prejudice.

IV. The evidence of sexual abuse admitted at trial.

¶15 Howard filed a motion in limine before trial to exclude any testimony or evidence regarding the alleged sexual abuse of two of the children. The trial court denied the motion. Howard claims this was error because any probative value of the evidence in question was outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03. He claims that the evidence appealed to the "jury's sense of horror," aroused the jurors' sympathy for the girls, and implied that he was the perpetrator "because why else would this material be presented at a TPR trial[?]"

¶16 A trial court's decision to admit or exclude evidence is also "a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990) (citation omitted). We conclude, as we did regarding Howard's motion to sever, that the trial court applied the correct law to the relevant facts, and it reached a reasonable conclusion which a reasonable judge could reach. *See* ***Burkes***, 165 Wis.2d at 590. The court said:

> I'm going to deny those motions in limine. I will grant you that I guess from a normal juror's perspective, once sexual abuse or sexual assault of a child is mentioned that red flags go up in the minds of the jurors, and the inference to be drawn is that the parents must have done it or somebody there that they allowed to do it. However, I think it can be made clear not only from the arguments of counsel and the evidence as it's presented that there has been no definitive finding that that is the case. It is, however, relevant from

> my perspective to, first of all, give the jury a total picture of what is going on in this case. It explains among other things why visits were terminated. It also directly relates -- or they also directly relate to elements that the County has to prove, one being the diligent efforts being made by the Department as well as the aspect of the parents meeting the conditions within a reasonable period of time….
>
> The Court will find that the probative value outweighs any prejudice to the parents. The … criteria for prejudice is unfair prejudice, whether evidence is being sought to be introduced by improper means, and that's not the case here, so one and two are denied.
>
> [The court went on to grant motions to exclude various other items of evidence.]

¶17 As with the joinder/severance issue, the court stated its reasoning on the record and applied the correct law to the relevant facts before it. The decision to admit the challenged evidence did not constitute an erroneous exercise of discretion.

V. Inadequate warnings in CHIPS extension order.

¶18 The final issue Howard raises is identical to that raised by Rosemary in her appeal: that the petition relating to Alchilseaya should have been dismissed because of the lack of a TPR warning and notice in one CHIPS extension order relating to that child. Although it is technically not "the law of the case," we conclude that our disposition of the issue in Rosemary's appeal should also govern here. Accordingly, we adopt the following analysis and conclusion:

> We conclude that the trial court did not err in refusing to set aside its finding that Alchilseaya had "been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of one year or longer pursuant to one or more court orders containing the

termination of parental rights notice required by law" (question 1 on the verdict).

Alchilseaya was first placed outside [Howard and] Rosemary's home shortly after the child's birth in March 1995. The court entered an order finding Alchilseaya to be in need of protection or services and placing her in foster care in October 1995, and the court entered CHIPS extension orders in October 1996 and again in October 1997. (The older three children were also found to be CHIPS and placed outside the parental home in 1995, with extension orders in 1996, 1997, and 1998.) [Howard] challenges only the October 1997 extension order for Alchilseaya as being defective for failing to contain the TPR warning and notice required under § 48.356(2), STATS.

Section 48.356(1), STATS., provides:

> Whenever the court orders a child to be placed outside his or her home … because the child … has been adjudged to be in need of protection or services … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation.

Subsection (2) of the statute goes on to require, in addition, that "any written order which places a child … outside the home … under sub. (1) shall notify the parent or parents … of the information specified under sub. (1)." The relevant TPR statute, in turn, requires a petitioner to establish "[t]hat the child has been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders … containing the notice required by s. 48.356(2)." Section 48.415(2), STATS.

[Howard] argues that since the order extending Alchilseaya's CHIPS out-of-home placement in October

1997, the last such order prior to the May 1998 TPR petition, failed to have attached to it the warning and notice required by § 48.356(2), STATS., the TPR petition relating to Alchilseaya should have been dismissed. We disagree. At the time the TPR petition was filed, Alchilseaya had been placed continuously outside of the parental home for over two years, dating back to the original CHIPS order in October 1995. That order, and the first extension order in October 1996, contained the required warning and notice. Thus, Alchilseaya had "been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders … containing the notice required by s. 48.356(2)" for a period of one year or longer, as the TPR petition alleged and the applicable statute required. *See* § 48.415(2), STATS.

We conclude that the failure to attach the warning to the 1997 extension order which continued Alchilseaya's out-of-home placement into a third year did not "wipe the slate clean"…. That omission does not preclude the County from going forward with TPR proceedings based on the two years of out-of-home placement under the CHIPS disposition and extension that preceded the defective order. Orders containing the required information were in fact entered in Alchilseaya's CHIPS case for the first two years of her out-of-home placement. Our conclusion is reinforced by the fact that [Howard] acknowledges that all of the orders relating to h[is] other three children, entered both before and after October 1997, contained the required warning and notice. Thus, there is no dispute that [Howard] was aware of the information required to be contained in orders placing h[is] children outside h[is] home.

We also note that we are not certain whether the warning notice was even required to be attached to the 1997 order, which did not "place" Alchilseaya outside the parental home, but merely continued her out-of-home placement. Section 48.415(2), STATS., refers to a child's having been "placed, or continued in a placement" pursuant to court orders containing the notice, but the notice is that "required by § 48.356(2)." The supreme court concluded in ***Marinette County v. Tammy C.***, 219 Wis.2d 206, 209, 579 N.W.2d 635, 636 (1998), that "the warning notice appl[ies] only to orders removing children from placement

with their parents…." The court explained that not all orders affecting a child who has been placed outside the home need contain the written notice required by § 48.356(2):

> On December 18, 1995, the circuit court for Marinette County issued another order in Anthony C.'s case, changing his placement and revising the dispositional order. This order did not include the WIS. STAT. § 48.356 warning, but *that warning was not required because the order did not change young Anthony C.'s placement from that of his mother's home to somewhere outside the home*. At the time of the December 18, 1995 order, young Anthony C. had already been placed outside his mother's home pursuant to the valid order entered March 7, 1995.

Id. at 224, 579 N.W.2d at 642 (emphasis added).[9]

[9] Notwithstanding the quoted language from ***Tammy C.,*** we believe that it is the better practice to include the notice under § 48.356(2), STATS., in all orders extending out-of-home CHIPS placements, as was done in this case for all of the extension orders save one.

Rosemary S.A., Nos. 99-2038, 99-2039, 99-2040, 99-2041 at ¶¶14-19.

CONCLUSION

¶19 For the reasons discussed above, we conclude that the verdict finding that grounds exist under WIS. STAT. § 48.415(2) to terminate Howard's parental rights to the four named children should not be set aside. Nonetheless, we conclude that the order terminating Howard's rights must be reversed because of the changed circumstances which now exist as compared to the state of affairs at the time of the original dispositional hearing. *See* WIS. STAT. § 48.424(3)

(providing that jury decides only whether grounds for TPR exist; court decides what disposition is in best interest of the child); ***C.E.W.***, 124 Wis. 2d at 60 ("Even if the jury finds grounds for termination, the circuit court, at the … dispositional stage of the proceedings, need not terminate parental rights.").

¶20 At the conclusion of the dispositional hearing, the trial court concluded that it was in the best interests of each of the four children that both Rosemary's and Howard's rights be terminated because, among other reasons, "all of the children are likely to be adopted," and thus the permanency and stability of the children's placements would be enhanced by the TPR. *See* WIS. STAT. § 48.426(3)(a) and (f). Now, however, given that this court has reversed and remanded the TPR orders with respect to Rosemary, it may no longer be in the best interests of these children to have their father's rights terminated. We therefore remand so that the trial court may determine whether it remains in the best interests of the children to terminate Howard's rights.

¶21 We feel it important to provide some further direction given the unusual posture of these cases following the separate appeals by the two parents. The record before us gives no indication of the status of the proceedings in the trial court to terminate Rosemary's rights following remand. It is likely that the parties and the trial court are awaiting the outcome of this appeal before going forward with a new trial of the allegations relating to Rosemary. We are aware of the time constraints that usually apply in TPR proceedings, in particular those which apply to ordering a disposition in timely fashion following the fact-finding hearing. *See, e.g.,* WIS. STAT. §§ 48.424(4) and 48.427(1). We suggest, however, that the parties and the court consider continuing the dispositional hearing

regarding Howard's rights until a final resolution is reached regarding grounds for terminating Rosemary's rights. *See* WIS. STAT. § 48.315.

¶22 Finally, we note that nothing in this opinion should be interpreted as a determination that Howard's parental rights may be terminated only if Rosemary's rights are terminated. *See* WIS. STAT. § 48.427(3) ("The court may enter an order terminating the parental rights of one or both parents."). Howard is not entitled to have the grounds for termination of his rights re-tried, but this court, like the circuit court, must keep in mind that the best interests of the child is "the prevailing factor" in determining the disposition of all TPR proceedings. *See* WIS. STAT. § 48.426(2). We conclude that it is in the best interests of these children that the trial court be given the opportunity to consider whether Howard's rights should be terminated in the event that Rosemary's are not.

By the Court.—Orders reversed and causes remanded with directions.

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