

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2014

Diane M. Fremgen
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. 2014AP595

Cir. Ct. No. 2012TP307

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

DWAYNE F., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DIMOTTO, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Dwayne F. Jr.² appeals the order terminating his parental rights to his daughter, Nylah F. Dwayne F. argues that the trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12).

(continued)

erroneously exercised its discretion in determining that Nylah F.'s best interest involved a guardianship with the Bureau of Milwaukee Child Welfare, with the expectation that Nylah F. would be adopted by the foster family with whom she had lived most her life and in whose care she had thrived. According to Dwayne F., the court should have ordered placement with his father, Dwayne F. Sr., instead. This court disagrees with Dwayne F. and concludes that the trial court properly exercised its discretion. Consequently, this court affirms the trial court's order.

BACKGROUND

¶2 Nylah F. was born in Milwaukee to Amanda G. on December 6, 2010. Because the Bureau of Milwaukee Child Welfare had been involved with Amanda G. concerning the welfare of her other children, social workers were involved with Nylah F. as soon as she was born. They put in to place an in-home safety plan for Amanda G. to follow, which included parenting assistance, crisis intervention counseling, and visits with a home health nurse. Amanda G. did not follow through on the safety plan, however, and there were concerns about Nylah F.'s safety. Consequently, Nylah F. was taken into custody in March 2011, when she was about three months old.

¶3 Dwayne F., Nylah F.'s father, never lived with Nylah F. and was only minimally involved in her life. For most of Nylah F.'s life, Dwayne lived in

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² This opinion references Dwayne F. Jr. as well as his father, Dwayne F. Sr. For ease of reference, the court will refer to Dwayne F. Jr. simply as "Dwayne F." and to Dwayne F. Sr. as "Dwayne F. Sr." or "Dwayne F.'s father."

Wisconsin Rapids and was inconsistent in attending scheduled visits with her, even though the Bureau bought his bus tickets and arranged visits according to his schedule. Dwayne F. last saw Nylah F. on February 9, 2013. He was thereafter incarcerated for nine months beginning February 10, 2013, and had no contact with Nylah F. during or after his incarceration.

¶4 Nylah F. was ultimately found to be a child in need of protection or services and placed outside her mother's home. She was placed with a married couple who serve as her foster parents and she has remained with them ever since.

¶5 In December 2012, the State moved to terminate Dwayne F.'s parental rights on two grounds: continuing CHIPS and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2) & (6). In November 2013, on the day that a jury trial on the grounds for termination was scheduled to begin, Dwayne F. decided to waive his right to a jury trial and stipulate to the continuing CHIPS ground. The trial court conducted a colloquy with Dwayne F., accepted the stipulation, and heard testimony from a family case manager that allowed the trial court to make a finding that there was a factual basis for the continuing CHIPS ground alleged in the petition. Per the stipulation, the failure to assume parental responsibility ground was dismissed.

¶6 The case proceeded to a dispositional hearing. The court heard testimony from Nylah F.'s foster mother, Nylah's case manager at the Bureau, Dwayne F., and Dwayne F.'s father, Dwayne F. Sr.

¶7 At the dispositional hearing, Nylah F.'s foster mother, C.G., testified that Nylah F. viewed C.G. and C.G.'s husband as her parents and saw their children as her brothers. C.G. explained that Nylah F. had been placed with her family when she was three months old and that her family was the adoptive

resource. Nylah F.'s biological brother Wayne, born in April 2013, also lived with C.G. and her family. C.G. testified that Nylah F. was doing well, although she was small for her age.

¶8 C.G. further testified that Nylah F. did not understand her biological parents to be part of her family, and that after visits with them, she was very withdrawn. Nylah F. had not asked for Dwayne F., nor had she asked for any visits with him or his extended family since Dwayne F.'s last visit. In addition, Dwayne F.'s family had not contacted the foster family at any point. Also, Dwayne F. never suggested that his two-year-old son, who lived in Wisconsin Rapids with Dwayne F.'s girlfriend, have contact with Nylah F.

¶9 Nevertheless, C.G. recognized that Nylah had two families, biological and foster, and that both are part of who she is. C.G. testified that she and her husband intended to send pictures and letters to Nylah's biological parents a few times a year if Nylah was adopted, and would possibly get together with them and their extended families a couple of times a year as well. C.G. further testified that the foster family had previously gotten together with Nylah's three older siblings and had exchanged letters and pictures with them a couple times a year. C.G. testified that she and her husband viewed the biological family connection as vital.

¶10 Nylah F.'s case manager testified that Nylah F. was very happy and healthy, was doing very well in her foster parents' care, and that the foster family was "willing to do whatever they need to make sure that Nylah's needs are met and that ... their commitment to her is lifelong." The case manager also testified that some of Dwayne F.'s relatives were looked into as possible placements for Nylah after she was detained, but none followed through. Regarding Dwayne F.'s

father, who had recently come forward as a potential guardian, the case manager testified that Dwayne F. Sr. had recently attended visits with Nylah F. and her mother about three or four times, beginning a few months prior to the dispositional hearing. Dwayne F. Sr. first got involved with Nylah F. when her mother called him and asked if he wanted to attend her visits. However, he had not contacted the case manager or expressed interest in placement of Nylah F. The case manager testified that she thought Dwayne F. Sr. only wanted to spend some time with his granddaughter.

¶11 Dwayne F. Sr. testified that he wanted to be Nylah F.'s guardian. He testified he knew of Nylah F.'s birth but did not get involved right away because his wife was very ill. More recently, Dwayne F. Sr. had been dealing with the death of his wife and working two jobs to pay medical bills. At the hearing he testified that he was now financially stable and in a position to become Nylah F.'s guardian.

¶12 Dwayne F. Sr. was motivated to become Nylah F.'s guardian in part by his desire to repair his relationship with his son. He explained that he and Dwayne F. had a falling out five and a half years ago and had no contact since. According to Dwayne F. Sr., if he was the guardian of Nylah F. it would force Dwayne F. to come to his home and deal with their past. Dwayne F. had left the home when he was about seventeen years old after a confrontation with his father and previous episodes of running away. When asked how he envisioned the guardianship to work if he did not have a relationship with his son, he said:

It's – well, it's pretty easy for me. It would be a way where if Nylah – if I got Nylah to stay with me, that would bring a situation with my son and me where he [would] have to come see me. The things we had in the past, I would want to ... bring it forth. I don't know.... But if I have his daughter and he loves his daughter like he let my younger

siblings know, then he would come to my house. He would have to have a meeting. That's a meeting that would have to happen. So that was my plan in the back of my head.

¶13 Dwayne F. Sr. felt if Nylah F. was removed from the foster home slowly, the experience would be a “small bump in the road” and she would benefit from joining the paternal family. Dwayne F. Sr. felt it was important that Nylah F. be with her biological family.

¶14 When asked why he favored having his father as Nylah F.'s guardian, Dwayne F. said that it would build a closer relationship between him and his father and give them the opportunity to reunite. Dwayne F. testified that he had not talked to his father for five and a half years, and his own stubbornness and attitude were the problem. Dwayne F. also felt his father could provide and care for Nylah F., and that it was important that she be with her paternal family. Dwayne F. further explained that his relatives did not pursue placement after Nylah F.'s detention because he initially indicated he was going to work towards meeting the CHIPS court order without anyone's help.

¶15 After considering the WIS. STAT. § 48.426 standard and factors, the trial court concluded it was in Nylah F.'s best interest that the parental rights of both her parents be terminated, and ordered that custody and guardianship of Nylah F. be transferred to the Bureau for the purpose of adoption.

¶16 The court determined that Nylah F. was doing well, was very happy and healthy, and was fully integrated into family life with her foster family—whose home had been her home for virtually all her life. The court pointed out that Nylah F. lived with her biological brother with her foster family, and that the family had established a relationship with Nylah F.'s other siblings and hoped to continue that contact. The foster family also would likely allow Nylah F.'s

biological parents and Dwayne F.'s extended family to have some type of relationship with Nylah F. in the future. The court concluded that everything the foster family did for Nylah F. was based on whether or not it benefited her.

¶17 In contrast, the court found that Nylah F. did not have a substantial relationship with Dwayne F. Sr., and that his proposed guardianship would benefit Dwayne F.'s family first, and Nylah F. secondarily. The trial court noted that what was best for Nylah F. "should not be a byproduct of a father and son being able to reunite." The court further indicated no paternal family member came forward for placement when they knew Nylah F. existed. Even if Dwayne F. Sr. could not have taken placement early on, the court asked why no other paternal family member did so. The court also noted Dwayne F. had never told the foster family about his younger son or asked that Nylah F. get to know her younger half-brother. The trial court concluded that it would not disrupt a wonderful life for Nylah for one of uncertainty with a family that failed to step up in the past and where the father and grandfather had many issues.

¶18 Dwayne F. now appeals.

ANALYSIS

Standard of Review

¶19 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." *Steven V. v. Kelley H.*, 2004 WI 47, ¶24, 271 Wis.2d 1, 678 N.W.2d 856. During the first, or "grounds" phase of the proceeding, "the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." *Id.*; see also WIS. STAT. § 48.31(1). "Once the court has declared a parent

unfit, the proceeding moves to the second, or dispositional phase, at which the child’s best interests are paramount.” *Steven V.*, 271 Wis. 2d 1, ¶26. In making this determination, “the court ‘should welcome’ any evidence relevant to the issue of disposition, including any ‘factors favorable to the parent,’ and must at a minimum consider the six ‘best interests’ factors set forth in WIS. STAT. § 48.426(3).”³ *Steven V.*, 271 Wis. 2d 1, ¶27.

¶20 “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.” *David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). This court

³ WISCONSIN STAT. § 48.426(3) provides:

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.

will not upset the trial court's decision unless the decision represents an erroneous exercise of discretion. *Id.* "The trial court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

The trial court properly exercised its discretion in terminating Dwayne F.'s parental rights.

¶21 On appeal, Dwayne F. argues that the trial court erroneously exercised its discretion by awarding guardianship of Nylah F. to the Bureau instead of Dwayne F. Sr., Nylah F.'s paternal grandfather. Specifically, Dwayne F. argues that: (1) the trial court's decision was not in Nylah F.'s best interests, (2) the decision "was nothing short of a rubber stamp of the fact that, clearly, the Bureau had its mind made up that the foster family ... [was] to be the adoptive family," and (3) the trial court was wrong to question why none of Dwayne F.'s family members came forward to care for Nylah F. during the time that Dwayne F. Sr. was caring for his wife and working his way out of debt, because the "onus for seeking a relative placement should always be on the Bureau ... not on the family." (Some formatting omitted.)

¶22 This court finds Dwayne F.'s arguments unavailing, first, because they are unsupported. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review inadequately developed issues). Dwayne F. provides no explanation for why the trial court's decision was not in Nylah F.'s best interest. Nor does he provide any factual support for his contention that the trial court's decision was a "rubber stamp" of the Bureau's work. Similarly, Dwayne F.'s argument that "[t]he onus for seeking

a relative placement should always be on the Bureau” is unsupported by any legal authority.

¶23 Second, Dwayne’s arguments that the trial court’s decision was not in Nylah F.’s best interest and was merely a “rubber stamp” of the Bureau’s work are belied by the record. Dwayne does not argue that the trial court failed to give “adequate consideration of and weight to” the factors required by WIS. STAT. § 48.426(3). See *State v. Margaret H.*, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475. Indeed, Dwayne concedes that the trial court “certainly gave a thorough and lengthy oral discussion ... presenting [its] findings of fact and conclusion in a seemingly reasoned manner.” As noted in more detail above, the trial court thoroughly considered all of the statutory factors, explaining the many reasons why placing Nylah F. with the Bureau, which the court was “absolutely certain” would lead to adoption by the foster family—the only family Nylah F. has known and under whose care Nylah F. has thrived—was far better for Nylah F. than placement with her grandfather, who had met with her only a handful of times and whose underlying interest was repairing his broken relationship with his son.

¶24 While Dwayne may not agree with the trial court’s decision, the question this court asks is whether the trial court appropriately exercised its discretion, not whether the parties agree with the decision. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (reviewing court’s inquiry is whether discretion was exercised, not whether it could have been exercised differently). In this case, the trial court properly exercised its discretion, and this court will not disturb its thoughtful, well-reasoned discretion.

¶25 For the reasons stated, the order terminating Dwayne F.'s parental rights is affirmed.

By the Court.—Order affirmed.

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

