

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2015

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 Nos. 2015AP986
2015AP987
2015AP988**

**Cir. Ct. Nos. 2012TP76
2012TP77
2012TP78**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

K. K.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

K. K.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

K. K.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County:
MARK A. SANDERS, Judge. *Affirmed.*

¶1 BRADLEY, J.¹ K.K. appeals the orders terminating her parental rights to her three children. She claims the trial court erroneously exercised its discretion when it terminated her parental rights without properly evaluating the harm that would result from severing the legal relationship with K.K. Because the trial court properly considered all of the relevant statutory factors before reaching the reasonable conclusion that termination was in the best interests of K.K.'s children, this court affirms.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶2 This case involves the termination of K.K.’s three children: R.N.H., Jr., born in December 2002; R.M.H., born in September 2003; and T.L.B., Jr., born in November 2006. R.H., Sr. fathered the first two children and T.B., Sr. fathered the third child. Both fathers voluntarily terminated their parental rights.

¶3 When R.M.H. was five months old, both R.M.H. and R.N.H. went to live with their father, where they resided for four years because K.K. was involved with drugs, “moving from house to house,” and spent a year in jail during that time period. In 2008, all three children were in K.K.’s care for about a week when she struck R.M.H. in the mouth with a belt buckle during a “whoop[ing],” which caused some of R.M.H.’s teeth to fall out. All three children were then removed from K.K.’s home and have been in foster placements ever since.

¶4 In 2012, the State filed petitions to terminate parental rights with respect to all three children. After finding grounds existed for termination, the trial court held a dispositional hearing to determine whether termination was in the best interests of the children. At the conclusion of the hearing, the trial court addressed both the standard to be applied—the best interests of the child—and each of the factors it was required to consider under WIS. STAT. § 48.426 (2013-14).²

² WISCONSIN STAT. § 48.426 provides:

Standard and factors. (1) COURT CONSIDERATIONS.
In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors

(continued)

¶15 First, the trial court addressed the likelihood each child would be adopted after termination: R.N.H. was “highly likely to be adopted.” R.M.H. was in “the middle of the intermediate range of adoptability.” T.L.B. was in the “higher range of adoptability” and it was “highly likely” that the foster parent would adopt. This factor demonstrated that termination of K.K.’s parental rights would be in the best interests of the children.

enumerated in this section and any report submitted by an agency under s. 48.425.

(2) STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

(3) 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.

¶6 Second, the trial court considered the age and health of the children both at the time of disposition and the time of removal. The trial court found the “most noteworthy thing about their age and health is the length of time that they’ve been in out-of-home care and how they have aged during that period of time.” This factor also favored termination of K.K.’s parental rights.

¶7 Third, the trial court addressed whether K.K. had a substantial relationship with the children and whether harm would result from severing that relationship.³ The trial court found that all three children had a significant relationship with K.K. and there would be “some level of harm” if the children never had contact with K.K. again. The trial court also determined that “whatever harm there is [that] would be mitigated” because the foster parents for R.N.H. and T.L.B. were “clear in their willingness to allow contact with” K.K. if they were to adopt, and the Bureau of Child Welfare would seek to find an adoptive resource for R.M.H. who would continue to allow contact with K.K., if appropriate. Although this factor weighs partially against termination, the current situation demonstrates that harm stemming from legal severance would be mitigated by likely ongoing contact.

¶8 Fourth, the trial court considered the wishes of each child and found each one to be complicated, with some expression by the children of wanting to be returned to their mother, and other times expressing a desire for adoption (in the

³ The trial court also considered whether the children had substantial relationships with others and each other, but because this appeal focuses solely on the substantial relationship factor with K.K., it is not necessary to set forth these additional facts.

case of R.N.H.), and wanting to call his foster parent “Mom” (in the case of T.L.B.).

¶9 Fifth, the trial court found very concerning the statutory factor addressing the duration of separation of the parent from the child. Here, the separation was six years and eight days, which amounted to “an enormous majority of [T.L.B.’s] life, more than half of [R.M.H.’s] life, and around half, although more than half of [R.N.H.’s] life.” The trial court found this to be “a significant factor.”

¶10 Finally, the trial court considered the last statutory factor—whether termination would allow the children to enter more stable and permanent family relationships. The trial court found “each of the [children] is likely to enter a more stable and permanent family relationship through termination.” The trial court also considered whether another option, such as continuation of the CHIPS order or guardianship would be feasible. It found continuing the CHIPS order “would not be in [the children’s] best interests” because of uncertainty, and guardianship would not “allow the same level of concrete permanence that each” of the children needs.

¶11 Based on the consideration of each of the statutory factors, the trial court ruled:

What that leaves me with, and I think because of the high likelihood that [R.N.H.] will be adopted, the high likelihood that [T.L.B.] will be adopted, and the no higher than intermediate level that [R.M.H.] would be adopted, because of -- while there are substantial relationships, the ability to mitigate any harm through severing those relationships because of the complicated wishes of each of the [children] and because of the long duration of separation and the fact that they would be able to enter a

more stable and permanent family relationship through termination, I'm going to find that termination of the parental rights ... is in the best interests of each of these [children].

An order terminating the parental rights of each child was entered, and K.K. appeals the trial court's orders.

DISCUSSION

¶12 The issue in this case involves only the disposition phase of the termination of K.K.'s parental rights. K.K. argues that the trial court erroneously exercised its discretion by failing to properly evaluate the harm factor under WIS. STAT. § 48.426(3)(c). This court is not persuaded.

¶13 “The ultimate determination of whether to terminate parental rights is discretionary with the circuit court.” *Darryl T.-H. v. Margaret H.*, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. This court affirms a discretionary determination where the trial court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. *See Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

¶14 As we have seen, the record shows the trial court started the analysis with the “prevailing factor” of the “best interests” of the children, *see* WIS. STAT. § 48.426(2), and proceeded to address all of the statutory factors with respect to each child, *see* WIS. STAT. § 48.426(3). The trial court's decision discussed the relevant facts for each child and applied each of the statutory factors. As noted, most of the WIS. STAT. § 48.426(3) factors indicated that termination was in the best interests of the children.

(a) *The likelihood of the child's adoption after termination.*

- R.N.H. and T.L.B. would very likely be adopted and R.M.H. was in “the middle of the intermediate range of adoptability.”

(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.*

- The extended length of time these children had been out of the home and how they had aged was significant.

(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.*

- All three children have substantial relationships with K.K. and each other and it would cause some harm to sever the relationship with K.K., but the harm would be mitigated by the likelihood of ongoing contact even after legal severance.

(d) *The wishes of the child.*

- The trial court found the children's wishes to be complicated—sometimes indicating a desire to return to K.K.'s home and other times expressing a desire to be adopted.

(e) *The duration of the separation of the parent from the child.*

- The trial court found the six-plus years of separation to be a significant factor and discussed it in terms of T.L.B.'s entire lifetime, and more than half of R.M.B.'s and R.N.B.'s lifetimes.

(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 found termination would give each child a more stable and permanent family relationship.

¶15 After considering all the facts and the pertinent law, the trial court reached a reasonable determination—the majority of the factors favored termination. The trial court also thoroughly addressed the substantial relationship that existed with K.K. and the harm that could occur as a result of severing the legal relationship. The trial court concluded, despite this harm, that termination of parental rights was in the best interests of K.K.’s children. It reached this conclusion in part because any harm would be mitigated by the likelihood that contact with K.K. would continue after termination. Although K.K. argues the trial court’s reference to likely ongoing contact was insufficient or erroneous under *Margaret H.*, this court is not persuaded.

¶16 *Margaret H.* held that a trial court must “evaluate all of the applicable factors enumerated under WIS. STAT. § 48.426(3), while focusing on the best interests of” the children. *Id.*, ¶36. *Margaret H.* does not prohibit trial courts from considering an adoptive resource’s promise to maintain ongoing contact post-termination; rather, it cautions against putting *complete* reliance on a promise because “such promises are legally unenforceable once the termination and subsequent adoption are complete.” *Id.*, ¶¶28-30. *Margaret H.* reversed and remanded the case because the trial court there:

failed to apply the best interests of the child standard and did not consider other pertinent factors besides WIS. STAT. § 48.426(3)(c). Although an evaluation of substantial

relationships and the harm of a legal severance is indeed critical to the court's determination, exclusive focus on any one factor is inconsistent with the plain language of WIS. STAT. § 48.426(3).

Id., ¶35.

¶17 K.K. suggests the trial court's actions here somehow violated the holdings in *Margaret H.* This court rejects K.K.'s argument. The record here shows the trial court applied the best interests of the child standard, thoroughly addressed all of the relevant statutory factors, and concluded that most of the factors favored termination. Although the trial court's analysis included consideration that legal severance would be mitigated by promises indicating likelihood of continuing contact between K.K. and her children, the trial court's decision was not based *entirely* or *solely* on the promises of future contact. Rather, the trial court afforded this factor the partial weight specifically contemplated by our supreme court in *Margaret H.* See *id.*, ¶30 (A trial court "may certainly choose to examine the probability that [the adoptive resource] will be faithful to [their] promise" of continuing contact post-termination, but the trial court "should not be bound to hinge its determination on that legally unenforceable promise.").

¶18 K.K. also argues that the trial court's reliance on the promise of future continued contact requires reversal because no one knows whether that will happen after termination. The future is always unknown, but this record indicates that the intent of all parties involved was to continue contact after termination; thus, the trial court's reference to this information as part of its thorough analysis of the proper standard and factors does not require reversal.

¶19 The trial court's decision in K.K.'s case was based on the best interests of the child standard after an analysis of all the relevant statutory factors. The decision did not violate any holding in *Margaret H.* To the contrary, the trial court here properly exercised its discretion in a well-reasoned and thoughtful opinion, ultimately concluding that termination of K.K.'s parental rights was the disposition that would serve the children's best interests.

By the Court.—Orders affirmed.

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

