COURT OF APPEALS DECISION DATED AND FILED

April 12, 2016

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. 2015AP1617

Cir. Ct. No. 2014TP71

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. N. S.,

RESPONDENT-APPELLANT.

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

¶1 CURLEY, P.J.[1] Melissa[2] appeals from a trial court order terminating her parental rights to Catie and from an order denying her Motion for Post Dispositional Relief (hereinafter, "postdisposition motion"). She argues that: (1) WIS. STAT. §§ 48.415(2) and (6) were unconstitutional as applied; (2) trial counsel was ineffective; (3) it is against public policy for a trial court to allow a foster parent to testify that he or she intends to allow an open adoption if parental rights are terminated; and (4) she is entitled to a new trial in the interests of justice. For the reasons that follow, we disagree and affirm.

BACKGROUND

¶2 Melissa is the mother of Catie, who was born on May 18, 2010, and she cared for Catie from the time of her birth until July 7, 2010, when she was approximately seven weeks old. On that date, Melissa was taken into custody for violating her probation.[3] Her probation was revoked and she remained incarcerated until November 2012. At the time her probation was revoked, Melissa arranged for her sister to care for Catie, as Catie's father was incarcerated prior to Catie's birth; however, after a few days, her sister took Catie to the home of Ms. J., who Melissa had met through her sister while she was pregnant. Ms. J. filed for guardianship, and on August 11, 2010, the Bureau of Milwaukee Child

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). Accordingly, despite appellant's request for publication, this decision will not be published. WIS. STAT. RULE 809.23(1)(b)4. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The child and parent have been assigned pseudonyms in accordance with WIS. STAT. RULE § 809.19(1)(g) and for ease of reading.

[3] Melissa was on probation for five felonies, and she violated her probation while pregnant with Catie.

Welfare (BMCW), took temporary physical custody of Catie. A Petition for Protection or Services was thereafter filed on August 13, 2010, and an Order for Temporary Physical Custody dated the same date placed her in Ms. J.'s home, where she remains.

¶3 Catie was found to be a child in need of protection or services (CHIPS) on October 11, 2010, and a CHIPS dispositional order was entered on that date. The CHIPS dispositional order was extended on October 10, 2011, and again on May 28, 2013. All of the dispositional orders set forth conditions for Catie's return, and the orders also set forth the warnings required by WIS. STAT. § 48.356(2).

¶4 As to Melissa, the initial CHIPS order set forth numerous goals and conditions for return, including, but not limited to: (1) demonstrating impulse control by considering the long-term effects of her decisions, setting aside her own needs in favor of her child's needs, and abstaining from criminal behavior and contact so that she could safely care for her child; (2) comply with recommendations for psychological treatment and participate in therapy to learn decision-making skills; (3) meet the basic care needs of her daughter by providing shelter, food, and necessary care items, as well as managing the day-to-day responsibilities of the household; (4) work with a home management provider to locate suitable housing, budget for household necessities and for her child, and utilize community services and resources; (5) maintain a relationship with her daughter by regularly participating in successful visitation; and (6) cooperating with the BMCW by staying in touch with the case manager. The order further required Melissa to "sign releases of information for the BMCW and DOC to coordinate services" while she was incarcerated. The October 11, 2010 order also contained an Addendum regarding conditions for incarcerated parents, which

identified additional conditions for return including, but not limited to: (1) participate in all programs recommended by the correctional institution social workers; (2) maintain regular contact with the BMCW worker; and (3) maintain monthly contact with her daughter.[4]

¶5 Melissa was released from custody in November 2012, and although Catie was in foster care in Milwaukee, Melissa chose to move to Wausau, Wisconsin, approximately three hours away. She eventually secured housing, and the BMCW worked with Melissa to establish supervised visitation with Catie, first in Milwaukee and then in Wausau. Visits advanced to unsupervised on March 21, 2013, and Melissa had approximately three overnight visits with Catie before being arrested for retail theft in April 2013 while Catie was with her. After that arrest, visits with Catie returned to supervised.

¶6 The BMCW continued to work with Melissa, and visits with Catie again advanced to unsupervised overnights in approximately November 2013. The BMCW had also put together a plan for trial reunification during that time period; however, the BMCW learned that Melissa had two new criminal charges and had stopped regularly attending her mental health therapy, and the plan for a trial reunification was withdrawn. On January 15, 2014, Melissa was again taken into custody and was ultimately sentenced to nine months at Taycheedah Correctional Institute with an October 2014 release date.

[4] Both the October 10, 2011, and May 28, 2013 Orders for Extension of Dispositional Order contained the same conditions for return as set forth in the initial Dispositional Order, and the two extensions both referenced the inclusion of the addendum for incarcerated parents.

¶7 On April 7, 2014, the State of Wisconsin filed a petition to terminate Melissa's parental rights to Catie, alleging that she remained a child in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2) and that Melissa had failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6).[5] On May 1, 2014, Melissa appeared for an initial appearance with her previously appointed counsel in the underlying CHIPS case, the trial court explained the allegations in the petition and Melissa's rights, and the trial court set the matter over. Melissa appeared again on June 10, 2014, with her appointed counsel for the termination proceedings, and the trial court again explained the grounds asserted in the petition, Melissa's rights, and the bifurcated nature of termination of parental rights (TPR) proceedings and the potential outcomes.

¶8 Melissa requested a jury trial as to the grounds phase, which began on September 8, 2014. The jury heard testimony from numerous witnesses, including Melissa, her extended supervision agent, and the ongoing CHIPS case manager. The jury found that the State established all elements of the continuing CHIPS ground as required by WIS. STAT. § 48.415(2), as well as that Melissa had failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6).

¶9 The dispositional hearing occurred on January 21, 2015, January 22, 2015, and February 17, 2015. After hearing testimony from multiple parties, including Melissa, the court addressed the factors set forth in WIS. STAT.

[5] The petition to terminate parental rights also sought termination of Catie's father's parental rights. The father's rights were terminated in conjunction with the proceedings related to Melissa's case. The termination of his parental rights is the subject of a separate appeal, 2015AP1618, and is not addressed here.

§ 48.426(3) and determined that terminating Melissa's parental rights was in Catie's best interests.

¶10 Melissa filed a notice of intent to pursue postdispositional relief on March 4, 2015, and she filed a notice of appeal on August 5, 2015. She thereafter filed a Motion for Remand Pursuant to WIS. STAT. § 809.107(6)(am) on September 10, 2015. In an order dated September 11, 2015, we granted the motion and remanded the matter to the trial court so that Melissa could preserve a claim for ineffective assistance of counsel and for related fact-finding on her claims.

¶11 In her postdisposition motion, Melissa raised multiple arguments that her trial counsel was ineffective, argued that allowing a foster/potential adoptive parent to testify regarding intent to allow for continued contact with the biological family if parental rights are terminated is contrary to public policy and that the trial court erred in relying on such testimony, and that the order terminating her parental rights to Catie should be vacated. The evidentiary hearing on Melissa's postdisposition motion commenced on November 24, 2015, and Melissa and her trial counsel both testified. The trial court denied the postdisposition motion on November 30, 2015, and Melissa appeals. Additional facts will be developed below as necessary.

ANALYSIS

¶12 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. *See* ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d

402. During the grounds phase, "'the parent's rights are paramount.'" *See* ***id.***, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). "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. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶13 On appeal, Melissa challenges the termination of her parental rights to Catie, arguing that: (1) WIS. STAT. §§ 48.415(2) and (6) were unconstitutional as applied; (2) trial counsel was ineffective; (3) it is against public policy for a trial court to allow a foster parent to testify that he or she intends to allow an open adoption if parental rights are terminated; and (4) she is entitled to a new trial in the interests of justice. We address each argument in turn.

I. WISCONSIN STAT. § 48.415(6) looks to the totality-of-the-circumstances over the child's entire lifetime and was not unconstitutional as applied.

¶14 Melissa first argues that WIS. STAT. § 48.415(6), the failure to assume parental responsibility statute, was unconstitutional as applied to her because she had assumed parental responsibility for Catie and therefore had developed a protected liberty interest in the care, custody, and control of Catie. She further argues that because she had developed a protected liberty interest, we must apply a strict scrutiny analysis in determining whether § 48.415(6) was unconstitutional as applied. We conclude that § 48.415(6) was not unconstitutional as applied because Melissa had not assumed parental responsibility for Catie within the meaning of that statute.

¶15 Whether a statute is unconstitutional as applied presents a question of law subject to independent appellate review. ***Kenosha Cnty. DHS v. Jodie W.***,

2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845. Any statute that infringes upon a parent's liberty interest in parenting his or her child is subject to strict scrutiny review. *See **id.***, ¶41. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. *See **Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. Because the Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see **Kelli B.***, 271 Wis. 2d 51, ¶25, the sole issue here is whether that statute, as applied to Melissa, is narrowly tailored to meet the State's compelling interest to protect Catie. *See **id***, ¶17.

¶16 In order to establish failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), the State must establish that the parent has not had a substantial parental relationship with the child. Section 48.415(6) provides:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶17 Melissa argues that this statute was unconstitutional as applied to her because, according to her, she assumed parental responsibility when she cared for Catie for the first seven weeks of her life and thereafter maintained contact during the times she was incarcerated and was allowed visits—both supervised and unsupervised—with Catie after she was released from prison. In essence, we view her argument as challenging the sufficiency of the evidence as to the jury's determination that she failed to assume parental responsibility for her daughter.

¶18 When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. *See* ***id***. We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. *See* ***id***.

¶19 Failure to assume parental responsibility is established by proof that the parent has not had a substantial parental relationship with the child. WIS. STAT. § 48.415(6)(a); ***State v. Bobby G.***, 2007 WI 77, ¶45, 301 Wis. 2d 531, 734 N.W.2d 81. As quoted above, "[s]ubstantial parental relationship" is defined by statute as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b).

¶20 When applying WIS. STAT. § 48.415(6), "a fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. Further, "[w]hen applying [the totality-of-the-circumstances]

test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's *entire* life." ***Id.***, ¶73 (emphasis added).

¶21 Melissa argues that she had assumed parental responsibility for Catie, primarily because she had cared for Catie during the first seven weeks of her life. In advancing this argument, Melissa essentially asks us to discount ***Tammy W-G.*** and to take a limited view of the record. In ***Tammy W-G.***, our supreme court concluded that when a factfinder considers whether a parent has assumed parental responsibility under WIS. STAT. § 48.415(6), the factfinder must apply a totality-of-the-circumstances test that considers the parent's actions during the child's entire lifetime. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶¶3, 22-23. In construing the statutory language of § 48.415(6), the supreme court further stated that the language used did "not indicate that the assumption of parental responsibility is established when the parent has cared for the child for only a short portion of the child's life." ***Tammy W-G.***, 333 Wis. 2d 273, ¶25.

¶22 In ***Tammy W-G.***, the supreme court rejected an argument similar to Melissa's. There, the parent—who lived with his child only during the first four months of her life—argued that under WIS. STAT. § 48.415(6), a parent who cares for his or her child "for a distinct and relatively short period of time, must be found to have 'assumed parental responsibility'" within the meaning of the statute. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶¶11, 33. Similarly, Melissa emphasizes her belief that she assumed parental responsibility for Catie because she cared for Catie during the first seven weeks of her life.

¶23 Melissa's view of the record focuses primarily on a very short period of Catie's life and ignores ***Tammy W-G.***'s holding that whether a parent has assumed parental responsibility pursuant to WIS. STAT. § 48.415(6) is a question

of fact for the factfinder and that the factfinder must consider the totality-of-the-circumstances over the child's entire lifetime. *See* ***Tammy W-G.***, 333 Wis. 2d 273, ¶38. The record demonstrates that the reason Catie was only in Melissa's care for the first seven weeks of her life was because at that time, Melissa was taken into custody for violating probation, had her probation revoked, and was thereafter incarcerated for over two years. After she was released from prison in November 2012, Melissa moved to Wausau despite the fact that her daughter was in foster care in Milwaukee. Although Melissa did have both supervised and unsupervised visits with Catie after being released from prison, during one of those unsupervised overnight visits, Melissa was arrested for retail theft in April 2013. The BMCW continued to work with Melissa, and the BMCW even put together a plan for a trial reunification in late 2013. The trial reunification ultimately did not occur, however, because the BMCW learned that Melissa had been arrested in October and November 2013. Melissa was then taken into custody on January 15, 2014, her probation was revoked, and she was incarcerated for an additional nine months after a revocation hearing.

¶24 In light of the totality-of-the-circumstances test applied over Catie's entire lifetime, there is sufficient evidence in the record to support the jury's conclusion that Melissa did not assume parental responsibility within the meaning of WIS. STAT. § 48.415(6). Accordingly, we conclude that § 48.415(6) was not unconstitutional as applied to Melissa.[6]

[6] Because we conclude that WIS. STAT. § 48.415(6) was not unconstitutional as applied to Melissa, we do not address whether trial counsel was ineffective for failing to raise the issue. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless issue).

II. WISCONSIN STAT. § 48.415(2) was not unconstitutional as applied because the jury appropriately considered the entire time period the CHIPS dispositional order was in effect.

¶25 Although the State need establish the existence of only one ground under WIS. STAT. § 48.415 to move forward with an involuntary termination of parental rights, we briefly explain why we also reject Melissa's second argument—that § 48.415(2) was unconstitutional as applied because the jury was allowed to consider the time periods that she was incarcerated when determining whether she had met the conditions for return and if she could meet the remaining conditions in the nine months following the dispositional hearing—despite having already concluded that § 48.415(6) was not unconstitutional as applied to Melissa.

¶26 In advancing her argument that the jury should not have been allowed to consider the time periods she was incarcerated in determining whether she had met the conditions for return related to the WIS. STAT. § 48.415(2) continuing CHIPS ground, Melissa does little more than conclusively state that "the jury was allowed to consider a time period nearly double that which should have been permitted." Melissa also fails to provide citation to relevant legal authority in support of her position.

¶27 Melissa's argument is not entirely devoid of legal citation; however, her reliance on ***Jodie W.*** for the proposition that incarceration alone cannot be the basis for termination, *see* ***id.***, 293 Wis. 2d 530, ¶49, is misplaced, as ***Jodie W.*** does not state that a jury cannot consider the time period a parent is or was incarcerated in determining whether grounds exist for termination of parental rights pursuant to WIS. STAT. § 48.415(2). To the contrary, ***Jodie W.*** suggests exactly the opposite. First, ***Jodie W.*** indicates that when a parent is incarcerated, the conditions of

return must be narrowly tailored in light of the parent's incarceration. *See* ***id.***, 293 Wis. 2d 530, ¶¶39-41, 55. This requirement would make little sense if a jury was not allowed to consider whether a parent had met conditions for return while incarcerated. Second, ***Jodie W.*** confirms that a parent's incarceration *is* relevant and that "the parent's relationship with the child … *both prior to and while the parent is incarcerated*" is one of the factors that must be considered in determining whether grounds for termination exist under § 48.415(2). *See* ***Jodie W.***, 293 Wis. 2d 530, ¶50 (emphasis added). Accordingly, we are not persuaded by Melissa's argument that periods of a parent's incarceration should not be considered by the factfinder in determining whether grounds for involuntary termination of parental rights exist pursuant to § 48.415(2).

¶28 Regardless, even if the jury had—or should have—only considered whether Melissa had failed to meet the conditions of return while she was *not* incarcerated, substantial evidence in the record supports the jury's finding. Significantly, Melissa repeatedly had difficulty meeting the first condition of return while *not* incarcerated: that she "demonstrates impulse control by considering the long-term effects of her decisions. [Melissa] sets aside her own needs in favor of her child and *abstains from criminal behavior and contact* because by doing so she can safely care for her child." (Emphasis added.) After being released on November 18, 2012, Melissa was arrested in April, October, and November 2013, and she was ultimately taken into custody on January 15, 2014, and thereafter had her probation revoked for nine months. Moreover, Catie was with Melissa at the time of the April 2013 arrest. Accordingly, even if the time periods that Melissa was incarcerated were excluded from consideration, the

record nevertheless supports the jury's finding.[7]

III. It is not against public policy for a trial court to allow a foster or potential adoptive parent to testify regarding intent to allow for an open adoption.

¶29 Melissa next argues that it is against public policy for a trial court to allow a foster or potential adoptive parent to testify that he or she intends to allow the child to maintain contact with the biological family if parental rights are terminated because such testimony is illusory.[8] Melissa also argues that she is entitled to a new dispositional hearing because the trial court erred in allowing and relying upon such testimony during the dispositional hearing. Again, we disagree.

¶30 The testimony at issue concerns Ms. J., Catie's foster parent and potential adoptive parent. At the dispositional hearing, Ms. J. testified that she would allow Catie's biological parents to continue contact with Catie if the court terminated their parental rights and she was thereafter allowed to adopt Catie. Melissa argues that the trial court erred in admitting this testimony because it was

---

[7] To the extent that Melissa suggests trial counsel was ineffective as to WIS. STAT. § 48.415(2), we do not address her argument because we conclude that WIS. STAT. § 48.415(2) was not unconstitutional as applied to Melissa. *See* ***Toliver***, 187 Wis. 2d at 360 (counsel is not ineffective for failing to pursue a meritless issue).

[8] Despite amending her "foster parent" claim to an interest of justice claim from an ineffective assistance of counsel claim at the postdispositional hearing, Melissa states in her brief that trial counsel was ineffective for failing to object when the State asked the foster parent if she would allow the biological parents to maintain a relationship with Catie if she was ultimately allowed to adopt Catie. Melissa does not further develop this argument and instead focuses primarily on her public policy argument. Because the ineffective assistance of counsel argument as to this testimony is undeveloped, we will not address it further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Moreover, even if we did consider this argument, we would conclude that trial counsel was not ineffective for failing to object to this line of questioning because "[a]n attorney does not perform deficiently by failing to make a losing argument." ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365.

more prejudicial than probative and against public policy because “the statement of the foster parent, even if well-intentioned, is entirely illusory and not binding.”

¶31 Melissa’s argument that Ms. J.’s testimony was illusory and therefore against public policy is unpersuasive. Once the termination of parental rights proceeding moves to the dispositional phase, as it did here, the trial court must consider specific factors in determining whether it is in the child’s best interests to terminate parental rights, *see* WIS. STAT. § 48.426(1), and the child’s best interest is the prevailing factor that the court considers, *see* § 48.426(2). The specific factors the court must consider—but is not limited to considering—in determining the child’s best interests are:

> (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.

WIS. STAT. § 48.426(3)(a)-(f).

¶32 The record reflects that the trial court properly and extensively addressed each of these factors at the dispositional hearing, as well as the

availability of options other than termination of parental rights. The court acknowledged that terminating parental rights would cause some harm; however, the court ultimately concluded that termination of parental rights was in Catie's best interests because: (1) she was likely to be adopted; (2) she described Ms. J.'s home as her home; (3) the length of separation from her biological parents had been almost her entire life; and (4) it was more likely that Catie would be in a stable and permanent relationship if adopted. Thus, although the trial court considered Ms. J.'s testimony in reaching its ultimate conclusion, it is clear that the trial court's decision was based upon all of the information presented at the dispositional hearing.

¶33 Our supreme court's decision in ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, confirms our conclusion. There, the trial court heard testimony from the potential adoptive parent, who testified that she would allow continued contact between the children and their biological family members if parental rights were terminated and she was allowed to adopt the children. ***Id.***, ¶9. The trial court considered her testimony; however, it ultimately denied the petition for termination, placing great weight on the grandmother's efforts to obtain placement and finding that it would be harmful to sever the childrens' relationship with their grandmother. *See* ***id.***, ¶10.

¶34 On appeal, the supreme court considered whether WIS. STAT. § 48.426(3)(c) requires an examination of the legal relationship between a child and the child's biological family or if the focus should instead be on the emotional connections between the child and biological family. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶¶13, 16. The court concluded that § 48.426(3)(c) "unambiguously require[s] that a [trial] court evaluate the effect of a legal severance on the broader relationships existing between a child and the child's birth family. These

relationships encompass emotional and psychological bonds fostered between the child and the family." ***Margaret H.***, 234 Wis. 2d 606, ¶21. In other words, a trial court must "assess the harmful effect of this legal severance on the emotional and psychological attachments the child has formed with his or her birth family." ***Id.***, ¶26. Such analysis "requires only that the [trial] court examine the impact of a legal severance on the broader relationships existing between a child and his or her family." ***Id.***, ¶29. The court went on to note that in evaluating § 48.426(3)(c), a trial court, in its discretion, "may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although [the supreme court] cannot mandate the relative weight to be placed on this factor." ***Margaret H.***, 234 Wis. 2d 606, ¶29.

¶35 The supreme court remanded the case for further proceedings after determining that the trial court had failed to consider all of the factors set forth in WIS. STAT. § 48.426, and the court noted that on remand, the trial court could "certainly choose to examine the probability that [the adoptive parent] will be faithful to her promise" to allow the children to maintain contact with their biological family if the court terminated parental rights. ***Margaret H.***, 234 Wis. 2d 606, ¶¶9, 30-31. This type of analysis is precisely what happened in this case.

¶36 Melissa dismisses ***Margaret H.***, arguing first that our supreme court's statement that a trial court may properly consider an adoptive parent's intent to allow a child to continue contact with the biological family is dicta, and second that no Wisconsin court "has ever considered the issue raised here: Whether public policy prohibits a court at disposition from considering information that is not binding and therefore illusory." We remain unpersuaded.

¶37 Regardless of whether the supreme court's statement in ***Margaret H.*** that "[i]n its discretion, the [trial] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members," *See **id.***, 234 Wis. 2d 606, ¶29, is dicta, we find it unlikely that our supreme court would have made such a statement if it believed that such consideration would violate public policy. Moreover, in its decision, our supreme court contemplated the unenforceability of a potential adoptive parent's promises to allow for continued contact with the biological family, stating that upon remand, the trial court could "certainly choose to examine the probability that [the adoptive resource] will be faithful to her promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***, ¶30. We see no reason to discount or deviate from those statements in this case, particularly given the similarity of the testimony at issue in ***Margaret H.*** to Ms. J.'s testimony.[9]

¶38 ***Margaret H.*** also clearly states that all factors set forth in WIS. STAT. § 48.426(3) must be considered and that no single factor is determinative as to the child's best interests; thus, even if the trial court finds that it would be harmful to sever the child's relationship with the biological family members, the

[9] We note that testimony from the postdispositional hearing belies Melissa's argument that Ms. J.'s testimony was illusory. Specifically, Melissa testified that she had seen Catie once between termination in February 2015 and the postdispositional hearing in November 2015, that she had talked to Catie approximately once a week, and that Catie had called her on a few different occasions. Thus, at least as of late November 2015, Ms. J. *has* allowed contact to continue with Catie. Moreover, to the extent Melissa argues that the trial court erred in light of Ms. J.'s apparent indication to Melissa that she plans to move out of state after these proceedings have concluded, such action would not preclude continued contact. It might not be the type or frequency of contact that Melissa prefers, but it is, nevertheless, contact. While we cannot say with certainty whether contact will continue, we remain unpersuaded that it is against public policy to allow the type of testimony at issue.

trial court may nevertheless ultimately conclude, after considering all relevant factors, that termination of parental rights is in the child's best interests. *See* § 48.426(3); *see also* ***Margaret H.***, 234 Wis. 2d 606, ¶35 ("[E]xclusive focus on any one factor is inconsistent with the plain language of [WIS. STAT.] § 48.426(3)."). Here, the trial court addressed all of the required factors, used its discretion in considering Ms. J.'s testimony, and ultimately concluded that termination of parental rights was in Catie's best interests. Because the trial court complied with § 48.426(3) and did not err in considering Ms. J.'s testimony, Melissa is not entitled to a new dispositional hearing.

IV. The interests of justice do not warrant a new trial in this matter.

¶39 Lastly, Melissa argues that we should act pursuant to WIS. STAT. § 752.35 and reverse the trial court and remand for a new trial. Section 752.35 provides for discretionary reversal and states that we may reverse the order appealed from "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried" and that in such cases, we may remand for a new trial "as … necessary to accomplish the ends of justice." WIS. STAT. § 752.35. "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation omitted). We only exercise our power to grant a discretionary reversal in exceptional cases. ***Id.***

¶40 Melissa argues that the full controversy was not fully and fairly tried; however, she presents no developed argument in support of her position. Because she does not advance an actual argument supporting her request, we decline to exercise our WIS. STAT. § 752.35 discretionary reversal power.

¶41 For the reasons stated, the order terminating Melissa's parental rights and the order denying her postdisposition motion are affirmed.

By the Court.—Orders affirmed.

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