

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2018

Diane M. Fremgen
Acting 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. 2017AP1945
2017AP1946
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2016TP157
2016TP158**

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO A.J.C.-W., A PERSON UNDER
THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

M.D.W.,

RESPONDENT-APPELLANT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO M.W., A PERSON UNDER
THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

M.D.W.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County:
LAURA GRAMLING PEREZ, Judge. *Affirmed.*

¶1 BRASH, J.¹ M.D.W. appeals from orders terminating her parental rights for two of her children, A.J.C.-W. and M.W. She argues that the trial court did not appropriately exercise its discretion in granting the termination of her parental rights because it did not sufficiently consider the statutory standard and factors relating to termination. She therefore seeks to vacate the termination of parental rights orders for the children. We affirm.

BACKGROUND

¶2 M.D.W. is the biological mother of A.J.C.-W., who was born August 31, 2002, and M.W., who was born June 3, 2008. M.D.W. has been married to P.L.W. since 1997 and had not divorced at the time of these proceedings; thus, P.L.W. is presumed to be the father of the children.

¶3 On August 20, 2014, the Bureau of Milwaukee Child Welfare (BMCW)² was informed that M.D.W. had been arrested four days prior for failure to send her children to school and had been in custody since then. The children,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

along with their older brother, T.W., who was fifteen years old at the time, were reported to have been living for several days in an apartment from which M.D.W. had been evicted with no electricity, no food, and no telephone to call for help.

¶4 P.L.W. eventually found out about the situation and took the children to his home; he maintained a separate residence from M.D.W. However, upon attempting to establish a protective plan under which the children would be placed with P.L.W., BMCW discovered that P.L.W. had violated a no-contact order with his current girlfriend. P.L.W. was then taken into custody as well on August 21, 2014.

¶5 BMCW was familiar with M.D.W. because there had been thirteen prior referrals to BMCW regarding similar reports of child neglect by M.D.W. since 2001. Those assessments had never resulted in the opening of a case by BMCW because family members had always intervened to take care of the children. In fact, in this instance M.D.W. initially claimed that when she was arrested she had left the children in the care of her older daughter, T.J., who was twenty years old at the time. However, M.D.W. later told a social worker from BMCW that she could think of no relatives with whom to leave the children while she was incarcerated. Therefore, BMCW took custody of the children.

¶6 Petitions for Protection or Services were filed for A.J.C.-W. and M.W. in August 2014, with dispositional orders on those petitions going into effect in October 2014. Those orders set forth conditions that were to be met by M.D.W. before the children could be returned to her. These conditions included controlling her mental health issues, meeting the children's mental health needs, resolving her criminal cases, maintaining a clean and safe home, and demonstrating the ability to appropriately supervise and care for her children's

needs. A visitation plan with the children was also required to be established, and M.D.W. was to consistently follow that schedule.

¶7 M.D.W. failed to satisfactorily meet the conditions of the dispositional orders. For example, BMCW was aware from its previous contacts with M.D.W. that she had been diagnosed with depression, bi-polar disorder, and schizophrenia, but M.D.W. declined to participate in a psychological evaluation and failed to regularly attend therapy sessions. She was able to maintain a residence for only a couple of months at a time, and there were eviction proceedings pending against her during these termination proceedings. She did not participate in the children's therapy services, despite having the contact information for the providers. She failed to regularly visit her children, which resulted in visitation being suspended several times. Additionally, M.D.W. was aware that there was an open warrant for her arrest but failed to address the matter.

¶8 As a result, petitions for the Termination of Parental Rights (TPR) of M.D.W. were filed on May 12, 2016, with regard to A.J.C.-W. and M.W. In the petitions, the State alleged two grounds for termination: (1) continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). The matter went to trial before a jury in January 2017, which resulted in unanimous findings by the jury that grounds existed to terminate M.D.W.'s parental rights for the reasons set forth in the petitions.

¶9 Accordingly, a dispositional hearing was held on April 6, 2017. After hearing testimony from several witnesses, and then weighing that evidence in accordance with the factors for determining the best interests for the children set

forth at WIS. STAT. § 48.426(3), the trial court granted the TPRs and ordered the parental rights of M.D.W. terminated. This appeal follows.

DISCUSSION

¶10 M.D.W.’s argument on appeal is that the trial court erroneously exercised its discretion in its consideration of the factors for determining the best interests for the children, as set forth at WIS. STAT. § 48.426(3).

¶11 “The ultimate determination of whether to terminate parental rights is discretionary with the [trial] court.” *State v. Margaret H.*, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. We will uphold the trial court’s decision to terminate parental rights “if there is a proper exercise of discretion.” *See id.*, ¶32. This requires that the trial court apply the correct standard of law to the facts of the case. *Id.*

¶12 In making its determination, “the best interests of the child[ren] is the paramount consideration” for the trial court. *Id.*, ¶33. To establish this, the trial court should reference the factors set forth in WIS. STAT. § 48.426(3), and any other factors it relied upon, in explaining on the record the basis for the disposition. *Sheboygan Cty. DHHS v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶13 The first factor for consideration by the trial court is whether the children are likely to be adopted upon termination. WIS. STAT. § 48.426(3)(a). M.D.W. concedes that both children would likely be adopted, and thus this factor is not at issue.

¶14 The second factor relates to the age and the health of the children. WIS. STAT. § 48.426(3)(b). M.D.W. focuses her argument on the mental health

issues of the children, noting that the trial court stated that “at least some” of the children’s continuing mental health issues “are related to the trauma that the boys have experienced previously” while living with their mother. M.D.W. contends that the trial court did not consider during the disposition hearing that she had provided evidence that she had obtained mental health treatment for the children prior to any involvement by BMCW.

¶15 M.D.W.’s argument does not accurately reflect the trial court’s consideration of this issue. Rather, the trial court noted that it did not believe that M.D.W. “has developed an understanding of the boys’ mental health needs to the degree that would place her in a position to best care for the boys,” based on evidence that M.D.W. “hasn’t spoken to their therapists or attended their therapy sessions” while these proceedings were pending. The court found that the foster parents were “better situated to address the boys’ challenges,” which weighed in favor of terminating M.D.W.’s parental rights. This is a reasonable and proper exercise of the trial court’s discretion in considering this factor. *See Margaret H.*, 234 Wis. 2d 606, ¶32.

¶16 M.D.W. next argues that the trial court’s conclusion with regard to the third factor—whether it would be harmful to the children to sever any substantial relationships with their parents or family members—was erroneous. WIS. STAT. § 48.426(3)(c). M.D.W. points out that the trial court found that both children have a substantial relationship with her. That said, the court went on to indicate that the relationship between M.D.W. and the children was “clearly a complicated relationship” and is “at times a somewhat negative relationship” due to M.D.W.’s challenges and struggles to provide for them. The trial court further stated that because of A.J.C.-W.’s age, upon termination it was likely that he would maintain a relationship with his mother. The court thus concluded that

overall its consideration of this factor “weighs in favor of termination of parental rights.” We again find this to be a reasonable and proper exercise of the trial court’s discretion. *See Margaret H.*, 234 Wis. 2d 606, ¶32.

¶17 The next factor that the trial court is to consider is the wishes of the children. WIS. STAT. § 48.426(3)(d). M.D.W. makes no argument regarding the trial court’s consideration of this factor. Thus, to the extent that the trial court’s consideration of this factor was raised as an issue, because it was not argued by M.D.W. we deem it abandoned. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

¶18 The fifth factor for consideration is the length of time that the children were separated from M.D.W. *See* WIS. STAT. § 48.426(3)(e). M.D.W. notes that the trial court called its weighing of the evidence related to this factor a “close[] call.” The trial court recognized that the two-and-one-half years that the children had been in foster care and separated from M.D.W. were not substantial portions of the children’s lives, given their age, and further acknowledged that M.D.W. had continued visiting the children and maintained contact with them since they were placed in foster care. In fact, the trial court found that this factor “actually weighs against termination” of M.D.W.’s parental rights.

¶19 M.D.W. asserts that this conclusion indicates that the trial court erred in granting the petitions for termination. M.D.W. misunderstands the standard. The trial court is to take *all* of the factors of WIS. STAT. § 48.426(3) into consideration in making its determination as to whether termination is in the best interests of the children. *See Julie A.B.*, 255 Wis. 2d 170, ¶30. *See also Margaret H.*, 234 Wis. 2d 606, ¶32. The trial court did just that in its overall assessment of the factors, most of which it found to weigh in favor of termination.

¶20 The final factor for the trial court to consider is whether the children would “enter into a more stable and permanent family relationship as a result of the termination.” WIS. STAT. § 48.426(3)(f). M.D.W. argues that the trial court’s rejection of a transfer of guardianship was an erroneous exercise of discretion with regard to this factor.

¶21 Actually, the trial court stated that a transfer of guardianship to a family member was not possible in this case. The court noted that there were a couple of paternal relatives that had previously been considered for placement, but one of them had passed away during the course of the proceedings and the other “didn’t work out.” The court further stated that no other family members had come forward as potential guardians.

¶22 Moreover, the trial court stated that a transfer of guardianship to a non-family member was “not legally possible” for M.W. The court then acknowledged that a recent change in the law may potentially allow for such a transfer of guardianship for A.J.C.-W. due to his age. Nevertheless, the trial court found that even if legally possible, a transfer of guardianship would not be in A.J.C.-W.’s best interests because it would continue the “uncertainty” in his life with the possibility of termination of the guardianship and visitation issues. Again, this is a reasonable and proper exercise of the trial court’s discretion. *See Margaret H.*, 234 Wis. 2d 606, ¶32.

¶23 In sum, we find that the trial court properly weighed all of the relevant factors of WIS. STAT. § 48.426(3) in determining the best interests of A.J.C.-W. and M.W. and reasonably exercised its discretion in granting the TPR. *See Margaret H.*, 234 Wis. 2d 606, ¶¶32-33. We therefore affirm.

By the Court.—Orders affirmed.

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

