

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 20, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 00-0378**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO  
ANTONIO J.K.B., A PERSON UNDER THE AGE OF 18:**

**WAUSHARA COUNTY DEPARTMENT OF HEALTH AND  
FAMILY SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**JAMES B.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waushara  
County: LEWIS MURACH, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> James B., the biological father of Tony B., appeals the trial court's dispositional order terminating his parental rights. He contends the trial court erroneously exercised its discretion in doing so because the trial court relied as a primary factor on Tony's adoptability, even though Tony's mother's rights had not yet been terminated and it was not clear when or if they would be. We conclude the trial court properly exercised its discretion in ordering termination of James' parental rights, and we therefore affirm.

### BACKGROUND

¶2 Tony is the twelve-year-old child of James B. and Nah-Lin B. James did not meet Tony until Tony was five years old, when Nah-Lin took Tony to see his father. James testified that after Tony was born he did not know where Nah-Lin lived, but he also acknowledged that he took no steps to find Tony. When Nah-Lin took Tony to see James for the first time, James was in the Adams County Jail. He was released shortly thereafter and moved in with and subsequently married Nah-Lin. The three of them lived together for approximately nine months, during which time James was actively involved in Tony's care. After Nah-Lin and James separated, James lost contact with Tony. James acknowledged that he did not attempt to find Tony or establish any type of visitation with him. In 1997 Nah-Lin took Tony to see James who was then in prison. With his mother, Tony visited James in prison two or three times.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 Tony was placed in foster care on December 24, 1997, when Nah-Lin had a heart attack and James was incarcerated. Tony has continued to live with his foster parents since that time.

¶4 The original order adjudicating Tony as a child in need of protection and services (CHIPS) was entered on January 30, 1998, and was extended for another year on January 13, 1999. On June 8, 1999, the petition to terminate James' parental rights was filed. Following a trial on August 27, 1999, the jury made these findings: (1) Tony had been adjudged in need of protection and/or services and placed outside the home for a cumulative total of six months or more pursuant to court orders containing the notice of termination of parental rights required by law; (2) the Waushara County Department of Social Services made a reasonable effort to provide the services ordered by the court; (3) James failed to meet the conditions established for return of Tony to his home;<sup>2</sup> (4) there is a substantial likelihood that James will not meet the conditions within the next twelve months; and (5) James has failed to assume parental responsibility for Tony.

¶5 A dispositional hearing was scheduled for October 11, 1999. In the interim, on September 1, 1999, Howard Harrington, a social worker with the Waushara County Department of Social Services, filed a petition for termination of parental rights of Nah-Lin, Tony's biological mother, which indicated that she consented to the voluntary termination of her parental rights. Then, on September 20, 1999, the court entered an order dismissing that petition, which stated that

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<sup>2</sup> The conditions included locating acceptable housing, securing gainful employment, and participating in visitation for a period of not less than ninety days following his parole; and cooperating with recommendations made to reunify him with Tony, such as counseling, alcohol and other drug abuse (AODA) services and parental skills training.

“[t]he County has determined that it is not in the best interests of [Tony] to terminate his mother’s parental rights.”

¶6 At the disposition hearing Harrington testified and expressed the opinion that termination of James’ parental rights would be in Tony’s best interests. Harrington explained that the permanency plan for Tony was for adoption, and included in the steps necessary to execute that plan was the termination of Nah-Lin’s parental rights. He testified that it was his understanding that Nah-Lin had intended to voluntarily terminate her parental rights and that was not going to be an obstacle in placing Tony for adoption. Harrington made no reference to the order dismissing the petition for a voluntary termination of Nah-Lin’s rights, and neither the corporation counsel, nor the guardian ad litem, nor James’ attorney, asked him any questions about that.

¶7 Harrington testified that Tony was receiving services at school for a learning disability and taking medication for attention deficit disorder. He was doing well in school and had adjusted well to his foster family. In Harrington’s view, Tony was adoptable because he had displayed an ability to fit well into daily family life and had the emotional capacity to form close, lasting relationships with family members. Tony had told Harrington that he liked living with his foster family, felt part of the family, was being well cared for, and he loves the family. He wanted to be able to have occasional contact with his father in the future, but he wanted to be a member of the foster family. These were the wishes Tony had consistently expressed when he talked to Harrington. The foster family had expressed to Harrington an interest in adopting Tony, and Harrington saw nothing that would prevent them from doing so; the family had recently successfully adopted a child and a favorable adoption study had been completed for that adoption. However, even if the foster family were unable to adopt Tony, it was

still Harrington's recommendation that James' parental rights be terminated. Although Tony had special needs, they could be accommodated within a family setting and were not an obstacle to adoption.

¶8 Harrington's testimony also included information about Tony's relationship to James' family. Tony has two half siblings that he rarely sees face-to-face, but he has had sporadic phone contact, some e-mail contact and some written correspondence with them, and occasional face-to-face contact with an aunt. Although Tony seemed to enjoy these contacts, Harrington did not view them as a substantial part of Tony's life. Harrington explained that he did not think Tony was asking for this contact, but rather much of it was initiated by his foster parents and was not initiated by James. Harrington had no reason to believe that this contact would cease if James' parental rights were terminated. In Harrington's opinion it would not be harmful to Tony to sever relationships with these members of James' family or with James. Harrington was recommending termination of parental rights now because Tony needed somebody to take care of him now and could not afford to wait to see if James was going to be able to do that in the future. Terminating James' parental rights was one step toward providing him with a permanent family where he could remain until he was an adult.

¶9 James testified that he was trying to make plans to care for Tony upon his release from prison. His next parole date was to be February 2000, although he acknowledged there was no guarantee he would be released at that time. If he were released at that time, his plan was to try to get a place at the Friendship Hotel and stay there until he was able to get an apartment or a house, and he would look for employment. He wrote to Tony while Tony was in foster placement and expressed to the social workers his desire to have visitation, but

that did not happen. James expressed his intention to abide by all the conditions and obligations placed on him by the court with respect to parenting Tony, including alcohol and other drug abuse (AODA) counseling and training in parenting skills. He understood he would not be able to have custody of Tony right away because it would take time to re-establish their bond. James acknowledged Tony had told him he wanted to stay where he was, and Tony's foster parents had said that if they adopted Tony, Tony would still be able to see James.

¶10 The guardian ad litem recommended that James' rights be terminated. When asked by the court to state Tony's view distinct from her recommendation as his guardian ad litem, she stated that she had met with Tony several times and he was "very adamant in each of those meetings" that it was his wish to have his father's parental rights terminated. Tony explained his reasons were that his father had been in and out of incarceration throughout his [Tony's] life, had not been there for him, had not been able to hold a job, and was unable to provide him with the things his foster family provides him. Tony did not believe his father was going to be able to turn himself around as he said he was going to do.

¶11 After the arguments by counsel, the court permitted James to make a statement to the court. James said that he knew he had made mistakes and had not taken responsibility for his other children or for Tony in the past and had let alcohol ruin his life. However, he had turned his life around and he wanted the opportunity to raise Tony, which he had never had with his other children. He believed he was now capable of doing that.

¶12 The court decided that it was in Tony's best interests to terminate James' parental rights, and it explained the factors and the evidence it was relying on. It referred to the likelihood that Tony would be adopted; the stability of the present placement; the foster family's interest in proceeding with adoption; and the improvement in Tony's life since he was placed with the family. The court found that Tony had not had a substantial relationship with James; that there had been a long separation between the parent and child, while only a short ten-month period of living together; and that Tony wished to have James' parental rights terminated and to formalize his placement with his foster family.

¶13 The court also stated that, based on the evidence there was a high probability that Tony would be adopted by his foster parents; but even if that did not occur, the evidence was that Tony would be able to relate well to another adoptive family. The court acknowledged and believed James' feelings of love for his child but found that James did not have a realistic idea of what is involved in being a parent and had not demonstrated that he could meet Tony's needs. In the court's view, even if things went well for James, it would take some years for him to be in a position where he could care for Tony, and Tony did not have the time to wait for that to happen.

## DISCUSSION

¶14 After a jury finds there are grounds to terminate the parental rights of an individual, as the jury did here, the court must make a determination whether or not parental rights should be terminated. *See* WIS. STAT. § 48.424(4). In making that determination the court is to consider the reports submitted by an agency under WIS. STAT. § 48.425 (the report submitted by Harrington in this case), and the prevailing standard is the best interests of the child. *See* WIS. STAT.

§ 48.426(1) and (2). In considering the best interests of the child, the court must consider the following factors but is not limited to them:

(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).

¶15 The decision whether to terminate parental rights is committed to the trial court's discretion, *see Mrs. R. v. Mr. and Mrs. B.*, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981), as is the determination of the child's best interests. *See David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). The trial court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and application of the correct standard of law. *See id.* When a court makes findings of fact in deciding whether or not to terminate a parent's parental rights, we do not set aside those findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶16 James contends that, because Tony's adoptability was a primary factor relied on by the court in deciding that termination of James' parental rights



was in Tony's best interests, it could not properly reach that decision without first determining that Nah-Lin's parental rights would in fact be terminated. According to James, the record does not support the trial court's finding that if Nah-Lin did not voluntarily terminate her parental rights, there would be a very high likelihood of involuntary termination. James points out that an order dismissing the petition for a voluntary termination of Nah-Lin's rights was entered just twenty-one days prior to the hearing and Harrington did not explain at the hearing why the termination of Nah-Lin's parental rights was not going to be an obstacle in placing Tony for adoption.

¶17 We conclude that the trial court's finding that there was a "fairly great" likelihood of the termination of the mother's parental rights is supported by the record. The court had before it, as part of the record, the report prepared by Harrington dated October 6, 1999—after the petition for voluntary termination of Nah-Lin's rights was dismissed. His report stated: "Nah-Lin ... plans to voluntarily terminate her rights if the parental rights of [James] are terminated.... Should Nah-Lin ... change her mind and decide not to voluntarily terminate her parental rights, the Waushara County Department of Social Services would petition for the involuntary termination of her rights, again with the objective of allowing Tony to be adopted into a more permanent family setting." Harrington's testimony at the trial was consistent with his report—that if James' parental rights were terminated, the next step would be the termination of Nah-Lin's parental rights and he did not believe that would be a problem because he understood she intended to voluntarily terminate her rights.

¶18 The court could reasonably infer that, as of the date of the dispositional hearing, Nah-Lin still did intend to voluntarily terminate her parental rights even though the petition had recently been dismissed. Her intention as

stated in the report was to voluntarily terminate her parental rights if James' parental rights were terminated, and it was reasonable for the court to infer, as its comments indicated, that would be the next step. Nah-Lin was present during the dispositional hearing.

¶19 We agree with James that the record does not show he was aware of either the petition for a voluntary termination of Nah-Lin's parental rights or the order dismissing the petition; therefore we do not rest our decision on the failure of James' counsel to question either Harrington or Nah-Lin about this. Rather, our decision is that the existence of the dismissal order in itself did not require the court to determine that Nah-Lin had changed her mind about voluntarily terminating her parental rights, given the later report of Harrington and Harrington's later testimony.

¶20 It appears that James may also be arguing that the court had a duty to inquire further about Nah-Lin's intentions. However we do not agree, given Harrington's report and testimony, both of which followed the dismissal order, and given that no one raised a question concerning her intentions. If, as may be the case, James first learned of the petition regarding Nah-Lin's parental rights and its dismissal after the dispositional hearing, and if he had evidence or concerns that Nah-Lin did not intend to voluntarily terminate her parental rights, it was incumbent on him to bring that to the court's attention through an appropriate motion.<sup>3</sup> We are reviewing the record before the trial court when it made its

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<sup>3</sup> We observe, however, that James has not made this court aware of any evidence besides the dismissal of the petition concerning Nah-Lin's parental rights that suggests she does not intend to voluntarily terminate her rights.

decision, and that record supports its finding regarding the likelihood of Nah-Lin's termination of her parental rights.

¶21 We also conclude the court did not need to wait to terminate James' parental rights until Nah-Lin had terminated hers, or until she had given her consent on the record, as James suggests. James asserts that "the better procedure would have been" for the court to do this. However, our inquiry is whether this trial court properly exercised its discretion in terminating James' parental rights as it did, not whether waiting to do so would have been preferable. Given Harrington's familiarity with Nah-Lin's circumstances and his statements in the report indicating that if Nah-Lin would not carry through with her agreement to voluntarily terminate her parental rights, the County was going to file a petition for involuntary termination, it was reasonable for the court to infer that the County had a basis for involuntary termination. As James recognizes, there is no requirement that the parental rights of both parents be terminated at the same time or that the termination of one parent's rights be conditioned on the consent on the record of the other.

¶22 We conclude the evidence supported the trial court's determination that the likelihood of Tony's adoption was great, both in terms of the termination of his mother's rights and Tony's chance of being adopted either by the foster family or another family. We also conclude the evidence supports the trial court's determination that the other statutory factors favored terminating James' parental rights: Tony's age; his special needs; his wishes; the lack of a substantial relationship with James and his family members and the lack of harm if those relationships were severed; the small amount of time James and Tony had lived together compared to the greater time they had been separated; the fact that Tony had been able to successfully fit into a stable and permanent family; and

Harrington's opinion that Tony would be able to do that in the future either with the foster family or another family.

¶23 James points out that Harrington's testimony was that Tony wanted to continue a relationship with his father and for this reason, too, James' rights should not have been terminated until it was more certain that Nah-Lin's rights would be terminated. In James' view, this desire of Tony's plus James' hope that he would be paroled in February 2000, and his desire to pursue a relationship with his son favored not terminating his rights at this time. However, the trial court found that Tony needed a stable family now where he could remain and grow into an adult, and that it was not in his best interests to wait to see if James was able to provide that for him. These findings are supported by the record. The court did consider the evidence that Tony wished to maintain a relationship with his father, that the foster family was making this possible, and that as long as James' contacts with Tony were beneficial, the contacts would be able to continue. The court acknowledged that it could not guarantee this and decided that, even so, the termination of parental rights was necessary for Tony's best interests. This is a reasonable conclusion, arrived at through a rational thought process and based on the evidence and the correct law.

*By the Court.*—Order affirmed.

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

