

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2020

Sheila T. Reiff
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. 2019AP2387

Cir. Ct. No. 2019TP2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO E. D. P.,
A PERSON UNDER THE AGE OF 18:**

WAUSHARA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

A. J. P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ A.J.P. appeals the circuit court’s order terminating his parental rights to his child, E.D.P., on the petition of Waushara County Department of Human Services (the County). He challenges only the circuit court’s ruling in the dispositional phase of proceedings and makes no arguments regarding the grounds phase. He argues that the circuit court erroneously exercised its discretion by failing to adequately consider three of the factors pertinent to the disposition of a termination of parental rights case under WIS. STAT. § 48.426(3). I affirm the court’s ruling.

¶2 The County’s petition alleged that the termination of A.J.P.’s rights as parent to E.D.P. was appropriate under the “abandonment” ground in WIS. STAT. § 48.415(1)(a)2. A fact-finding hearing was held on the issue of grounds, and a jury determined that the abandonment ground for termination existed. The circuit court subsequently held a hearing on the dispositional phase, at which the court received evidence and took arguments. At the conclusion of the hearing, the court ordered A.J.P.’s parental rights terminated. Below I provide additional details regarding this hearing and the court’s ruling. A.J.P. appeals.

¶3 A.J.P. argues that the circuit court erroneously exercised its discretion in issuing a dispositional order terminating A.J.P.’s rights because the court failed to adequately consider three of the factors listed in WIS. STAT. § 48.426(3). *See State v. Margaret H.*, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475 (“While it is within the province of the circuit court to determine where the best interests of the child lie, the record should reflect adequate consideration of and weight to each factor [in § 48.426(3)].”). Specifically, he contends that the court did not consider

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

E.D.P.’s age and health under § 48.426(3)(b), E.D.P.’s substantial relationships under par. (c), and E.D.P.’s wishes under par. (d). I state the pertinent standards, and then address each of the § 48.426(3) factors that A.J.P. argues were not adequately considered.²

¶4 I review the circuit court’s disposition in a termination of parental rights case for an erroneous exercise of discretion. *See Sheboygan Cty. DHHS v. Julie A.B.*, 2002 WI 95, ¶¶4, 42, 255 Wis. 2d 170, 648 N.W.2d 402.

¶5 A court exercising its discretion in determining the appropriate disposition “shall consider the standard and factors enumerated in” WIS. STAT. § 48.426(2) and (3) respectively. *See* § 48.426(1). “The best interests of the child

² In applying the best interests standard under WIS. STAT. § 48.426(2), “the court shall consider but not be limited to” the following factors:

- (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.

Sec. 48.426(3). A.J.P. concedes that the court’s oral ruling during the disposition phase adequately considered the factors listed in § 48.426(3)(a), (e), and (f) and, accordingly, I do not separately address those factors.

shall be the prevailing factor considered by the court in determining the disposition of all proceedings.” Sec. 48.426(2). “The [circuit] court should explain the basis for its disposition, on the record, by alluding specifically to the factors in WIS. STAT. § 48.426(3) and any other factors that it relies upon in reaching its decision.” *Julie A.B.*, 255 Wis. 2d 170, ¶30.

¶6 At the outset of my analysis, I note that in this appeal A.J.P. has elected to forgo filing a reply brief after the County filed its brief. This is significant because A.J.P. fails to address the County’s arguments that it can be inferred from the record that the circuit court gave adequate consideration to each of the WIS. STAT. § 48.426(3) factors now highlighted by A.J.P. This could be a sufficient basis to reject A.J.P.’s assertions to the contrary in his initial brief. *See State v. Chu*, 2002 WI App 98, ¶53, 253 Wis. 2d 666, 643 N.W.2d 878 (deeming conceded as true arguments raised in respondent’s brief that are not addressed in reply brief). For the sake of completeness, however, I address the factors that A.J.P. contends were not adequately considered by the court.

¶7 **Age and health of the child.** A.P.J. asserts that the circuit court neglected to evaluate the effects that E.D.P.’s health and age would have had on her future placements, apparently based on the court’s failure to recite E.D.P.’s age at the pertinent points or to explicitly note her health status. However, I agree with the County that the court’s reasoning in making its dispositional determination demonstrates that it gave adequate consideration to the age and health of the child, given the circumstances.

¶8 As the County notes, the court was presented with the report and testimony of a County social worker, Kara Quick. Quick’s report addressed each WIS. STAT. § 48.426(3) factor, including the health and age of the child. The report

stated in pertinent part that E.D.P. had been placed in “out of home care” since February 2018, when she was one and a half years old and showed no signs of being physically maltreated. Quick testified at the dispositional phase hearing that E.D.P. was three years old at the time of the hearing and did not have any health issues that would present obstacles to adoption. A.J.P. did not contest the contents of the report or Quick’s testimony.

¶9 After receiving Quick’s report and testimony, the court’s decision included the following:

You[, A.J.P.,] haven’t been in [E.D.P.’s] life for well over half of it. She probably doesn’t have the faintest idea who you are. I’d be shocked if she did. She’s been in foster placement for 16 months now. Actually, we are moving towards [month] 17. She’s in an environment where she is loved, where people care for her, where people look out for her and her best interests.

Not long after making this statement, the court characterized A.J.P.’s absence from E.D.P.’s life as having lasted “a vast majority” of the child’s life. This discussion, particularly as it related to the consistent placement of E.D.P. in the same loving home, demonstrates that the court was aware of the pertinent timeline of events regarding E.D.P.’s young age and the nature of the care she was receiving, including consideration of Quick’s reporting of E.D.P.’s age and health generally. I do not take A.J.P. to assert that the court was not aware how old E.D.P. is or failed to note a pertinent health concern in the course of court’s dispositional ruling.

¶10 **Substantial relationships and harm of severing substantial relationships.** A.J.P. contends that the trial court wholly failed to consider whether E.D.P. had substantial relationships with A.J.P. or other members of A.J.P.’s family. A.J.P. further argues that the court wholly failed to consider whether the severance

of such relationships would be harmful to E.D.P. This argument appears to be based on the court's failure to explicitly invoke WIS. STAT. § 48.426(3)(c) or to make findings that explicitly used the words "substantial," or "severance." In assessing this factor, I note that, as a matter of law, the termination of A.J.P.'s parental rights "results in a legal severance of the relationship between a child and the child's family." See *Margaret H.*, 234 Wis. 2d 606, ¶25.

¶11 I conclude that the court's discussion of A.J.P.'s relationship with E.D.P. demonstrates that the court did not believe that there was a substantial relationship between them. This is apparent in the court's description of A.J.P.'s minimal contact with E.D.P., and in particular the passage that I quote above. Similarly, the court clearly did not believe that there would be harm to severing E.D.P.'s relationship with someone about whom she "probably doesn't have the faintest idea."

¶12 The court also made multiple references to the "intrafamily" care being provided to E.D.P. by extended family members. The County notes that this discussion came in the context of Quick's testimony that E.D.P. had substantial relationships with maternal relatives, but no apparent relationships with A.J.P.'s family. Given this context and the lack of further argument from A.J.P., I conclude that he fails to show that (1) the court would not have naturally considered E.D.P.'s lack of a relationship with A.J.P.'s wider family, given the court's attention to her relationships with extended family overall, and (2) it was not implicit in the court's discussion that the court determined that the substantial relationship factor in WIS. STAT. § 48.426(3)(c) should not weigh heavily into the court's overall assessment due the lack of evidence regarding substantial relationships with A.J.P. or his family.

¶13 **The child's wishes.** A.J.P. asserts that the court wholly failed to consider the factor in WIS. STAT. § 48.426(3)(d). Specifically, A.J.P. appears to contend that, although E.D.P.'s young age at all pertinent times likely rendered this factor of little weight here, the court still had an obligation to explicitly say so on the record. However, A.J.P. fails to provide support for the proposition that giving adequate consideration and weight to each factor must include explicitly explaining which factor or factors bear little or no weight in a particular case. And this proposition is a premise of his argument regarding this and the other factors he raises. As A.J.P. appears to accept, Quick's uncontested report states that E.D.P. was too young to understand the nature of the proceedings. To repeat, A.J.P. does not contend that the court was unaware of E.D.P.'s age. Further, even if the court should have considered E.D.P.'s preferences, it is again clear from this same discussion, and from the court's references to the supportive foster home being provided to E.D.P., that the court considered it likely that she would prefer to stay in that home on a permanent basis.

¶14 A.J.P. steps back from his contentions regarding the three factors and observes that the court's discussion of its disposition ruling was not long, referenced considerations more pertinent to the grounds phase, and did not explicitly reference each factor in WIS. STAT. § 48.426(3). I agree that it would have been a better practice for the court to have explicitly addressed each of the sub. (3) factors on the record, briefly summarized the relevant evidence regarding each factor, and explained in some manner how much weight it gave to each factor. However, I disagree with A.J.P. that it is reasonable to infer from the court's discussion that it was unaware of the statutory factors altogether. And, as I have noted, A.J.P. concedes that the court's discussion indicated its consideration of three of the pertinent factors failed to demonstrate that the court did not adequately consider and

weigh each factor, including the three that A.J.P. now highlights. *See Margaret H.*, 234 Wis. 2d 606, ¶35.

By the Court.—Order affirmed.

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

