COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-1721

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JOHNNIE B.P.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Johnnie B.P. appeals a judgment terminating his parental rights to his six-year-old son, Brack. He claims that the trial court erroneously exercised its discretion in ordering his rights terminated because the parental rights of Brack's mother were not also terminated. We disagree and affirm the appealed judgment.

BACKGROUND

¶2 Johnnie was adjudicated in March 1994 to be the father of Brack, who had been born a month earlier to Nichelle L.P. According to a Dane County social worker, prior to the involvement of the Dane County Department of Human Services in 1997, Johnnie "had not been actively involved with his son." The Dane County Circuit Court determined Brack to be a child in need of protection or services (CHIPS), and he has been placed continuously in foster care since September 23, 1997.

¶3 On September 15, 1998, the department filed a petition for the termination of the rights of both parents. Because Nichelle was "making progress" during a period of incarceration, and initially continued to do so following her release from prison, the termination petition against her was continued and later dismissed. The action to terminate Johnnie's rights proceeded however, and following a two-day trial to the court, the court determined on January 13, 1999, that grounds to terminate Johnnie's parental rights had been

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes in this opinion are to the 1997-98 version unless otherwise noted.

established.[2] On Johnnie's motion, a disposition with respect to his parental rights was postponed because of the then-existing continuance in the proceedings regarding Nichelle's rights. In October of 1999, the department moved for dismissal of the petition against Nichelle, and informed the court that it would not take a position regarding a disposition of the petition against Johnnie. Brack's guardian ad litem, however, requested that proceedings against Johnnie continue, and the matter was set for disposition in February 2000.

¶4 At the dispositional hearing, a social worker presented her report to the court, *see* WIS. STAT. § 48.425, and gave testimony in support of the termination of Johnnie's rights. The social worker stated that a new termination petition would soon be filed against Nichelle, but even if the mother's rights were not terminated, she believed it to be in Brack's best interests to terminate Johnnie's rights. The court, after considering the social worker's testimony, and Johnnie's, made the following findings and conclusions from the bench:

> The evidence at the trial in this case created a record full of strong impressions and reasonably-drawn inferences that Johnnie [] was a pimp and a drug dealer who was violent to his domestic partners who occasionally supported him, leading him to believe he had no good reason to work. Those aren't necessarily reasons to terminate parental rights and a relationship between father and a son.
>
> The trial also contained a mixed bag of information about the nature of the relationship between Johnnie [] and Brack, with testimony from one witness … about his frequent contacts with Johnnie [] and Brack.

[2] The court found that the department had established both Johnnie's abandonment of Brack under WIS. STAT. § 48.415(1)(a)2 and that Brack was in continuing need of protection or services under § 48.415(2)(a). Johnnie does not contest on appeal the existence of statutory grounds to terminate his parental rights.

I am aware that Nichelle [] has testified that in the early days at least, Johnnie [] was there and was present as a father figure to all the children, provided for all the children, was involved in Brack's life. I am also aware that when the Department – once the Department was involved, it wasn't until about December of '97 that there were any visits.

The first visit was December 3rd, and as I recall the testimony, it seemed to go all right for a first visit. Brack was quite shy.

The next visit wasn't until January 14th, and Mr. [] had missed two scheduled visits between December 3rd and January 14th. The January 14th visit went well.

A week later, a visit occurred that went well. A week after that on the 28th, Mr. [] showed late and only had about twenty minutes of visit. The week after that, he didn't call, didn't show up, and there was no visit. He then had about five visits that went well, and it appeared that the relationship was beginning to develop.

Then on March 18th, he showed late for a visit. The 25th, he didn't call and didn't visit. April 1st, he called to say that he was coming and then didn't show. And if I'm correct about the facts, since April of '98, he's been in custody and has not had any visits. And the communications coming from Johnnie [] have been what I'd describe as minimal.

Frankly, I don't recall if I made the finding back in January of '99 following fact finding. 48.426 sub (4) requires a finding of unfitness if grounds for termination of parental rights are found. I'm not – I have no qualms making that finding at this point in time.

Johnnie []'s level of interest in Brack [] has been minimal since early in Brack's life, and Johnnie [] hasn't shown any meaningful interest in Brack [] as best I can tell since a fairly short period of visits in early 1998, nearly two years ago now.

I'm mindful of the fact that Brack's best interests are the prevailing factor to be considered here. With respect to the particular factors listed under 48.426(3), I don't think that Brack's age and health either at the time of removal from the home when he was approximately three and this time plays a role except insofar as you might be able to say that he's fairly young, his health is good, they don't pose any barriers to a possible adoption.

Whether he has a substantial relationship with Johnnie [] or other family members is a factor. Whether it would be harmful to sever those relationships is a factor.

The information I have before me suggests that there was a relationship. There is a memory that Brack has of his father, and that's not surprising. But, it doesn't do the word "relationship" justice to describe a handful of visits in three years as a substantial relationship.

The duration of the separation is significant. It has been half of Brack's life that Johnnie [] has not been involved directly by choice or indirectly by choosing to engage in activities that leave him incarcerated.

The wishes of the child are a factor. I have to tell you at age six, it doesn't surprise me that a child might have some romantic notion of the idea of daddy. But, frankly, in terms of best interest and wishes, I think they're better expressed by the guardian ad litem.

And that leaves for consideration the first and last factors to be considered, the likelihood of adoption after termination and the factor will Brack be able to enter into a more stable and permanent family relationship as a result of termination.

Those factors turn on what might happen with respect to Nichelle [] and a possible termination of her parental rights. If her parental rights are not terminated, then the likelihood of Brack's adoption is on the record before me zero, since I have no information about any stepparent waiting in the wings.

And the likelihood that Brack would enter into a more stable and permanent family relationship in the absence of a termination of Nichelle's parental rights depends on what you mean by family relationship. If his relationship with the current foster family counts, then even without a termination of Nichelle's parental rights, it may be that Brack's long-term relationship in the current foster home would continue.

It makes little sense to terminate the parental rights of Johnnie [] if Nichelle is going to continue to have parental rights to Brack.

To the extent Johnnie may pose a danger to Brack – And there is no direct evidence of any abuse or neglect in the record. You certainly could infer that Johnnie's criminal lifestyle poses a risk to Brack. But, to the extent that Johnnie poses a danger to Brack directly or indirectly, frankly, that concern can be addressed in the context of the CHIPS case, where no contact or only supervised contact can be ordered.

Terminating Johnnie []'s parental rights and assuming Nichelle will continue to have parental rights and not bring a stepparent into the picture deprives Brack of support, social security, inheritance, and a number of similar factors that may or may not become significant in the next twelve years or for the rest of Brack's life. And so, I'll say that I don't think that it would be equitable to terminate Johnnie []'s parental rights in the absence of a termination of the parental rights of Nichelle [].

I must say, though, that on the record before me, given Nichelle []'s performance as described earlier in the petition in this case and what I understand to be her performance since her release from prison, that I find as fact that it is very likely that Nichelle []'s parental rights will be terminated. And I guess while I can't find it to be fact with the same degree of certainty that I can find that it's very likely that her rights will be terminated, I'd expect that that would occur within a year.

And given that I make that finding of fact, then I do find that it is likely that Brack would be adopted and that at age six to seven, that it would be high time, and it would

> finally be possible for him to enter into a stable and permanent family relationship and not one that is repeatedly interrupted by parents being incarcerated for a variety of crimes that they seem to be unable to quit committing and have a relationship with people who will work and be parents to him and not spend their time living on the streets engaged in drug and other illegal activities.
>
> I do conclude based on those facts that it is in Brack []'s best interest that the parental rights of Johnnie [], and frankly, given what I know, Nichelle [], be terminated….

¶5 The court subsequently incorporated its findings and conclusions into a written judgment terminating Johnnie's parental rights to Brack. Johnnie appeals the judgment.

ANALYSIS

¶6 Although a court need not terminate parental rights after finding grounds for a termination to exist, it may do so if it determines that a termination of the parental rights of "one or both parents" is in the best interest of the child. *See* WIS. STAT. §§ 48.424(3), 48.426, and 48.427(2) and (3); *see also* ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 103-04, 470 N.W.2d 914 (1991). In exercising its discretion as to whether to terminate parental rights, the "best interests of the child shall be the prevailing factor" and the court must consider 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.

WIS. STAT. § 48.426(3).

¶7 The sole basis upon which Johnnie challenges the court's determination that a termination of his rights was in Brack's best interest is the fact that, as of the dispositional hearing in his case, the parental rights of Nichelle remained intact, and there was no petition pending to terminate her rights at that time. Johnnie argues that, absent an imminent stepparent adoption, "the one-parent termination of parental rights order in this case served no purpose." In support, he cites our holding in ***A.B. v. P.B.,*** 151 Wis. 2d 312, 444 N.W.2d 415 (Ct. App. 1989).

¶8 Johnnie's reliance on ***A.B.*** is misplaced. We concluded in ***A.B.*** that the trial court erred in granting a mother's petition to terminate the father's parental rights to their child. The father there had agreed to the termination of his rights, but we concluded that "[p]arental rights may not be terminated merely to advance the parents' convenience and interests, either emotional or financial.… Simply put, no parent may blithely walk away from his or her parental responsibilities." ***Id.*** at 322. We further concluded that terminating the father's

rights, thus leaving the child in a single-parent household, "would cut an actual financial support line ... and would sever the potential for future emotional succor." ***Id.*** Significantly, however, we noted that there had been "no showing that the parents' relationship adversely affects their daughter to the extent that termination is warranted…." ***Id.***

¶9 By contrast, here, there was ample indication in the record that, not only was it "very likely" that Nichelle's rights to Brack would also be terminated, as the trial court found, but that even if that were not to occur, any continued relationship between Johnnie and Brack would not be in Brack's best interest. The record shows that Johnnie had never paid child support for Brack, and that he had not held a full-time job since 1994. His criminal record includes convictions for possession of controlled substances, and possession with intent to deliver, felony bail jumping, instigation of animal fights, felon in possession of a firearm, numerous traffic offenses, escape, and battery to a prisoner. The record also supports the court's finding that Johnnie had been incarcerated for a good portion of Brack's life, and that his efforts to establish a relationship with his son were at best minimal. In June 1999, a different Dane County Circuit Judge ordered in the CHIPS proceedings that Johnnie have no contact with Brack until further order of the court, based on the following findings:

> 1. Visitation in a jail setting is usually not healthy for young children.
>
> 2. Johnnie [] has not been a major player in Brack's upbringing. He has not provided financial support or moral guidance for Brack.
>
> 3. Brack is a very fragile child, having experienced a great deal of turmoil in his short life. Reintroduction of Johnnie [] to Brack would likely be emotionally taxing on Brack and the potential harm would outweigh any

benefits it could have for Brack.

4. Johnnie []'s legal status is uncertain and no visitation or reintroduction to Brack should be done until the conclusion of the pending termination of parental rights case, when the situation can then be assessed by qualified professionals.

¶10 In short, the record before us in this case is vastly different than the one we reviewed in ***A.B.*** When reviewing a trial court's exercise of discretion, we are only to ascertain whether the trial court applied the correct law to the relevant facts, and engaged in a process of reasoning, reaching a result which a reasonable judge could reach. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991). After reviewing the record and the trial court's decisional process, we conclude that the trial court did indeed consider the standard and factors set forth in WIS. STAT. § 48.426, and that the court reasonably applied them to the salient facts before it.

¶11 We are not to substitute our judgment for that of the trial court on matters committed to that court's discretion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). We conclude that the trial court did not err in determining that a termination of Johnnie's parental rights to Brack was in the best interest of the child.

CONCLUSION

¶12 For the foregoing reasons, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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