COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1823-FT

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

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

EAU CLAIRE COUNTY DEPT. OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TIMOTHY G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.[1] Susan Thorson is Timothy G.'s mother and Stephanie G.'s paternal grandmother. This appeal involves an order terminating Timothy's parental rights to Stephanie. The issue is whether the trial court erred by ordering termination without considering the best interests standard and the factors set forth in WIS. STAT. § 48.426(2) and (3) and without affording Thorson an opportunity to testify concerning an appropriate disposition. This court agrees that the trial court was required but failed to consider the statutory standard and factors in § 48.426 and that Thorson was entitled to testify regarding disposition. The order is therefore reversed and the matter is remanded for a dispositional hearing.

FACTS AND PROCEDURAL POSTURE

¶2 A thorough recitation of what occurred at the termination of parental rights (TPR) hearing is necessary to resolve the issues. Timothy Sullivan, assistant corporation counsel, appeared on the County's behalf. Attorney Timothy Adler appeared with Thorson. Stephanie's guardian ad litem, Gregory Brown, also was present. Sullivan first recounted for the trial court the County's three previous TPR actions that were commenced in an attempt to terminate Timothy G.'s parental rights to Stephanie. Each was dismissed because the County was unable to obtain service of process over Timothy. However, in the second action, No. 99-TP-16, Timothy filed an affidavit admitting paternity and indicating, as

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

This is an expedited appeal under WIS. STAT. RULE 809.17.

described by Sullivan, "that he essentially assigned his rights to represent his rights to his mother and also authorized Attorney Adler to act on his behalf."[2]

¶3 Sullivan indicated that the County was proceeding on the grounds of abandonment in light of Timothy's lack of contact with Stephanie, and upon a continuing need for protection and services based in part upon Timothy's admission of paternity in the affidavit filed in No. 99-TP-16. The County asked for a default judgment in light of Timothy's failure to appear after he was served by publication.

¶4 A significant portion of the hearing was then devoted to (1) whether Thorson had standing to appear on Timothy's behalf so as to prevent a default judgment on the basis of the affidavit filed in the earlier action[3] and, if so, (2) what would be accomplished by such an appearance.[4] When the trial court then observed that it was strange that Timothy wanted to require the County to prove the petition, presumably by having his mother attempt to appear on his behalf, and yet was apparently avoiding service, the following exchange occurred:

> MR. ADLER: Judge, can I be perfectly honest with the court?
>
> THE COURT: Sure.
>
> MR. ADLER: We, meaning Ms. Thorson and myself, quite frankly, are not interested in [the TPR grounds] phase of the proceedings. What we're interested in is the physical disposition regarding this child. In other words, if the court were to find after a trial that [Timothy's] rights should be terminated, that's a perfectly legitimate finding. However,

[2] The affidavit is not in the appellate record.

[3] The County raises the standing issue on appeal as well.

[4] The trial court essentially questioned how Thorson would defend against the allegations. Adler disclosed the theory of the defense and how it might be pursued.

> what we're seeking, as the grandmother of the child involved here, is the right to have a study done to determine if the disposition should be involving the grandmother, either as a guardian of this child, a foster parent of this child or an actual adoption of this child. My goal is representing the grandmother as the, quote, additional attorney, quote, assigned by [the judge in 99-TP-16] is to do everything that I can to ultimately get us to that disposition phase.

This exchange ended with Adler confirming to the court that Thorson's "ultimate desire" was to exercise any rights she had, including those under the termination statutes.

¶5 When the court then asked whether Thorson could "make these same arguments" regardless whether Timothy's rights were terminated, Sullivan informed the court that she would not necessarily be able to because:

> If you terminate his rights, she has no rights. But Mr. Adler wants to get to the point of essentially what would be a disposition in this proceeding, where the court would look at whether or not it's in the best interest of Stephanie G[.] to terminate her rights or to possibly place her with someone else, maybe being Susan Thorson.

¶6 The court then inquired, assuming termination, whether the placement decision was made by the Department of Human Services. Adler said no and Sullivan said yes. The court, after confirming that Timothy had not retained Adler to appear and contest the termination, inquired whether a TPR could be ordered upon default and was informed that it could. Adler, however, again indicated his concern with the disposition phase.[5] Sullivan inferred from the

[5] Adler stated: "Well, I guess the question is what is the effect of the default. The default is that the court will find that the allegations in the petition are true. And then we're right back into the disposition phase. Am I correct?"

court's question about the availability of a default judgment that the court had concluded that Thorson lacked standing, asked the court to terminate Timothy's parental rights, and asked that "the matter as to where Stephanie G[.] is going to be placed for adoption or long-term care" be left with the department.

¶7 Adler then informed the court that Sullivan's proposal was "contrary to the statutes," and that if a default judgment was granted regarding the allegations in the petition, the court would then hold a dispositional hearing. Only at such a hearing, Adler asserted, may the court order termination or another disposition.

¶8 The court, indicating it was ready to rule, made several findings, including that Timothy was Stephanie's father based upon the admission in the No. 99-TP-16 affidavit, that he was in default, and therefore both grounds in the petition were established.[6] In response to Sullivan's request, and "[i]n as much as this termination is granted," the court then immediately granted legal custody and physical placement to the State Department of Health and Family Services.

ISSUES

¶9 Thorson does not challenge the default judgment. Rather, she argues that it was error for the court to proceed directly to disposition without considering the best interests standard and the factors set forth in WIS. STAT. § 48.426(2)

[6] Thorson states that because Timothy did not appear at the hearing, it was "not contested" pursuant to WIS. STAT. § 48.422(3) and the trial court was therefore required under that same subsection to take testimony in support of the petition's allegations. Rather than specifically assign error in this regard, however, she then merely goes on to observe that the court made its findings based upon Timothy's default. Because Thorson fails to develop her argument, this court will not consider the County's argument concerning § 48.422. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

and (3).[7] She further contends, relying on ***In re Brandon S.S.***, 179 Wis. 2d 114, 507 N.W.2d 94 (1993), that it was error for the trial court to proceed to disposition without giving her an opportunity, as her attorney put it at the time of the hearing, to "exercise her rights … even if the court finds [Timothy's] rights should be terminated …." Under ***Brandon***, Thorson contends, one of her rights was to testify.[8]

¶10 The County argues that Thorson lacks standing to appeal the TPR order. It further contends that, while the trial court must consider the factors under WIS. STAT. § 48.426, information was available to the court upon which it could take those factors into consideration. It also contends that Thorson was not entitled to testify because she was not a party, foster parent, treatment foster parent or other physical custodian. *See* WIS. STAT. § 48.427(1) and (1m). The County does not address Thorson's reliance upon ***Brandon***. This court agrees with Thorson and rejects the County's arguments.

STANDARD OF REVIEW

¶11 Neither party expressly addresses the appropriate standard of review. Nevertheless, it is well established that the decision whether to terminate parental rights is committed to the trial court's discretion, *see* ***In re J.L.W.***, 102 Wis. 2d

[7] Thorson suggests other issues as well. *See* note 10.

[8] Thorson did not specifically alert the court that she wished to testify at the dispositional hearing and she did not object when the court terminated Timothy's parental rights without taking evidence under the statutory factors. This court nevertheless is satisfied that Thorson's reference to "her rights," her repeatedly, if implicitly, expressed desire to be heard at disposition and her wish to be considered as a placement alternative sufficiently preserved the issue for appellate review. Moreover, the County does not argue waiver. In any event, the waiver rule is one of judicial policy rather than jurisdictional prerequisite. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). This court thus will address her arguments.

118, 131, 306 N.W.2d 46 (1981), as is the determination of the child's best interests. *See* ***Brandon***, 179 Wis. 2d at 150. 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.***

STANDING

¶12 The trial court did not expressly rule on the County's standing objection. It did so implicitly, however, by noting that the affidavit was filed in an earlier action that was dismissed and by then proceeding to grant a default judgment despite Thorson's claim that she had standing to appear on Timothy's behalf.

¶13 The County does not contend that Timothy could not confer standing upon Thorson by means of an affidavit. Rather, its argument rests solely upon the proposition that the affidavit was filed in an action that was dismissed, was not refiled, and therefore had no effect in the current action. The County contends that because the affidavit could not confer standing upon Thorson in the current case before the trial court, she therefore lacks standing to appeal that court's decision.

¶14 The TPR actions in question are, of course, discrete, and therefore this court would ordinarily be persuaded by the County's argument. In this instance, however, this court agrees with Thorson's contention that the County should not be permitted to claim that she cannot rely on the affidavit filed in the earlier TPR action to give her standing while at the same time using that affidavit

as proof of Timothy's paternity.[9] In addition, standing is a rule of judicial policy rather than jurisdictional prerequisite. *See* ***Sussex Tool & Supply v. Mainline Sewer & Water***, 231 Wis. 2d 404, 409 n.2, 605 N.W.2d 620 (Ct. App. 1999). Because the trial court did not follow the case law and statutory mandates for determining whether to terminate Timothy's parental rights, and because in TPR cases "relationships are affected in a fundamental and radical manner," ***In re T.R.M.***, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981), the merits will be addressed. Finally, aside from the standing concept, ***Brandon*** provides Thorson with an alternative right to address the trial court at disposition.

FAILURE TO FOLLOW STATUTORY STANDARD AND FACTORS

¶15 Thorson argues that the trial court erred by ordering disposition without considering the best interests standard and the factors set forth in WIS. STAT. § 48.426(2) and (3).[10] She further contends, relying on ***Brandon***, that it was

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[9] The County originally alleged abandonment as termination grounds. *See* WIS. STAT. § 48.415(1). The petition in this action additionally alleged continuing need for protection and services under WIS. STAT. § 48.415(2) because of Timothy's admission of paternity in the affidavit filed in No. 99-TP-16.

[10] Thorson also complains that the court did not solicit (1) Brown's recommendation regarding Stephanie's best interests or (2) a report from the County agency under WIS. STAT. § 48.425. These issues are not adequately developed. Regarding Brown's recommendation, Thorson does not provide any authority to support her tacit proposition that failure to specifically seek a recommendation from a guardian ad litem constitutes error. This court declines to consider arguments that are unexplained, undeveloped, or unsupported by citation to authority. *See* ***M.C.I.***, 146 Wis. 2d at 244-45. This court notes, however, that in TPR proceedings, the guardian ad litem has a duty to make recommendations to the court concerning the child's best interests. *See* ***In re Guenther D.M.***, 198 Wis. 2d 10, 22-23, 542 N.W.2d 162 (Ct. App. 1995).

In addressing the court report issue, Thorson cites WIS. STAT. § 48.422(8) requiring the court to order an agency filing a TPR petition to submit a report to the court as provided by WIS. STAT. § 48.425. She then states:

> The Court report by an agency required by Wisconsin Statutes §48.425(8) amongst other things, requires "A statement applying the standards and factors enumerated in s.48.426(2) and (3) to

(continued)

error for the trial court to proceed to disposition without affording her an opportunity to testify concerning disposition.

¶16 The County concedes that in determining a disposition under WIS. STAT. § 48.427 the trial court must consider the standard and factors in WIS. STAT. § 48.426. It argues, however, that "the Trial Court was able to take into consideration the standard and factors set forth in Wisconsin Statutes s.48.426" because: (1) A county social worker had filed a report as required by WIS. STAT. § 48.425; (2) a social worker for the State Department of Health and Family Services had submitted a letter confirming that the State would serve as Stephanie's guardian with the ultimate permanency plan of adoption by the foster parents; (3) "there were several people present in the courtroom" at the time of the hearing, and; (4) the court had the allegations in the petition available to it.

¶17 WISCONSIN STAT. § 48.426, entitled "Standard and factors," provides:

> (1) COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> (2) STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> (3) FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

> the case before the Court." The Trial Court failed to follow this requirement …. (Citation omitted.)

Thorson's brief implies that the court failed to require the agency to file such a report. The County's brief, however, refers to a County Human Services Department report filed before the hearing, "pursuant to Wisconsin Statutes s. 48.425," and providing a record citation. Thorson does not address why this report does not comply with the statutes she cites.

> (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.

¶18 WISCONSIN STAT. § 48.427, entitled "Dispositions," provides in pertinent part:

> (1) Any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court. *After receiving any evidence* related to the disposition, the court shall enter one of the dispositions specified under subs. (2) to (4) within 10 days.
>
> (1m) In addition to any evidence presented under sub. (1), the court shall give the foster parent, treatment foster parent or other physical custodian described in s. 48.62 (2) of the child an opportunity to be heard at the dispositional hearing by permitting the foster parent, treatment foster parent or other physical custodian to make a written or oral statement during the dispositional hearing, or to submit a written statement prior to disposition, relevant to the issue of disposition. A foster parent, treatment foster parent or other physical custodian described in s. 48.62 (2) who receives notice of a hearing under s. 48.42 (2g) (a) and an opportunity to be heard under this subsection does not become a party to the proceeding on which the hearing is held solely on the basis of receiving that notice and opportunity to be heard.
>
> (2) *The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.*

> (3) The court may enter an order terminating the parental rights of one or both parents.
>
> (3m) If the rights of both parents or of the only living parent are terminated under sub. (3) and if a guardian has not been appointed under s. 48.977, the court shall either:
>
> (a) Transfer guardianship and custody of the child pending adoptive placement to:
>
> 1. A county department authorized to accept guardianship under s. 48.57(1)(e) or (hm).
>
> ….
>
> 4. The department.
>
> ….
>
> (b) Transfer guardianship of the child to one of the agencies specified under par. (a)1 to 4 and custody of the child to an individual in whose home the child has resided for at least 12 consecutive months immediately prior to the termination of parental rights *or to a relative*. (Emphasis added.)

¶19 Thorson asserts that the trial court was required to consider the best interests standard and the factors in WIS. STAT. § 48.426(2) and (3), respectively. Its failure to do so before proceeding to a final disposition under WIS. STAT. § 48.427 was, she contends, error. This court agrees that the case law supports Thorson's interpretation of the statutory mandate.

¶20 In ***In re A.B.***, 151 Wis. 2d 312, 319-20, 444 N.W.2d 415 (Ct. App. 1989), this court observed that once grounds for parental rights termination have been proven,[11]

> the trial court moves on to the "disposition" stage and decides, *upon the evidence*, whether termination is warranted. *See* … sec[]. 48.427(1), Stats. The trial court may then either enter an order terminating parental rights, if the evidence supports termination, or dismiss the petition if the evidence does not. Sec. 48.427, Stats. In making that

[11] ***In re A.B.***, 151 Wis. 2d 312, 444 N.W.2d 415 (Ct. App. 1989), involved an attempted voluntary termination.

> decision, the trial court must give "paramount consideration" to the child's best interests, sec. 48.01(2), Stats., which also constitute the "prevailing factor." Sec. 48.426(2), Stats. (Emphasis added.)

¶21 We also observed that WIS. STAT. § 48.426(3) requires the trial court to consider the factors set forth in that subsection in ascertaining the child's best interests. We further held that alternatives to termination must be explored. *See* ***id.*** at 322. "Only … after consideration but rejection of these alternatives, is termination permitted." ***Id.***

¶22 In ***In re T.R.M.***, an involuntary termination proceeding, the supreme court reversed a termination order for two reasons. First, no specific findings of fact were made with respect to the factual grounds supporting the order. *See* ***id.*** at 686. Second, there was no specific finding that it would be in the child's best interests to terminate the father's parental rights.

> The trial court findings are also deficient with respect to a lack of a specific and formal determination regarding the best interests of T. R. M. Where this is an issue in a court proceeding, the trial court is under an obligation to make findings with regard to the best interests of the child in relation to the evidence adduced. The failure to make this formal finding in and of itself is cause for remand of the matter for completion of the record.

Id. at 687 (citations omitted).[12]

¶23 Here, the record demonstrates that although the trial court was seeking assistance from counsel so as to properly execute its responsibilities, it

[12] The court explained its preference in cases that implicate "the fundamental rights of a parent" for remanding to the trial court for further findings and conclusions rather than employing the other alternatives available to an appellate court. *See* ***In re T.R.M.***, 100 Wis. 2d 681, 689, 303 N.W.2d 581 (1981).

nevertheless did not hear evidence or otherwise consider the applicable standard or factors. As indicated, the County contends that because the trial court had certain reports and potential witnesses available to it, "the Trial Court was able to take into consideration the standard and factors set forth in Wisconsin Statutes s.48.426." That the court had means available by which it could consider the statutory factors does not, however, satisfy the requirement that it actually exercise its discretion in doing so. This court must therefore conclude that the trial court did not properly exercise its discretion by proceeding to terminate parental rights when it failed to examine the relevant facts, apply the proper standard of law, and use a demonstrated rational process to reach its decision to terminate. *See* ***In re Michael I.O.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

IN RE BRANDON S.S.

¶24 Thorson contends that she was denied her right under ***Brandon*** to address the court at the disposition phase. This court reverses on different grounds, *i.e.*, that the trial court erroneously exercised its discretion by terminating Timothy's parental rights without considering the WIS. STAT. § 48.426 standard and factors. It will nevertheless address Thorson's argument because the matter is being remanded for further proceedings and, as indicated, the County contends that Thorson was not entitled to testify because she is not a person identified by statute as permitted to participate. *See* WIS. STAT. § 48.427(1) and (1m). This court concludes that Thorson has demonstrated a right to testify under ***Brandon***.

¶25 ***Brandon*** involved proceedings under WIS. STAT. § 48.837[13] to terminate parental rights and approve a petition for adoption by nonrelatives. *See* ***Brandon***, 176 Wis. 2d at 123. The Waupaca County Circuit Court granted the petition and denied the maternal birth grandparents' motion to intervene as parties and to vacate the termination and adoption order. On appeal, the supreme court held that the child's grandparents were not "interested parties" and were therefore not entitled to intervene as parties in the termination and adoption proceedings. *See* ***id.*** at 148. It further held, however, that the trial court erroneously exercised its discretion by deciding the best interests of child without hearing and considering evidence that the grandparents might have furnished.[14] *See* ***id.*** at 148-49. The court stated:

> To determine what course of action is in the child's best interests a circuit court must understand, among other factors, the nature of the child's substantial relationships with family members. Section 48.426(3), Stats.1990-91. Unless the circuit court is willing to listen to people who have formed such relationships with the child, it cannot make a reasoned determination of the child's best interests.

See ***id.*** at 147 (footnotes omitted). The court held that the trial court erroneously exercised its discretion by deciding Brandon's best interests without giving the grandparents an opportunity to be heard. *See* ***id.*** at 148-49. Under ***Brandon***,

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[13] Under WIS. STAT. § 48.837, the birth parents and the proposed adoptive parents may jointly petition for an adoptive placement. If the circuit court approves the adoptive placement, it then proceeds to the voluntary parental rights termination.

[14] "Because its decision was made without hearing important evidence relevant to Brandon's longstanding relationship with his grandparents and Brandon's best interests, we hold that the Waupaca court erroneously exercised its discretion." ***In re Brandon S.S.***, 179 Wis. 2d 114, 152, 507 N.W.2d 94 (1993).

Thorson is entitled to be heard regarding what disposition would be in Stephanie's best interests.[15]

CONCLUSION

¶26 The trial court erred by not conducting a hearing to consider the standard and factors under WIS. STAT. § 48.426. The case is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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

[15] In ***Brandon***, the court noted that the grandparents had relevant information to give to the court regarding disposition because they had a relationship with the child. In this case, such a relationship may be inferred from Thorson's active interest in the proceedings. Alternatively, her relationship with Stephanie is an appropriate subject to explore under WIS. STAT. § 48.426(3). Finally, this court also notes that under WIS. STAT. § 48.427(3m)(b), Thorson's testimony might appropriately extend beyond the subject of Stephanie's relationships to reach whether Thorson herself would be an appropriate guardian if Timothy's parental rights are terminated.