

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 3, 2005**

Cornelia G. Clark  
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. 2005AP1226**

**Cir. Ct. No. 2004TP35**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ABREANNA S.,  
A PERSON UNDER THE AGE OF 18:**

**FOND DU LAC COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**PETITIONER-APPELLANT,**

**v.**

**WILHELMINA F.,**

**RESPONDENT,**

**TRACEY D. R.,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Fond du Lac County:  
STEVEN W. WEINKE, Judge. *Reversed and cause remanded with directions.*

¶1 SNYDER, J.<sup>1</sup> Abreanna S., by her guardian ad litem, and the Fond du Lac County Department of Social Services (collectively, the Department) appeal from an order dismissing the County's petition for the termination of parental rights (TPR) of Abreanna's father, Tracey D.R. The Department contends that the circuit court failed to apply the statutorily mandated standard of the best interests of the child when it dismissed the petition. We agree, reversing the order of the circuit court and remanding the cause with directions.

### FACTS

¶2 On July 28, 2004, the Department filed a petition for the termination of parental rights to Abreanna, who at the time of the petition was approaching her second birthday. The petition alleged that grounds existed for the termination of the mother's, Wilhelmina F.'s, parental rights based on Abreanna's continuing need of protection or services and on continuing denial of periods of physical placement or visitation. The Department alleged that grounds existed for the termination of Tracey's rights based on abandonment, continuing need of protection or services, and failure to assume parental responsibility. The parties subsequently agreed to dismiss the continuing need of protection or services basis for the termination of Tracey's parental rights and proceeded on the grounds of abandonment and failure to assume parental responsibility.

¶3 On January 3, 2005, a two-day jury trial ensued. It concluded when the jury unanimously found that grounds existed for the termination of Tracey's

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

parental rights. A default judgment was entered against the mother, who did not appear at the trial.

¶4 The circuit court conducted a dispositional hearing regarding Abreanna and Wilhelmina's four other children on February 9, 2005. At the hearing, Fond du Lac County Department of Social Services social worker Christine Luckow testified that Abreanna's foster parents were very likely to adopt her and would provide a suitable home for her. Luckow explained that Abreanna has only one operative eye and suffers from a genetic disease that could be the cause of her developmental delay of approximately six to nine months behind her chronological age, as well as a shortened life expectancy. In her written report to the court, Luckow indicated that Abreanna had her right eye removed and replaced with an orbit. Abreanna wears glasses to correct impaired vision in her left eye. Luckow also reported that Abreanna was attending occupational therapy, physical therapy, and speech sessions. She noted that Abreanna's foster parents were specially trained and provided a treatment foster home.

¶5 Luckow also testified that Abreanna had "absolutely no relationship with either one of her biological parents" but noted that her half-brother had lived with her in the same foster home since October 2003 and that the foster parents had committed to adopting him as well. Luckow observed that Abreanna was too young to express her wishes regarding termination and further stated that Abreanna has been separated from her mother since shortly after her birth and never had contact with her father. Luckow opined that Abreanna would enter into a more stable and permanent family relationship if the termination of both parents' rights was granted.

¶6 With regard to Tracey, Luckow testified that he was adjudicated Abreanna's father on February 18, 2004, after taking a genetic test for paternity in December 2003. Luckow noted that Tracey failed to show up for two previously scheduled paternity tests. She also conveyed that Tracey told her that prior to entering prison he sold drugs to support himself because he had no money. Tracey also indicated that he planned to move to Oshkosh.

¶7 In her report to the court, Luckow summed up Abreanna's family relationships as follows:

The only family member that [Abreanna] does have a substantial relationship with is her half brother that is placed in the foster home with her. She has not had any kind of visits or any other contact from her mother since prior to her first birthday. She has never met her father and has only received a few letters and cards from him. It is believed that it would not be harmful to Abreanna to sever the relationship with her biological parents.

Luckow's report also indicates that Abreanna's mother informed Tracey of her pregnancy, but Tracey did not come forward or attempt to accept any parenting responsibility. As a result, paternity was not confirmed until December 2003, when Abreanna was sixteen months old.

¶8 At the dispositional hearing, Tracey testified that his most recent term of incarceration was eighteen months, and that he had been incarcerated a substantial portion of the past ten years. He acknowledged serving time for several crimes, including possession and delivery of cocaine, entry into a locked vehicle, and disorderly conduct. He stated that he expected to be released from his current term of incarceration on July 26, 2005. Tracey stated that he is willing to support Abreanna and do whatever he can for her because he feels it is his responsibility to care for a child he brought into this world. He indicated that he

has two other daughters by two other women. Tracey explained that he pays support for his oldest daughter, who was sixteen years old at the time of the hearing, by private arrangement with the mother. He also pays twenty-five percent of any income he earns for the support of his younger daughter, who was fourteen at the time of the hearing. These payments are facilitated through Milwaukee county and the Department of Corrections.

¶9 Tracey's sister, Carmen G., also testified at the dispositional hearing. She told the court that she resides in a Milwaukee apartment with her husband and daughter and a son who occasionally stays with them. She said that she is a licensed practical nurse and is taking classes to become a registered nurse. Carmen testified that she has been an LPN since 1993 and has "taken care of people with all sorts of disabilities," assuring the court that she could care for Abreanna and her special needs. She also testified that she would be financially able to care for Abreanna and to provide a stable home. An investigator from the State Public Defender's office visited Carmen's apartment and determined it would be a suitable place for Abreanna to live.

¶10 At the conclusion of the dispositional hearing, the circuit court terminated the parental rights of Abreanna's mother. The court then dismissed the petition to terminate Tracey's parental rights. The Department appeals from the court's order dismissing its petition to terminate Tracey's parental rights.

## DISCUSSION

¶11 Whether there is sufficient evidence at the dispositional phase to warrant the termination of parental rights is a matter vested to the circuit court's discretion. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶4, 255 Wis. 2d 170, 648 N.W.2d 402. "The statutes governing petitions for termination of

parental rights require the court, in the exercise of its discretion, to consider the best interests of the child as the prevailing factor in a disposition under Wis. Stat. § 48.427.” *Julie A.B.*, 255 Wis. 2d 170, ¶4. In deciding whether to terminate a parent’s rights, the circuit court may consider any relevant evidence as well as alternative dispositional recommendations. *Id.*, ¶29. The circuit court “shall consider any report submitted by an agency under [WIS. STAT.] § 48.425, and it shall consider the six factors set out in [WIS. STAT.] § 48.426(3)” in determining the best interests of the children. *Julie A.B.*, 255 Wis. 2d 170, ¶29. The six factors mandated under § 48.426(3) are:

(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.

¶12 Tracey contends that the circuit court referenced the best interests of the child twice and therefore the court applied the correct legal standard. Tracey adds that while “the court did not make a talismanic recitation of the factors to be considered when giving its decision as to Abreanna, it had just terminated the parental rights as to [her four half-siblings].” Tracey argues that the court’s

express consideration of the statutory factors when it terminated the parental rights to the other children demonstrates the court's rationale regarding Abreanna's best interests.

¶13 The Department points out that “the sole reference the court made to the best interests of the child before dismissing the TPR petition was when it discussed the fairness of the situation and expressed appreciation of the testimony of all the parties.” While acknowledging that the circuit court did use the phrase “in the best interests” a second time, the Department highlights that the court invoked the statutory standard *after* the TPR petition had been dismissed. At that point, the court was considering whether allowing Abreanna to visit Tracey while he remained incarcerated was in Abreanna's best interests. In sum, the Department contends that neither reference to Abreanna's best interests “was more than superficial” and asserts that “the substantive best interests of Abreanna S. did not drive the decision.”

¶14 We agree with the Department for two reasons. First, the circuit court's references to the best interests of Abreanna are not founded on any consideration of the statutory factors mandated by WIS. STAT. § 48.426(3). The court stated:

[T]aking into consideration what is in the best interests of the child, the Court values the testimony of all of the parties that have been given here. I appreciate the solid work that the Department of Social Services ha[s] done in connection with this case. My only concern has always been and was at the time of hearing is that I think more concern and attention has to be given in cases where an individual is incarcerated. There is nothing to indicate any bad character on the part of [Tracey]. He is not a child molester. He is not an ax murderer. He sold cocaine. He paid the penalty for that.... [I]f one wants to believe that one of the components of the criminal justice system is rehabilitation and that a person is willing to accept the responsibilities of

being a good citizen, this Court cannot deny him that opportunity in this situation ....

¶15 A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand. *State v. Margaret H.*, 2000 WI 42, ¶32, 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 statutory factor. *Id.*, ¶35. Here, the circuit court failed to present any rationale showing that it considered the six factors set out in WIS. STAT. § 48.426(3) in determining the best interests of Abreanna; therefore, we must conclude that it erroneously exercised its discretion. See *Julie A.B.*, 255 Wis. 2d 170, ¶¶29, 43.

¶16 Second, Tracey’s argument that the circuit court somehow continued its rationale from the disposition of the first four children’s cases to the disposition of Abreanna’s case fails. The court expressly separated the termination proceedings for the four older children from that of Abreanna. This is because Tracey is Abreanna’s biological parent, but he is not the parent of the other children. The court stated that Abreanna “presents a different issue for this Court” and invited the parties to “make your recommendations as to the four that I have named and then I will make a ruling as it relates to those four children, and then we will take up the matter of Abreanna ... separately.”

¶17 We conclude from the record that the circuit court did not consider the best interests of Abreanna as the prevailing factor in its disposition. Accordingly, we reverse the order dismissing the petition to terminate Tracey’s parental rights and remand the matter for a new dispositional hearing. We direct the circuit court to address the legal standard and statutory factors mandated by WIS. STAT. § 48.426(3).

*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.

