

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 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 Nos. 2005AP1924
2005AP1925
2005AP1926**

**Cir. Ct. Nos. 2004TP11
2004TP12
2004TP13**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2005AP1924

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

RUSK COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

HAROLD S., SR. AND SHANNON S.,

RESPONDENTS-RESPONDENTS.

No. 2005AP1925

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

RUSK COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

**HAROLD S., SR. AND SHANNON S.,
RESPONDENTS-RESPONDENTS.**

NO. 2005AP1926

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

**RUSK COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,
PETITIONER-APPELLANT,**

V.

**HAROLD S., SR. AND SHANNON S.,
RESPONDENTS-RESPONDENTS.**

APPEALS from orders of the circuit court for Rusk County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ The Rusk County Department of Health and Human Services appeals dispositional orders terminating the parental rights of Harold S. and Shannon S. and placing the children in sustaining care. The County

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

contends the court's findings do not support ordering sustaining care, pursuant to WIS. STAT. § 48.428. We affirm the orders.

FACTS

¶2 On December 21, 2004, the County filed petitions to terminate the parental rights of Harold and Shannon to their four children. At a fact-finding hearing on April 26, 2005, a jury found grounds to terminate Harold's and Shannon's parental rights, and the court found both to be unfit parents.

¶3 A dispositional hearing was held on June 8, and the court terminated Harold's and Shannon's parental rights to three of their four children. The parties stipulated to dismissing the case regarding the fourth child, Dakota, because Dakota had not been outside of the home for a sufficient time to meet the grounds for termination under WIS. STAT. § 48.415(2). The court ordered sustaining care for the three children, pursuant to WIS. STAT. § 48.428, because it believed their contact with Dakota should not be severed. The court also provided for visitation between Harold and Shannon and the children, although it concluded that if they did not exercise their right to visitation, the County could seek orders vacating the sustaining care orders and making the children available for adoption.

¶4 Relying upon WIS. STAT. § 48.428, the County filed a motion for reconsideration of the sustaining care portion of the orders, asserting it was contrary to the court's factual findings. After a hearing, the court clarified its findings and reaffirmed its orders. The County appeals.

DISCUSSION

¶5 When a court orders sustaining care, legal custody of a child is transferred to a county or state agency, and the child is placed with a “sustaining care parent,” who agrees to care for that child until he or she reaches eighteen years of age. WIS. STAT. §§ 48.428(2) and (4). A court may order or prohibit visitation by the birth parents during that time. WIS. STAT. § 48.428(6). A child may be placed in sustaining care if “the court has terminated the parental rights of the parent or parents of the child ... and the court finds that the child is unlikely to be adopted or that adoption is not in the best interest of the child.” WIS. STAT. § 48.428(1).

¶6 According to the County, the court found that adoption was likely and that it was in the best interests of the children. Therefore, the County contends that sustaining care was not an option under WIS. STAT. § 48.428. The County also argues that the court’s use of sustaining care was contrary to the legislative purpose of the Children’s Code.

¶7 The County relies upon the court’s statements at the dispositional hearing. According to Shannon, the County reads the findings out of context. When addressing the factors for determining whether termination is in the children’s best interests, the court concluded, after discussing testimony, that “it’s very likely that they would be adopted after termination.” Later, when explaining its disposition, the court stated:

The Court however does recognize that there are other facts that we need to consider in entering the disposition. I’m satisfied that the relationship between these three children and the fourth child, Dakota, needs to be continued. I’m satisfied that there is clear and convincing evidence that visitation between Harold, Sr., and Shannon S[] is in the

welfare and best interest of the – particularly Melissa and Shaun.

Therefore, I'm ordering that custody be transferred to the Department or their designee; ... and that an order for sustaining care pursuant to Section 48.428 be implemented.

The other benefit of this order is this: The rights are terminated as to Harold, Sr., and Shannon. ... By permitting ongoing visitation, it leaves these two parents still an opportunity to have a relationship with three children. If they choose not to have that relationship, to not exercise visitation rights, then the Department, as I understand the statute and the law, can come back into court and ask me to vacate the sustaining care order and make the children absolutely available for adoption. And I'm not so sure that the Department can't do that already.

....

I think it may also accomplish a potential adoption by the C[] which, given my observations about them, is clearly in the children's best interest....

¶8 The parties agree that the court found these children were likely to be adopted. However, they disagree about whether the court found adoption to be in the children's best interests. Shannon contends the court only found a *potential* adoption to be in the children's best interests, but not an imminent adoption. Essentially, Shannon contends the court found that adoption would be in the children's best interests *if* the parents do not exercise their visitation rights and the sustaining care orders are vacated.

¶9 Fortunately, the court clarified its findings upon reconsideration, a fact that the County largely ignores. The court first elaborated on the bases for the sustaining care orders:

[O]ne of the children said specifically to someone they want to continue to have a relationship with mother and dad

....

... [A]nd then underlying all of this was the relationship between the three children that were TPR'd and Dakota, who was not because there was a jurisdictional defect, that was the family unit that was perhaps the most cohesive. It was the children. It wasn't these incompetent parents we heard about for four days. They weren't holding this thing together. The kids themselves, for whatever reason, and by the grace of God perhaps, had held it together. That was the cohesiveness that I viewed needed some credit when I entertained and entered the order that I thought I should.

The court ultimately concluded:

It was for those reasons that, although I may not have said it in these terms, that I found that adoption of the older three and leaving Dakota behind was not in their individual or collective best interests.

¶10 The above clarification is supported by the facts found at the dispositional hearing. Further, to the extent these statements are arguably inconsistent with the court's original findings, where decisions of the same court appear to conflict, we accept that court's most recent pronouncement. *See, e.g., Bruns Volkswagon, Inc. v. DILHR*, 110 Wis. 2d 319, 324, 328 N.W.2d 886 (Ct. App. 1982). Thus, we accept the court's clarification on reconsideration that it found adoption was not in the best interests of these children.

¶11 The County also contends that the court's sustaining care orders are contrary to the intended purpose of WIS. STAT. § 48.428. The County argues that sustaining care is only appropriate where children are not likely to be adopted. To use it in other situations, argues the County, is contrary to the Children's Code's intended purpose of providing permanence for children, which is better achieved through adoption than foster care.

¶12 We reject the County's argument because the statute clearly provides that sustaining care may be ordered where adoption is not in a child's best interest,

not just where adoption is unlikely. *See* WIS. STAT. § 48.428(4). Here, the court found that maintaining the relationships between these siblings was more important than making them available for adoption. The court also found that visitation with the birth parents was in the children's best interests.

By the Court.—Orders affirmed.

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

