

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2006

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. 2006AP2122

Cir. Ct. No. 2006TP1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

FOREST COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CHRISTINA G.,

RESPONDENT-APPELLANT,

CLAY C.,

RESPONDENT.

APPEAL from an order of the circuit court for Forest County:
ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded with
directions.*

¶1 CANE, C.J.¹ Christina G. appeals an order terminating her parental rights. Christina argues the trial court applied the wrong legal standard during the fact-finding stage by addressing the child's best interests rather than addressing whether Christina had good cause for the abandonment. We agree and, therefore, reverse and remand this case so the trial court may consider whether Christina would have met the good cause standard if it had not considered the best interests of the child.

BACKGROUND

¶2 On February 6, 2006, Forest County filed a petition for termination of Christina's parental rights to her daughter, nine-year-old Cynthia G. The petition alleged two grounds: abandonment and a failure to assume parental responsibility. Christina contested the petition and the case proceeded to a bench trial on April 6, 2006.

¶3 At trial, Jenny C., Christina's former foster mother, testified Christina was fourteen years old when she gave birth to Cynthia. Both Christina and Cynthia came to live in Jenny and her husband's foster home when Cynthia was four months old.

¶4 Shortly before Christina's eighteenth birthday, Jenny and her husband became Cynthia's legal guardians. When Christina turned eighteen on August 8, 2000, she moved out and did not take Cynthia with her. Later in 2000, Christina came back and stayed with Jenny for a few days and then left again.

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.

¶5 The court found Christina had no contact with Cynthia for three different time periods that exceeded six months: December 22, 2004, through December 27, 2005; May 5, 2004, through December 20, 2004; and October 2002 through October 2003.² The court then informed Christina’s attorney that Christina had “the burden by the greater weight of the evidence showing that there is good cause....” Counsel argued that Christina’s learning disability and her belief that Jenny would not allow visitation constituted good cause for the abandonment.

¶6 In rendering its decision at the fact-finding hearing, the court stated:

[Christina’s attorney] has a good argument. “Look my client never got dealt a very good deck of cards here.”

“I got a disability. I got problems.” And, perhaps, could meet the good cause with that. But don’t we also have to have it applied, the consideration, as to what is best for Cynthia?

....

But, you know, thinking about everything here, I just have to take into account where we might be in this case in two years, three years, four years down the road

....

And so, you haven’t prevailed on the affirmative defense about good cause under all of the circumstances.

¶7 The court held a disposition hearing on May 17, 2006, and found it would be better for Cynthia to stay in Jenny and her husband’s home. Further, the court found Cynthia was likely to be adopted. The court entered an order terminating Christina’s parental rights.

² WISCONSIN STAT. § 48.415(1)(a)3 provides abandonment may be proved by showing “[t]he child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.”

DISCUSSION

¶8 [A] TPR proceeding is bifurcated into an initial fact-finding stage and a dispositional stage. In the initial stage, the fact-finder must decide whether there is clear and convincing evidence that proves the grounds for termination. Once grounds have been established, the court must decide whether to terminate the parental rights by determining what is in the best interests of the child. The supreme court has thus concluded that the best interests standard is confined to the dispositional phase, and that at the fact-finding stage, the best interests of the child are not to be considered.

Door County DHFS v. Scott S., 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999) (citations omitted). If abandonment is alleged as grounds for termination of parental rights, abandonment is not proven if the parent can show, by a preponderance of the evidence, good cause for the abandonment. WIS. STAT. §§ 48.415(1)(c)1-3. Christina argues the trial court applied the wrong legal standard during the fact finding stage by addressing the child’s best interests rather than addressing whether Christina had good cause for the abandonment.³

¶9 “The decision to terminate parental rights is within the discretion of the trial court.” *Jerry M. v. Dennis L.M.*, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). This court will not overturn the trial court unless there has been

³ The Forest County Department of Human Services argues Christina waived this argument by not objecting during the court’s oral decision. The Department does not cite authority for the proposition that it is even permissible to make such an objection. The Department also fails to cite a case finding waiver based on a party’s failure to object to an erroneous standard in an oral decision. Further, WIS. STAT. § 752.35 permits this court to provide relief in the interest of justice if we are convinced “that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried....” “[T]he power ... to terminate the parental relationship is an awesome one, which can only be exercised under proved facts and procedures which assure that the power is justly exercised.” *In re M.A.M.*, 116 Wis. 2d 432, 436-37, 342 N.W.2d 410 (1984). We do not find waiver appropriate under these circumstances.

an erroneous exercise of that discretion. *Id.* A trial court “erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record.” *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

¶10 In this case, the court mixed its consideration of whether Christina proved good cause with the best interests of the child standard. Specifically, the court stated:

[Christina’s attorney] has a good argument. “Look my client never got dealt a very good deck of cards here.”

“I got a disability. I got problems.” And, perhaps, could meet the good cause with that. But don’t we also have to have it applied, the consideration, as to what is best for Cynthia?

The court continued to address the best interests of the child standard throughout the rest of its decision in the fact-finding stage of the proceeding. The court never considered whether Christina would have met the good cause standard if it had not considered the best interests of the child. The supreme court has clearly stated the best interests of the child standard is not to be considered at the fact-finding stage. *Scott S.*, 230 Wis. 2d at 468. Rather, the court should have considered whether there was clear and convincing evidence proving grounds for termination. *Id.* By failing to consider whether Christina met the good cause standard, the court never did this. The trial court’s use of the best interests of the child standard during the fact-finding stage was an error of law and therefore an erroneous exercise of its discretion. *See King*, 224 Wis. 2d at 248. We therefore reverse and remand so the trial court may hold a new fact-finding proceeding wherein it considers the appropriate legal standard.

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.

