

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2009

David R. Schanker
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. 2008AP2404
2008AP2405
2008AP2406**

**Cir. Ct. Nos. 2007TP5
2007TP6
2007TP7**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2008AP2404

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

CRAWFORD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ROSE M. O.,

RESPONDENT-APPELLANT.

No. 2008AP2405

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

CRAWFORD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ROSE M. O.,

RESPONDENT-APPELLANT.

No. 2008AP2406

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

CRAWFORD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ROSE M. O.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Crawford County:
MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Rose M.O. appeals the circuit court's orders terminating her parental rights to her children, Fantasia O., Elric O., and Lorenia O. Rose argues that the circuit court erroneously exercised its discretion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

at the dispositional phase of the proceedings. Specifically, she argues that the court failed to consider, as required by WIS. STAT. § 48.426(3)(c), whether severing her substantial relationship with the children would be harmful to them. We disagree, and affirm the orders.

Background

¶2 The guardian ad litem filed petitions to terminate Rose's parental rights to the children in June 2007. The ground alleged was that the children were in continuing need of protection and services. According to the petitions, all three children were removed from Rose's care in January 2006 and found in need of protection and services in February 2006.

¶3 After a trial on the petitions, a jury found that the alleged ground existed. The jury's findings included that Rose failed to meet the conditions established for the safe return of the children to her home and that there was a substantial likelihood that Rose would not meet the conditions within the twelve-month period following the conclusion of the trial. The case proceeded to a dispositional hearing at which the circuit court concluded that Rose's parental rights to the children should be terminated. Rose appealed.²

¶4 We reference additional facts as needed below.

² While this appeal was pending, Rose moved this court to retain jurisdiction while remanding to the circuit court for a post-disposition fact-finding hearing. We granted the motion. On remand, Rose claimed ineffective assistance of trial counsel. In addition, she argued to the circuit court that it failed to consider the harm that would result to the children if their relationship with Rose was severed. The circuit court denied Rose's motion. On appeal, Rose has abandoned her ineffective assistance claim.

Discussion

¶5 The focus at the dispositional stage of termination of parental rights proceedings is the best interests of the child. *Sheboygan County Dep't of Health & Human Servs. v. Julie A.B.*, 2002 WI 95, ¶28, 255 Wis. 2d 170, 648 N.W.2d 402. In determining whether termination is in the child's best interests, the circuit court must consider the factors enumerated in WIS. STAT. § 48.426(3). *See id.*, ¶29. Those factors 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.

WIS. STAT. § 48.426(3) (emphasis added).

¶6 “The ultimate determination of whether to terminate parental rights is discretionary with the circuit court.” *State v. Margaret H.*, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. Accordingly, the question before us is not whether we would reach the same result that the circuit court did but rather whether the circuit court “examine[d] the relevant facts, applie[d] a proper

standard of law and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach.” *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

¶7 The dispute here focuses on the factor in WIS. STAT. § 48.426(3)(c). This factor “directs focus on the legal severance resulting from a termination of parental rights and requires courts to assess the harmful effect of this legal severance on the emotional and psychological attachments the child has formed with his or her birth family.” *Margaret H.*, 234 Wis. 2d 606, ¶26.³

¶8 As already noted, Rose argues that the circuit court failed to consider the harm that would result from severing her relationship with her children. We disagree. We first set forth the most pertinent parts of the circuit court’s decision, and then turn to Rose’s more specific arguments.

¶9 The circuit court found that Rose and her family had been involved with social services agencies going back to 1995. The court also found that the children had been out of Rose’s home continuously for a little over two years. At the time the children were removed from Rose’s home, Fantasia was about eleven months old, Elric about two years and three months old, and Lorenia about three

³ There is no serious dispute that the circuit court adequately considered all of the other required factors. In the facts section of her brief-in-chief, Rose M.O. states that the court did not consider the children’s health, as required by WIS. STAT. § 48.426(3)(b). The guardian ad litem in her brief, however, explains that the children’s health was not at issue. Rose does not address this factor further in her reply brief. Accordingly, any argument Rose may have intended to make on this matter is both undeveloped and waived, and we do not consider it further. See *Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999) (“An argument to which no response is made may be deemed conceded for purposes of appeal.”); *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (courts need not consider undeveloped arguments).

years and five months old. At the time of the dispositional hearing, the children were about three years old, four years and three months old, and five and one-half years old. Although Rose had maintained regular contact with the children, the court observed that two years in the lives of children of those ages was a significant period of time.

¶10 The circuit court acknowledged that Rose had complied with some of the conditions for return. The court stated, however, that Rose had not complied with some of the “very important requirements.” The court cited a number of incidents raising a concern for the welfare of the children if they were returned, unsupervised, to Rose’s full-time custody. In one instance, for example, while the children were in Rose’s care, Rose was gone overnight without providing supervision for the children.

¶11 The court considered the need to achieve permanency for the children. It agreed with the fact, as found by the jury, that Rose was unlikely to meet the conditions for their return in the future. The court determined that, if it did not terminate Rose’s parental rights and the children could not be returned to Rose’s care, they would remain in a foster home, whereas if the court granted the petition to terminate Rose’s parental rights, an adoption was very likely.

¶12 The court acknowledged that the prospective adoptive parents might or might not allow Rose to have contact with the children. The court opined that, if the adoptive parents did not allow contact, this would “not be good” for the children because of their relationship with Rose.⁴

⁴ During the dispositional hearing, a potential adoptive parent testified that she was willing to allow Rose to have continued contact with the children after adoption if she felt it was
(continued)

¶13 The court specifically acknowledged the importance of the substantial relationship factor, stating that it was perhaps the most important of all the statutory factors. The court found that it had been conceded that Rose and the children had a substantial relationship. The court considered but rejected the possibility of continuing the dispositional hearing in order to obtain “psychological advice about the effects and importance of the substantial relationship of [the] mother with these children of these ages, young ages, and the harm that might be caused to the child to sever the relationship.” The court observed that the children had been in foster care and “legal limbo” for more than two years.

¶14 After weighing all these considerations, and others, the court concluded as follows:

Ultimately, I conclude that the children—it is not likely that the children would be able to return home, that the situation would be remedied satisfactorily within a reasonable time, that requirement of permanency on top of that requires that the best—well, requires a finding that the best interests of the children would be served by termination of the mother’s parental rights. That continuation of the child in the custody of the mother wouldn’t be appropriate to the welfare of these children; although, it is strongly urged and would be so helpful for the children for the relationship with the mother to continue.

So the Court is granting these three petitions.

in their best interests. The circuit court’s comments were apparently in reference to this testimony and in recognition of the fact that, once an adoption is finalized, adoptive parents cannot be required to allow continued contact. See *State v. Margaret H.*, 2000 WI 42, ¶30, 234 Wis. 2d 606, 610 N.W.2d 475 (“[T]he [circuit] court may certainly choose to examine the probability that [a potential adoptive parent] will be faithful to her promise [to allow continued contact], at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete.”).

¶15 Rose argues that the court should have done what it considered but rejected doing, namely, continued the dispositional hearing to obtain further “psychological advice.” She asserts that there is every reason to believe that, in doing so, the court would have been advised that great harm would result from severing her relationship with the children. She argues that the court’s failure to continue the hearing for this purpose rendered the court unable to make a reasoned, informed decision. We are not persuaded.

¶16 Rose points to nothing in the record to support her assertion that, if the court had continued the dispositional hearing to obtain additional “psychological advice,” the court would have been advised that severing Rose’s relationship with the children would result in “great harm.” Similarly, Rose’s argument is insufficiently specific as to how or why such advice would have shed new light on the facts already available to the circuit court.⁵

⁵ The record contains a post-disposition psychological report the circuit court requested that the guardian ad litem obtain. Specifically, the court requested that the guardian ad litem have a psychologist prepare a report addressing “the importance of the significant relationship of the mother with the children given their ages in regard to the possible adoption.” We do not rely on the report in upholding the circuit court’s exercise of discretion at the time of the disposition, but we summarize some of its most pertinent contents for the limited purpose of showing that it does not support Rose’s assertion. The report states that there does not appear to be a strong bond between Rose and the two younger children, Fantasia and Elric. It acknowledges that the oldest child, Lorenia, showed a more significant attachment to Rose. The report suggests limited supervised contacts between Rose and the children of two hours per month based on the relationship between Lorenia and Rose. The report expressed reservations even with such limited contact, however, noting that Rose sometimes engaged in behaviors that confused the children and sabotaged their relationship with the adoptive parents. The report recommends that, if Rose continued with this “sabotaging behavior,” all contact between Rose and the children should be terminated because the damage from such behavior would far outweigh any benefit from the children’s contact with Rose. The report does not state or suggest that discontinuing contact between Rose and the children would cause great harm to the children.

¶17 Moreover, there is no dispute that the court had before it and considered, among other evidence, a termination-of-parental-rights report that the county filed for each child pursuant to WIS. STAT. § 48.425. In those reports, a county social worker assigned to Rose’s case concluded that, although Rose and the children had a substantial relationship, it would not be harmful to sever the relationship, and the need for permanency outweighed the impact of severing the relationship.

¶18 Although the circuit court did not make an express finding as to whether severing Rose’s relationship with the children would or would not be “harmful” to the children, the court’s decision adequately shows that the court considered this factor. The court plainly recognized that severing Rose’s relationship with the children would have certain negative impacts on the children. It acknowledged that it would “not be good” for the children if their adoptive family refused to allow Rose to have contact. Similarly, the court’s concern for the impact of severing Rose’s relationship with the children is shown by the court’s comment that it “strongly urged and would be so helpful for the children for the relationship with the mother to continue.”

¶19 What the court’s decision reflects is its recognition that severing Rose’s relationship with the children was not desirable, but that other factors outweighed the possible harm to the children. In particular, the court reasonably gave weight to the children’s need for permanency and the likelihood that permanency would be achieved only if Rose’s parental rights to the children were terminated. In addition, the court plainly viewed as important the high likelihood of adoption, along with the period of time that Rose and the children had been separated. The court reasonably concluded that this was a significant amount of

time relative to the children's ages, even considering that Rose had maintained ongoing contact with the children.

¶20 Rose may be arguing as a general matter that, in cases where a substantial relationship exists, the circuit court must obtain an independent psychological or other expert report focusing on the potential harm to the children; otherwise, the circuit court is unequipped to measure the level of harm and unable to reasonably exercise its discretion. If that is her argument, we reject it because it is insufficiently developed and because she provides no supporting authority. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (courts need not consider undeveloped arguments). In any event, we are aware of no authority that would have required the circuit court to order an independent assessment of this nature.

¶21 Rose argues in the alternative that the circuit court implicitly found that severing her relationship with the children would result in harm to the children and, therefore, the court should not have terminated her parental rights. This argument fails because it incorrectly assumes that the circuit court may not terminate parental rights if the court finds that severing the parent-child relationship will be harmful to the children. Whether severing the parent-child relationship is harmful to a child plainly is an important consideration, but it is not necessarily dispositive. “Although an evaluation of substantial relationships and the harm of a legal severance is indeed critical to the court’s determination, exclusive focus on any one factor is inconsistent with the plain language of WIS. STAT. § 48.426(3).” *Margaret H.*, 234 Wis. 2d 606, ¶35.

¶22 As we have indicated, the circuit court here reasonably recognized that severing Rose’s relationship with the children could have a negative impact

on the children, but the court also reasonably concluded that any harm in severing the relationship was outweighed by other factors. In particular, the court understandably gave considerable weight to the children's need for permanency and the likelihood that permanency would be achieved only if Rose's parental rights to the children were terminated.

¶23 Finally, Rose argues that the circuit court made a “*de facto* finding” of “great harm” to the children based on its observations that Rose was committed to continued contact with the children and that it would not be good for the children if the adoptive family refused to allow Rose to have contact. We reject this argument. The court's observations plainly do not constitute a finding of “great harm.”

By the Court.—Orders affirmed.

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

