

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2002

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. 01-2850
STATE OF WISCONSIN**

Cir. Ct. No. 98JC282661

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF AHAYANA P.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SEPTEMBER D.,

RESPONDENT-APPELLANT,

AHAMIHL P.,

RESPONDENT-CO-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

¶1 CURLEY, J.¹ September D. and Ahamihl P., the parents of Ahayana P., appeal the order extending and revising the dispositional order in Ahayana's CHIPS case. Ahamihl P. submits that the trial court erred in its interpretation of WIS. STAT. § 48.38(4)(d) (1999-2000) when it permitted Ahayana to move to Tennessee with her foster family.² Both Ahamihl P. and September D. argue that the trial court erroneously exercised its discretion in finding that it was in Ahayana's best interests to move with her foster family to Tennessee. September D. also submits that the trial court violated the mandate found in WIS. STAT. § 48.355(1), requiring disposal of a CHIPS case in a manner that is least restrictive of the rights of the parent and child, by revising Ahayana's placement order and allowing her to go to Tennessee. This court affirms.

I. BACKGROUND.

¶2 After Ahayana was born on February 17, 1997, she lived with her mother, September D., and several siblings. On March 2, 1998, the State filed a CHIPS order concerning Ahayana and her siblings. This order originally placed Ahayana with her mother and legal custody remained with her mother, but Ahayana has resided with her foster family since May 22, 2000. This placement occurred after her mother was unable to pay her rent, a condition of the CHIPS order. At the present time, her father, Ahamihl P., is incarcerated with a release date in 2006. The dispositional order concerning Ahayana has been extended several times.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 After learning of the anticipated out-of-state move of Ahayana’s foster family, her guardian ad litem filed a petition seeking to revise the dispositional order. The petition requested “that the Court deny any request for change of placement of Ahayana from the ... foster home, and find that placement of Ahayana more than sixty miles from her parents’ residence is in her best interests.” Both parents opposed the motion, and a contested hearing was held on April 30, 2001. After a hearing, the trial court found:

Pursuant to sec. 48.38(4), placement of Ahayana P[.] more than sixty (60) miles from the home of her parents when her current foster parents move to Tennessee is in her best interests because this situation is the most stable she has known and it continues placement with her biological brother ...

....

The legal custody of the child, Ahayana P[.], shall be with the mother, September D[.]...

....

The Bureau shall ensure that September D[.] is afforded monthly visits with Ahayana and that September D[.] be allowed to place weekly collect phone calls at reasonable times to Ahayana at Corson foster home in Tennessee, both at least until the Permanency Plan Review of September 7, 2001....

II. ANALYSIS.

A. The trial court correctly interpreted WISCONSIN STAT. § 48.38(4)(d).

¶4 Ahamihl P. argues that the trial court erred in interpreting WIS. STAT. § 48.38(4)(d). The relevant subsections of the statute in question read:

Permanency planning.

....

(4) CONTENTS OF PLAN. The permanency plan shall include a description of all of the following:

....

(d) If the child is living more than 60 miles from his or her home, documentation that placement within 60 miles of the child's home is either unavailable or inappropriate or documentation that placement more than 60 miles from the child's home is in the child's best interests. The placement of a child in a licensed foster home or a licensed treatment foster home more than 60 miles from the child's home is presumed to be in the best interests of the child if documentation is provided which shows all of the following:

1. That the placement is made pursuant to a voluntary agreement under s. 48.63 (1).
2. That the voluntary agreement provides that the child may be placed more than 60 miles from the child's home.
3. That the placement is made to facilitate the anticipated adoptive placement of the child under s. 48.833 or 48.837.

¶5 The trial court concluded that the statute permits a child to live more than sixty miles from his or her parent under three different scenarios: (1) the child's home is unavailable; (2) the child's home is inappropriate; or (3) a showing has been made by documentation that it is in the child's best interests to be placed more than sixty miles away. Ahamihl P. maintains that the trial court was first obligated to determine whether placement was available within sixty miles and was appropriate. He contends that because other placements were available within sixty miles of her mother's home, including Ahayana's maternal grandmother, who was caring for September D.'s other children, and Ahayana P.'s sisters, who were willing to care for Ahayana, the trial court erred in not making an inquiry into whether a suitable and appropriate placement was available locally before inquiring whether it was in Ahayana's best interests to move to Tennessee.

¶6 The interpretation of a statute is a question of law which this court reviews *de novo*. *Hackl v. Hackl*, 231 Wis. 2d 43, 46, 604 N.W.2d 579 (Ct. App. 1999). In interpreting a statute, if the statute is clear on its face, the inquiry ends. *Peter B. v. State of Wisconsin*, 184 Wis. 2d 57, 71, 516 N.W.2d 746 (Ct. App. 1994). The aim of statutory interpretation is to discern the intent of the legislature. The court must ascertain the legislature's intent from the language of the statute in relation to its context, scope, history, and objective intended to be accomplished. *Dixon v. Dixon*, 107 Wis. 2d 492, 498-99, 319 N.W.2d 846 (1982).

¶7 The statute in question is relatively new. After reading WIS. STAT. § 48.38(4)(d), this court concludes that it is clear on its face. It contains plain and unambiguous language that requires one of three conditions to occur before a child can be placed more than sixty miles away from his or her home. The statute requires documentation that: (1) no placement is available within 60 miles; or (2) any available placement within sixty miles is inappropriate; or (3) it is in a child's best interests to be placed in a home more than 60 miles away. Contrary to the interpretation given to the statute by Ahamihl P., the statute does not obligate the trial court to find a suitable placement within sixty miles of the child's home before looking to see if the placement outside the sixty-mile radius is in the child's best interests. Consequently, the trial court properly considered whether Ahayana's best interests were met in moving her over sixty miles away, without first looking to see if another suitable placement was available for her locally.

B. Ahayana P.'s best interests were served by her continued placement with her foster family.

¶8 Both September D. and Ahamihl P. submit that the trial court erroneously exercised its discretion when it determined that Ahayana's best interests lie with her continued placement with her foster family in Tennessee.

They cite *Richard D. and Sally D. v. Rebecca G.*, 228 Wis. 2d 658, 664, 599 N.W.2d 90 (Ct. App. 1999), for their contention that the best interests of a child “will be served by living in a parent’s home.” Further, they note that here the permanency plan had reunification of Ahayana with her mother as the ultimate goal, and permitting her to leave the state both undermined that goal and set up an inherent conflict in the trial court’s orders.

¶9 September D. posits that she had met many of the conditions for the return of Ahayana to her, and her return was likely to occur. The dispositional order required September D. to obtain anger management, cooperate with her parent aide, have an adequate residence, and have adequate employment. At the hearing, September D. pointed to her certified nursing assistance certificate, graduation from parenting classes, and drug and alcohol counseling as evidence that she was making progress toward regaining Ahayana. Moreover, she stated that permitting Ahayana to leave the state would make extended visits with her impossible.

¶10 Both parents also claim that the trial court placed undue emphasis on the fact Ahayana had been with her foster family for eleven months, while discounting the fact that Ahayana had spent a longer period of her life with her mother. They also believe the trial court erroneously exercised its discretion when it stated Ahayana’s best interests were to remain with the foster family because Ahayana would be with her biological brother. They argue that since the foster family had adopted Ahayana’s brother, their legal relationship as siblings had been severed. Further, they note that Ahayana had a sibling living with her mother, and had Ahayana remained in the Milwaukee area, she could have visited her.

¶11 Revision or extension of a CHIPS dispositional order, based on the best interests of a child, is a matter left to the circuit court's discretion. *Sallie T. v. DHHS*, 219 Wis. 2d 296, 305, 581 N.W.2d 182 (1998). This court will not reverse a circuit court's discretionary decision unless the circuit court erroneously exercises that discretion. *Id.* To find an erroneous exercise of discretion, this court must find either that the circuit court has not exercised discretion or that it has exercised discretion on the basis of an error of law or irrelevant or impermissible factors. *Barstad v. Frazier*, 118 Wis. 2d 549, 554, 348 N.W.2d 479 (1984). The circuit 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. *Mrs. R. v. Mr. and Mrs. B.*, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981). This court is satisfied the trial court properly exercised its discretion.

¶12 WISCONSIN STAT. § 48.426(3) specifies the factors a court must consider in determining the best interests of a child in all juvenile proceedings. Relevant to this litigation are the following factors:

(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 parents 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.

Whenever appropriate, courts and agencies should preserve the unity of the family. However, the legislature recognized that reunification of the child and parent may be contrary to the child's current welfare. While examining the options for temporary placement, the paramount goal is the child's best interests. Thus, in certain situations, it may be more important for the present and future welfare of the child to have the placement remain unchanged, even if it makes it less convenient for attempts at reunification.

¶13 The trial court employed a rational process in reaching its conclusion:

We have a situation here where Ahayana has been placed in this home since May of 2000. It is coming upon a year. She is placed there with a sibling. This is her third out of home placement and she is four years old. I think it is probably fair and I gather here that each of these out of home placements has been with a different family. This is actually her fourth family that she has been with in four years. She has been with them for one year. She has been there with a sibling. I would dare say that her current situation is the most stable situation that she has known in her short life. You want to disturb that? I don't want to disturb that.

The trial court noted that Ahayana had been in four different foster homes in her very short life. Because of this shuffling of residences, the trial court believed that stability for Ahayana was a significant factor in its best interests determination. The trial court also noted that Ahayana had made great strides since residing with her foster family. Testimony from the foster mother indicated that when Ahayana came to the foster home she did not have proper clothing, lacked the ability to sit and eat at a table, was fearful to soil a diaper, and reluctant to sleep in a bed or to permit adults to help her. Over the past months, Ahayana had learned table manners, and could now ask an adult to help her. She also was using the bathroom and was sleeping in her bed.

¶14 The trial court observed that, under the then-current order, September D. failed to call her daughter even once and she had not exercised all her visitation rights with Ahayana, despite the fact that the county was providing her with transportation. Indeed, the trial court's visitation order for September D. with Ahayana in Tennessee tracked the same frequency that September D. had been visiting Ahayana here in Wisconsin. The trial court also permitted September D. to make weekly collect phone calls to Ahayana while she remained in Tennessee.

¶15 With respect to Ahayana's brother, the trial court also properly considered their relationship. Although the legal relationship has been severed by his adoption, nevertheless, the children are biological siblings and, testimony revealed, the two children have a strong attachment to each other.

¶16 This court further notes that the trial court did not change the permanency plan of reunification. It merely allowed Ahayana to remain with her foster family until such time as her mother meets all the conditions of her return. Evidence revealed that September D. still needed to attend anger management and parenting classes. She also did not have an adequate residence for Ahayana at the time of the hearing. Given these impediments, the trial court concluded that it was unlikely that September D. would complete all the conditions in the near future, and, in the interim, Ahayana needed to remain in a safe and secure setting. Ahayana's best interests were served by the trial court's ruling.

C. The trial court did not violate the mandate found in WIS. STAT. 48.355(1).

¶17 Finally, September D. asserts that, under the present circumstances, the trial court violated the mandate found in WIS. STAT. § 48.355(1):

(1) ...The disposition shall employ those means necessary to maintain and protect the well-being of the child [] which are the least restrictive of the rights of the parent and child, [] and which assure the care, treatment or rehabilitation of the child and the family, [] consistent with the protection of the public. When appropriate, and, in cases of child abuse or neglect [], when it is consistent with the best interest of the child [] in terms of physical safety and physical health, the family unit shall be preserved and there shall be a policy of transferring custody of a child from the parent [] outside of her home only when there is no less drastic alternative. If there is no less drastic alternative for a child than transferring custody from the parent, the judge shall consider transferring custody to a relative whenever possible.

September D. claims that the trial court's ruling placing Ahayana in Tennessee violated her right as a parent. She argues that permitting Ahayana to move to Tennessee is contrary to the "least restrictive means" requirement of the statute. This court disagrees.

¶18 Parents continue to have rights even when they have temporarily lost custody or placement. *See Sallie T.*, 219 Wis. 2d at 310. However, WIS. STAT. § 48.355(1) states that children also have rights. As the trial court noted, in this case what was in the best interests of Ahayana's parents was not in Ahayana's best interest. Ahayana's situation required her to continue living in a stable and caring home while her parents corrected the deficiencies in their lifestyles that led to the out-of-home placement. The trial court carefully crafted an order that allowed September D. to continue building her relationship with her daughter while still protecting Ahayana. September D. was afforded monthly visits with Ahayana and weekly collect phone calls to her. Given the circumstances facing the trial court, its ruling balanced the rights of the parents with those of the child and determined that Ahayana's needs trumped the inconvenience wrought on her parents by her relocation out of state. Accordingly, this court affirms the circuit court's order.

By the Court.—Order affirmed.

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

