

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 11, 2003**

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. 02-3411**

**Cir. Ct. No. 02-TP-9**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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

**LANGLADE COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**ASHLEIGH P.,**

**RESPONDENT,**

**JAMES A. S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Langlade County:  
JAMES P. JANSEN, Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.<sup>1</sup> James A.S. appeals an order terminating his parental rights to his son, Tyler P. James argues the trial court erroneously exercised its discretion by basing its conclusion on findings not supported by the record. We agree and reverse the order and remand for a new dispositional hearing.

## FACTS

¶2 Tyler P. has lived with his great-aunt, Julie P.,<sup>2</sup> since his birth. Julie has had permanent guardianship since November 2001. Tyler's mother, Ashleigh P., has not had a substantial relationship with him.

¶3 In June 2002, Langlade County sought to terminate James's parental rights. The ground for termination was that Tyler was conceived as the result of a sexual assault.<sup>3</sup> *See* WIS. STAT. § 48.415(9). James did not contest the ground alleged and entered an admission to the facts alleged in the petition. However, he did contest termination of his parental rights, arguing that the termination would not be in Tyler's best interests.

¶4 At the dispositional hearing, James testified that he was not seeking custody of Tyler. However, he stated he would like to have visitation with Tyler and wanted to provide financial support for the child.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

<sup>2</sup> Julie P. is Tyler's biological mother's aunt.

<sup>3</sup> Ashleigh was fifteen when Tyler was conceived, and James was thirty-eight. James pled guilty to second-degree sexual assault of a child and was sentenced to two years in prison. James has been in prison since Tyler's birth and is scheduled to be released on May 2, 2003. The County has not sought to terminate Ashleigh's parental rights.

¶5 Julie testified at the hearing in support of the termination of James's parental rights. She stated she did not want Tyler's life disrupted, and that she would be willing to adopt Tyler should she be given the opportunity. The Department of Human Services recommended in its report that guardianship remain with Julie. The department was not seeking to place Tyler for adoption.

¶6 In its oral ruling, the court stated it thought there was no reasonable prospect of a relationship between James and Tyler, especially given that Tyler's birth resulted from a sexual assault. The court emphasized two factors. First, the court noted that Tyler was three years old stating, "Children learn all of their emotions and everything they need to learn by the time they are three or so." The court added that it would be inappropriate to force Tyler "to have a relationship here with a person who wasn't there when the child was born." Second, the court stated it believed "there is a much better likelihood that the child would be adopted if we go through with this termination here today."

¶7 The court also indicated it did not want anything to interfere with Tyler's relationship with Julie, and that terminating James's rights would strengthen that relationship and give Tyler more security. The court added that when Tyler is eighteen, he can initiate contact with James if he wants a relationship with him. The court then found that the standards of WIS. STAT. § 48.426 were met and terminated James's parental rights. James appeals.

#### STANDARD OF REVIEW

¶8 The decision whether to terminate parental rights is discretionary. *In re J.L.W.*, 102 Wis. 2d 118, 130-31, 306 N.W.2d 46 (1981). The trial court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a

conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). The trial court's findings of fact will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2)

#### ANALYSIS

¶9 WISCONSIN STAT. § 48.426(3) sets forth the factors a circuit court must examine in determining whether the termination of parental rights is in the best interests of the child:

- (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.

James does not argue that the court failed to consider the statutory factors, but that its findings are based on facts not supported by the record.

¶10 First, James disputes the court's finding that he could not have a relationship with Tyler because Tyler has "learned all [his] emotions and everything [he] need[s] to know by [the age] of three ...." James contends there is no evidence to support the finding.

¶11 Second, James argues that terminating his parental rights does not make Tyler's adoption more likely. He maintains that adoption is not a possibility because the County has not sought to terminate Ashleigh's parental rights.

¶12 The County does not dispute James's argument. It does not even contend that the record supports the two findings James disputes. Instead, the County argues any error is harmless and the remainder of the record supports termination of James's parental rights.

¶13 However, our reading of the trial court's decision is that the court placed great emphasis on the two findings James disputes. Under these circumstances, we are reluctant to substitute our judgment for the trial court, or to divine what the court would have decided if it had not relied on the two erroneous findings. We have expressed a preference for remanding to the circuit court when confronted with erroneous findings, particularly in family law or domestic relations actions. *In re T.R.M.*, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981).

¶14 When considering whether termination of parental rights is in the best interests of a child, "the court should explain the basis for its disposition, on the record, by alluding specifically to the factors in WIS. STAT. § 48.426(3) and any other factors that it relies upon in reaching its decision." *Sheboygan County HHS v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. Here, when the court made its decision, it put a great deal of significance on two factors. We agree with James, and the County implicitly concedes, that these findings are not supported by the record. We therefore reverse the order and remand for a new dispositional hearing for a consideration of all relevant factors supported by the record.

*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.