

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 2004

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. 04-2172
04-2173**

**Cir. Ct. Nos. 03TP000033
03TP000035**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 04-2172

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

FRANK W.,

RESPONDENT-APPELLANT.

No. 04-2173

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

FRANK W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
DENNIS J. BARRY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Frank W. appeals from orders terminating his parental rights to his children, Tiesha W. and Annesha W.² Frank's principal argument is that the juvenile court failed to give due consideration to his lack of culpability in failing to meet the conditions for the return of the children as set out in an underlying CHIPS order. We hold that the juvenile court did not misuse its discretion in terminating Frank's parental rights. We affirm the orders.

BACKGROUND

¶2 The facts and procedural history of this case are not in dispute and are set out in the termination of parental rights petitions. Annesha was born on October 6, 1998, and Tiesha was born on October 1, 1999. Frank is the father of both children, who share a common mother. The children were born out of wedlock.

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

² The orders also terminated the parental rights of the mother of the children.

¶3 On February 13, 2002, the juvenile court entered a dispositional order finding both children in need of protection or services (CHIPS) and transferring legal custody to the Racine County Human Services Department. The CHIPS order was based on incidents of physical abuse against Annesha. This order was accompanied by the requisite warnings to Frank pursuant to WIS. STAT. § 48.356 advising of the potential for termination of parental rights, the applicable grounds for such termination, and the conditions necessary for the return of the children or for allowable visitation with the children. Following this order, the Department physically placed the children in separate foster care homes.

¶4 On August 28, 2002, the juvenile court amended the dispositional order authorizing the Department to change the permanency plan and to seek the termination of Frank's parental rights. On February 5, 2003, the juvenile court extended the dispositional order for one year, finding both children to be in continuing need of protection or services. This order continued the existing placement of the children in their respective foster homes. Both of these orders were again accompanied by the requisite warnings to Frank pursuant to WIS. STAT. § 48.356.

¶5 On April 29, 2003, the Department petitioned for the termination of Frank's parental rights, alleging the following information and history. Frank had "neglected, refused or been unable" to meet the conditions set out in the CHIPS dispositional order and that it was not likely that he would be able to meet those conditions within the next year. Frank had failed to complete a parenting class as arranged by the Department due to his missing sessions and failing to do homework assignments. As a result, Frank was instructed to repeat the program, but he failed to do so. In addition, Frank had failed to attend several supervised scheduled visitations, stating that the children were too much for him. The

visitation arrangements had not progressed from the existing supervised visitation to unsupervised visitation. The mother's treating therapist opined that Frank cannot parent the children "without substantial assistance."

¶6 The petitions further alleged that Frank had not been consistently employed and had been in and out of the Racine county jail since the inception of the CHIPS order. At the time of the petitions, Frank was involved in a criminal proceeding in which the mother was the victim. Frank also had failed to cooperate with the Department by applying for SSI benefits as directed, had refused to participate in recommended counseling, and had not participated in the educational or medical programs of the children.

¶7 Based upon the above history, the Department not only sought the termination of Frank's parental rights, but also obtained a temporary injunction barring contact or visitation by Frank with the children.

¶8 At a hearing on February 24, 2004, Frank advised the juvenile court that he did not intend to contest the grounds for termination of his parental rights as alleged in the petitions, and that he would waive his right to a fact-finding hearing on this first step of the two-step procedure in a termination of parental rights case. See *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. Instead, Frank stated that he would challenge only the second step of the procedure—the ultimate determination of whether the juvenile court should terminate his parental rights. *Id.*, ¶28. Frank reconfirmed this stance in sworn testimony at a later hearing on April 13, 2004. Accordingly, the court determined that Frank had knowingly waived his right to a hearing on the first phase of the proceedings. The court further determined that the petitions stated adequate grounds for termination of Frank's parental rights.

¶9 On May 13, 2004, the juvenile court conducted a bench trial on the second phase of the proceedings—whether the court should terminate Frank’s parental rights. Following the close of the evidence and after hearing the parties’ and the guardian ad litem’s final arguments, the court terminated Frank’s parental rights in a bench decision. Frank appeals. In addition to the parties’ briefs, we have the benefit of the guardian ad litem’s brief on behalf of the children. We will detail the court’s decision as we address the appellate issue.

DISCUSSION

¶10 The decision whether to terminate parental rights is committed to the juvenile court’s discretion. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Pursuant to WIS. STAT. § 48.426(2), the prevailing factor in a termination case is the best interests of the child. *Davis S. v. Laura S.*, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993) (“The legislature and this court have made clear that the best interests of the child is the polestar of all determinations under ch. 48.”). When addressing that prevailing factor, § 48.426(3) directs that the juvenile court shall consider, but is not limited to, the following:

- (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.

¶11 “A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the [juvenile] court.” *Davis S.*, 179 Wis. 2d at 150. Such a determination will not be upset unless the decision represents an erroneous exercise of discretion. *Id.* A juvenile court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and an application of the correct standard of law. *Julie A.B.*, 255 Wis. 2d 170, ¶43. Even in the face of sufficient grounds to terminate parental rights, a juvenile court retains the discretion to determine whether such rights should be terminated. WIS. STAT. § 48.424(4) (“If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall *not* preclude a dismissal of a petition under s. 48.427(2).”) (Emphasis added.)

¶12 We have reviewed the juvenile court's bench decision in detail and we conclude that it represents a classic exercise of sound discretion. The court began its discussion by acknowledging the importance of the parent/child and familial relationships. *See* WIS. STAT. § 48.01(1)(a) (“[t]he paramount goal of this chapter is to protect children[,] ... to preserve the unity of the family, whenever appropriate, by strengthening family life”). Next, the court correctly observed that the paramount consideration was the best interests of the children. *See* WIS. STAT. § 48.426(2). Thereafter, the juvenile court specifically addressed each of the statutory considerations set out in § 48.426(3)(a) through (f). The following is a summary of the court's decision:

- There is a strong likelihood that Annesha would be adopted. Tlesha's adoption prospects were less certain because of her special needs, but the Department believed that this would not be a barrier to adoption, and the Department was making efforts to have her placed.
- Although the physical abuse against Annesha prompted the CHIPS proceedings, she does not have any lingering major health issues. Tlesha has some special needs.
- Both children had been residing outside the family home for more than two years, representing a significant portion of each child's lifetime.
- Frank had not taken full advantage of the opportunities for supervised visitation and did not have a substantial relationship with the children.
- Both children had a strong relationship with their respective foster parents.
- Considering the children's current placement and the likelihood of future placements, the termination of Frank's parental rights would enhance the children's opportunities for finding a more stable and permanent family relationship.
- The philosophy of the federal Adoption and Safe Families Act is that the sooner a permanent relationship is provided for a child, the better.

- While the children’s tender ages did not allow for a meaningful expression of their wishes, the guardian ad litem had recommended termination of Frank’s parental rights.

¶13 Having analyzed and considered each statutory factor, the juvenile court concluded that the termination of Frank’s parental rights would serve the best interests of the children.

¶14 On appeal, Frank argues that he has “limitations” which impeded his ability to comply with the conditions set out in the underlying CHIPS order. As such, he contends that he was not fully culpable for his noncompliance and that the juvenile court failed to adequately consider this fact. We reject this argument for two reasons. First, Frank does not identify what his “limitations” are, how they related to his parenting abilities, or where in the record this topic was addressed. As such, we deem the matter inadequately briefed. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶15 Second, the juvenile court did recognize Frank’s limitations (whatever they were) but further determined that Frank had made choices that were not beyond his capabilities. Frank fails to demonstrate how this factual determination by the juvenile court is clearly erroneous. *See* WIS. STAT. § 805.17(2). Instead, he simply quarrels with the court’s assessment of this evidence. While a juvenile court must give adequate consideration to the relevant factors, the weight to be given to each factor is a matter committed to the juvenile

court's discretion. *See State v. Margaret H.*, 2000 WI 42, ¶¶29-30, 234 Wis. 2d 606, 610 N.W.2d 475.³

¶16 The juvenile court's decision represents a proper exercise of discretion. We affirm the orders terminating Frank's parental rights.

By the Court.—Orders affirmed.

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

³ In support of his argument on this point, Frank cites to the Michigan case of *Michigan Department of Social Services v. McDuel*, 369 N.W.2d 912, 915-16 (Mich. Ct. App. 1985), *superseded by statute as stated in Department of Social Services v. Smith*, 444 N.W.2d 789 (Mich. 1989). In *McDuel*, the court held that, in the absence of culpable neglect, a termination of parental rights was improper in the face of the parent's physical inability. *McDuel*, 369 N.W.2d 915-16. Here, however, the juvenile court determined that Frank's limitations did not impede his ability to make choices that led to the termination of his parental rights.

