

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2005

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. 04-3173
04-3174**

**Cir. Ct. Nos. 02TP000553
02TP000554**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

No. 04-3173

CIR. CT. NO. 02TP000553

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NICOLE O.,

RESPONDENT-APPELLANT.

No. 04-3174

CIR. CT. NO. 02TP000554

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NICOLE O.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
CARL ASHLEY, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Nicole O. appeals the orders terminating her parental rights to her children, Anthony M. and Demetrius I. She argues that the trial court erroneously exercised its discretion in determining that it was in the best interest of the children to have her parental rights terminated because “there was a serious question as to whether the children would be adopted.” While ordinarily the likelihood of adoption is a significant factor in determining whether to terminate the rights of a parent, here there were extenuating circumstances supporting the termination, even though the anticipated adoption by the foster mother was delayed by her husband’s failure to be approved as an adoptive resource. Consequently, the trial court properly exercised its discretion in electing to terminate Nicole’s rights to her children. Thus, this court affirms.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

These cases were consolidated for appeal.

I. BACKGROUND.

¶2 Nicole O. gave birth to Anthony M. on October 1, 1994, and gave birth to Demetrius I. on October 25, 1995. Both children were born with cocaine in their systems. Nicole O. has never been married.² Anthony M. was left with Nicole O.'s mother when he was five months old. Demetrius I. has never lived with Nicole O., as he was placed in foster care shortly after his birth. Both children were found to be children in need of protection or services per WIS. STAT. § 48.345 (CHIPS) in 1995. The CHIPS orders have been renewed annually.

¶3 On July 24, 2002, a petition was filed seeking to terminate Nicole O.'s parental rights pursuant to WIS. STAT. § 48.42.³ The petition alleged several grounds for the termination. The State claimed that: (1) Nicole O. had failed to assume parental responsibility for the children pursuant to WIS. STAT. § 48.415(6); (2) the children remained in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2); and (3) the children had been abandoned pursuant to WIS. STAT. § 48.415(1)(a)(2). Eventually, Nicole O. stipulated that sufficient facts existed for a finding of unfitness on the grounds that the children continued to be in need of protection or services; that she had failed to meet the conditions for the children's return; and that it was unlikely that she could meet the conditions for their return in the next twelve months. The trial court accepted the stipulation and found Nicole O. unfit.⁴ Nicole O. did, however, contest the State's request to

² The father/fathers of the two children have never been adjudicated.

³ Nicole O. also has a younger daughter and three older children. The younger daughter was also named in this petition seeking to terminate Nicole's parental rights, but she is not a party to this appeal. None of the older children were named in the termination petition.

⁴ The putative fathers' parental rights to the children were terminated along with Nicole O.

terminate her parental rights. As a result, pursuant to WIS. STAT. § 48.427, a dispositional hearing was held over the course of several days, with the trial court ultimately determining that it was in the children's best interests to have Nicole O.'s parental rights terminated.

II. ANALYSIS.

¶4 When a parent stipulates that grounds exist for the termination of his or her parental rights, the court must then determine a final disposition for the child. *See* WIS. STAT. § 48.427. Options available to the court include termination of the parental rights, *see* § 48.427(3), or dismissal of the petition “if it finds that the evidence does not warrant the termination of parental rights[.]” § 48.427(2).

¶5 WISCONSIN STAT. § 48.426 lists the factors that the trial court should consider in deciding whether termination of the parent's rights is in a child's best interests. It provides:

(1) COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.

(2) STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

(3) FACTORS. In considering the best interests of the child under this section the court shall consider but not be 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.

¶6 Whether circumstances warrant termination of parental rights is within the trial court's discretion, *see Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996), as “[a] determination of the best interests of the child [or children] in a termination proceeding depends on first-hand observation and experience with the persons involved[.]” *Brandon S.S.*, 179 Wis. 2d at 150. We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. *See id.*, 179 Wis. 2d at 150.

¶7 Nicole O. argues that the trial court erroneously exercised its discretion. She contends that because it is unlikely that the foster mother will be able to adopt the children, the trial court did not properly exercise its discretion in terminating her parental rights. She submits that because no adoption will take place, the children's lives will not be better after the termination because they will continue to remain in foster care, but will be cut off from any future financial support from Nicole O. Finally, she argues that the trial court, contrary to the statutory mandate, failed to consider the alternatives to termination. This court disagrees.

¶8 During the dispositional hearing, various witnesses were called by the State and by Nicole O. Testimony was presented indicating that when the petition seeking the termination of Nicole O.'s rights was filed, the CHIPS petitions had been renewed for over seven years. The trial court was advised that Nicole O. had left Anthony M. with her mother when he was only months old and had never cared for Demetrius I., and that the children lived with their grandmother and then their aunt for brief periods, but these arrangements proved to be unsatisfactory. At the time of the hearing, neither Nicole O. nor any of her relatives had seen the children in over two years. Further, both children had been in the care of their current foster mother, Mrs. M., for some time. Anthony M. had lived with her for two and one-half years, and Demetrius I. for one and one-half years.

¶9 According to the reports filed with the court, the children have special needs. Both have serious mental health problems. Anthony M. has a diagnosis of Mood Disorder NOS with psychotic features, ADHD, and Borderline Intellectual Functioning. Demetrius I. has a diagnosis of ADHD, Mood Disorder NOS, Reactive Attachment Disorder, Mild mental retardation and Psychotic disorder. Each child had received extensive outpatient and inpatient care on numerous occasions because of their conditions. The court was also made aware of the children's needs for structure and continuity of care, as it was feared that a change of placement for these children would be especially disruptive. Further, the trial court was advised that the foster mother was involved in the time-consuming therapies for the children and ensured that they received the numerous medications they require. Indeed, it was believed that Mrs. M. treated the children like they were her own and that the boys, in turn, called her "mother."

¶10 With respect to the issue of adoption, the court was told that originally it was thought that Mrs. M. would adopt the children, but it was later discovered that her husband's mental health history prevented him from being an adoptive resource.

¶11 Following the extensive testimony, the trial court made the following findings:

What I'm looking at is what's in their best interest. And even now after you have been given an opportunity to work at META House to work in programs, you have been in so many programs, it is hard for anyone to recognize or recount them all—but there is one consistent thing and that is unfortunate for you and your kids—you have not been able to accomplish the conditions, and you're in and out of custody, unavailable to be around.

And as far as your relatives are concerned, the testimony here would indicate that's not a good bet either, namely, because of the significant issues of your boys. Demetrius and Anthony—they have significant mental health issues, significant. And the fact that [Mrs. M.] is willing to continue to work with them with these concerns is a testament that even though she is not biologically the mother she certainly has been doing everything she can to help them.

So as to the likelihood of the child's adoption after termination, I have a real question. I don't know if that will ever happen. It is an important consideration as your attorney has pointed out, but I can't see any other resources that these boys are familiar with that can step in and replace what she is doing for them. I don't see it.

You've mentioned some of your relatives that stepped up. My recollection is that there are issues there. She has her own issues.

The age and health of the children. Both of the time of disposition and the time that they were removed. And the record is pretty clear on that. They have significant issues they have to deal with. And the record is clear that [Mrs. M.] has worked with the health professionals at every step. And really that's the only people they know is her and the only people your kids know as mother.

Whether the child has a substantial relationship with the parent or other family members and whether it would be harmful to have the children sever these relationships. I think anytime the children are severed from their biological relations it's a problem. But when I balance what they are getting now based on the perceived disruption in their tenuous existence, it certainly does not outweigh severing the relationship with the family members.

The wishes of the child. I don't think that's been articulated. There is reference or inference perhaps they called [Mrs. M.] mother. That's what they want. I'm not exactly sure if they would draw that core relation, but it is a reasonable one.

The duration of the separation from the parent from the child. That is longstanding. I think it is '97 or '95. But even so that is a tremendous period of time in these young kids['] li[ves], and I don't believe that there was ever a point where you really had Anthony staying with you.

And finally, whether the child will be able to enter into a more stable and more permanent family relationship as a result of the termination. The odd thing is even though I can't see here that in fact [Mrs. M.] will adopt, whatever she is giving the kids is more permanent and more stable than what they have received from any other source.

Thus, the trial court concluded that it was in the children's best interest to have Nicole O.'s parental rights terminated.

¶12 This court is satisfied that the trial court properly exercised its discretion. The trial court considered all the factors listed in WIS. STAT. § 48.426 in deciding that terminating Nicole O.'s parental rights was in the children's best interest. First, the children, now aged nine and ten, had been removed from their mother's care when they were babies and they had no relationship with their mother or her extended family.

¶13 Second, the children had serious psychological problems that placed them in the special needs category. A social worker testified that the children needed a home environment that was stable and that their treatment regimens

demanded that there be no changes in their routine. Further, testimony revealed that the foster mother treated the boys like her own and that she was deeply involved in their care. Indeed, the children considered their foster mother to be their mother. The trial court felt this care could not be replicated by any other resources.

¶14 As to Nicole O.'s argument that the trial court was eliminating any possible future financial support from her, it appears that the likelihood of Nicole O. ever contributing to the financial needs of the children is slight. Nicole O. herself has been diagnosed as suffering from schizophrenia, and she has a severe drug addiction that has prevented her from working for over nine years and has led to her imprisonment. She also is the single mother of three other children.

¶15 With respect to the factor of the possibility of adoption, the trial court noted that it was unknown whether Mrs. M. would be able to adopt the children, but the court observed that the children were receiving excellent care from her and there were no other resources available that could take better care of the children. By implication, the trial court considered other alternatives to the termination.

¶16 In sum, the trial court considered all of the WIS. STAT. § 48.426(2) factors and they all supported the termination of Nicole O.'s parental rights. The guardian ad litem for the children also urged the trial court to terminate Nicole O.'s parental rights. The trial court's determination was one that a reasonable judge would make. Thus, the trial court properly exercised its discretion. Accordingly, the trial court's decision is affirmed.

By the Court.—Orders affirmed.

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

