

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 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 No. 2008AP2565
2008AP2566**

**Cir. Ct. Nos. 2006TP295
2006TP296**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

2006TP295

IN THE INTEREST OF AALIYAH S. A., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LACOLE C.,

RESPONDENT-APPELLANT.

2006TP296

IN THE INTEREST OF MELVIN W. A., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LACOLE C.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County:
WILLIAM S. POCAN, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Lacole C. appeals from orders terminating her parental rights to Aaliyah S.A. and Melvin W.A. The only issue on appeal is whether the trial court erroneously exercised its discretion when it terminated Lacole's parental rights.² We affirm.

BACKGROUND

¶2 Lacole is the mother of Aaliyah, born in October 1997, and Melvin, born in January 2001. Until December 2003, the children lived with Lacole and their maternal grandparents. The grandparents frequently took care of the children, especially when Lacole was using drugs. Lacole first began using crack cocaine when she was twenty-two years old and Melvin was about three months old.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The parental rights of Melvin A., the children's father, were also terminated, based on consent. He did not appeal and his rights are not at issue in this appeal.

¶3 In December 2003, Lacole gave birth to a third child, who was born cocaine positive.³ A referral was made to the Bureau of Milwaukee Child Welfare (BMCW). Aaliyah and Melvin were removed from the home in December 2003 and have lived in foster care continuously since that time, with Melvin staying with a single family and Aaliyah living with a series of three families. They were found to be children in need of protection or services on June 8, 2004, and the CHIPS orders were extended in 2005 and 2006. On August 18, 2006, the State filed a petition seeking to terminate Lacole's parental rights, alleging two grounds for termination: abandonment and continuing CHIPS. A third ground, failure to assume parental responsibility, was later added.

¶4 On November 5, 2007, Lacole stipulated to the grounds of failure to assume parental responsibility. The trial court made a finding that Lacole had failed to assume parental responsibility, and the matter proceeded to a dispositional hearing.

¶5 At the hearing, the State introduced evidence indicating that the children were doing well in their respective foster care placements, and that the foster parents had indicated a willingness to adopt the children. The State also introduced evidence concerning Lacole's drug addiction and two periods of incarceration that occurred while the children were in foster care. Ultimately, the trial court found termination to be in the children's best interests and terminated Lacole's parental rights. This appeal follows.

³ The parental rights to that child are not at issue on appeal and will not be addressed.

DISCUSSION

¶6 At issue is the trial court's determination, at the dispositional phase of the cases, that termination was in the children's best interests. An appellate court will sustain the trial court's ultimate determination if there is a proper exercise of discretion. *State v. Margaret H.*, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475. "A proper exercise of discretion requires the [trial] court to apply the correct standard of law to the facts at hand." *Id.*

¶7 In this case, Lacle challenges the trial court's consideration of the six factors that the court was required to consider pursuant to WIS. STAT. § 48.426(3), which provides:

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.

I. The trial court's decision

¶8 The trial court found that each of these factors either weighed in favor of terminating Lacole's parental rights, or at least did not weigh against termination. First, the trial court considered the likelihood that each child would be adopted. The State presented testimony that the children were doing well in their respective foster homes, that the foster parents had expressed interest in adopting the children, and that the foster parents had been approved as potential adoptive parents. The court found there was "no reason to believe that if there was a termination that anything but adoption would occur," and therefore, this factor supported termination, or at least did "not run contrary to it."

¶9 Second, the trial court considered the age and health of the children. The court discussed testimony from Aaliyah's therapist that in the past Aaliyah had suffered behavioral and mental problems that required out-patient and in-patient medical care. However, as of the time of the dispositional hearing, Aaliyah's health had improved dramatically, such that the therapist was discharging her from care because of her progress. The court noted that there was evidence Melvin's health had improved since he got treatment and medication for ADHD. The court found that in both cases, the age and health of the children supported termination or did "not run contrary to it."

¶10 Third, the trial court considered whether the children have a substantial relationship with their parent or other family members, and whether severing the relationships would be harmful. The court reviewed testimony from BMCW case worker Patricia Taylor, who testified that although Melvin and Aaliyah were originally placed together with a paternal relative, Aaliyah was ultimately moved to a non-relative foster placement with a couple who have no

other children and who know the couple with whom Melvin is placed. Aaliyah benefitted from one-on-one attention, and she and Melvin have had opportunities to visit one another. Taylor said the children have also had visits with their maternal grandmother and paternal relatives. Taylor said she had no doubt that if the children want to see each other and their other family members in the future, they will be able to.

¶11 The trial court also noted that Aaliyah's foster mother testified that she and her husband had known Melvin's foster parents, who live one mile away, for twelve and thirty years, respectively. She said she encourages Aaliyah to have contact with Melvin, her biological father, her maternal grandmother and even her mother. Both she and Aaliyah's foster father testified they would allow contact with family members, including Aaliyah's mother, if it was safe and healthy for Aaliyah.

¶12 Based on all the testimony, the trial court questioned whether the children's relationships with their mother and maternal grandmother could be considered substantial, but found that even if they were, "it would not be harmful to sever the legal relationship because I'm confident based on the testimony I've heard here ... that contact will continue as long as mom and grandmother, A, want that and, B, that it's safe and good for the child."

¶13 The trial court further found that the most substantial relationship the children have is between the two of them. It stated:

I'm always concerned about separating children, but in this particular case, based on the testimony we've heard, it sounds like some wise decisions have been made based on the children's needs. And that ... while it was tried to keep the children together ... it's healthier for Aaliyah to be [in her current placement] where she still can have contact with [Melvin's foster family].

So I think while I'm not a big fan of separating siblings ... I think this is probably a wise decision.... I don't find as a practical matter that it's going to be harmful to sever the legal relationship between these children. So at the end of the day on this factor, I do find that it does support termination.

¶14 The fourth factor the trial court considered was the wishes of the children. Taylor told the trial court that Melvin actually sees himself as part of his foster family, with whom he had lived for over four years. The court found that Aaliyah wanted to be adopted by her foster family, although she felt pressure from her family members not to support adoption. The court summarized testimony from Aaliyah's therapist that Aaliyah wants to live with her current foster parents and "has never wavered from that," but has expressed concern "about her family's reaction to her choice." The court found that with respect to both children, the factor supported termination.

¶15 The fifth factor the trial court considered was the duration of the separation between Lacle and the children. The court noted that a substantial time had passed—over four years—and that this factor "certainly support[ed] termination."

¶16 Finally, the trial court considered the sixth factor: whether each 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 [each] child's current placement, the likelihood of future placements and the results of prior placements." *See* WIS. STAT. § 48.426(3)(f). The court discussed the success each child had ultimately found in foster care, as well as problems continuing their relationships with their mother while she was in prison, briefly released and then returned to prison after testing positive for cocaine within a few months of her release from prison. The court found that it did not believe Lacle could "provide

that stable and permanent family relationship” the children needed. It stated: “I’m hopeful because I’m always hopeful that mom indeed will get her act together ... and get to the point where she can stay clean ... but ... I’m just not convinced that that’s going to happen.... [This] last factor strongly supports termination.”

II. Lacole’s challenges to the decision.

¶17 On appeal, Lacole appears to contest four aspects of the trial court’s decision.⁴ We consider each in turn.

¶18 First, Lacole agrees with the trial court’s conclusion that there is a substantial relationship between Aaliyah and Melvin, but disagrees with the court’s finding that the children will be allowed to continue their relationship, which was a reason it cited for finding that severing the children’s legal relationship would not be harmful. She asserts: “Whether Melvin and Aaliyah will continue to have a substantial relationship depends solely on the goodness and will of their adoptive families and their willingness and ability to foster that relationship.” She contends that it is unreasonable to expect that Melvin’s family, which had Aaliyah removed from their foster home when they could not adequately address her special needs, will in the future facilitate visits with Melvin. She also notes that Melvin did not always want to visit with his sister, and that his foster parents have allowed him to choose whether to do the visits.

¶19 We reject Lacole’s argument. First, it was entirely appropriate for the trial court to consider testimony from numerous sources indicating that the

⁴ Lacole did not number her challenges, but having carefully reviewed her brief we agree with the guardian-ad-litem’s assertion that there are four distinct challenges.

children would be allowed to see each other in the future. *See Margaret H.*, 234 Wis. 2d 606, ¶29 (“In its discretion, the court may afford due weight to an adoptive parent’s stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor.”). Second, the court’s finding that the children will be allowed to see each other in the future is supported by the record. The BMCW case worker and Aaliyah’s foster mother both testified that the visits between the children would be allowed to continue, and Lacole cites no testimony in opposition. Lacole’s suggestion that Melvin’s foster parents would not allow the visits in the future because they had trouble parenting Aaliyah in the past is pure speculation.

¶20 Lacole’s second challenge to the trial court’s decision is that it erroneously found that “there was ‘inappropriate’ pressure placed on Aaliyah by her family to remain with her family.” Lacole asserts that “the court relied on erroneous facts when it held that Aaliyah ha[d] been the victim of ‘inappropriate’ pressure by her family.” Lacole does not explain how this finding, even if erroneous, was relevant to the court’s finding that Aaliyah wanted to live with her foster parents. For instance, if Aaliyah had expressed an interest in returning to her mother and the court had found this expression of interest was tainted by inappropriate pressure from her family, the court’s finding concerning family pressure might have influenced its finding concerning Aaliyah’s true wishes. But here, the court implicitly found that *despite* inappropriate pressure from the family, Aaliyah was still willing to say she wanted to live with her foster parents. Thus, we fail to see how the finding, even if erroneous, affected the exercise of discretion.

¶21 In any event, we have carefully examined the record and we conclude that the trial court’s finding—that “a lot of pressure’s been put on

[Aaliyah] and continues to be put on her I think inappropriately”—is supported by the record. Taylor testified that Aaliyah’s foster mother “reported that Aaliyah states that she feels pressure from the family members sometimes about being placed [in the foster home] ... and that she wants to remain in the home. She feels pressure from the family.” The court was entitled to accept and rely on that testimony. See *Ehlinger v. Hauser*, 2008 WI App 123, ¶23, ___ Wis. 2d ___, ___ N.W.2d ___ (“The weight and credibility to be given to testimony is within the province of the [trial] court.”).

¶22 Next, Lacole asserts that the trial court disregarded her “substantial efforts to improve her life and remain drug free.” The record belies this assertion. The court considered at length Lacole’s progress since the children were removed from her home in December 2003. It discussed her incarceration, her release and subsequent reincarceration due to cocaine use, and testimony suggesting that after four years, Lacole was no closer to regaining custody of her children than she was when they were removed. It noted that in the three weeks since Lacole had been released, she had attended one computer class to develop job skills and was “looking into AODA and parenting classes,” but had not attended any AODA treatment. It expressed hope that Lacole would stay clean, but found that it was unlikely given the many times she was offered AODA treatment and failed to stay off drugs. In short, the court gave careful consideration to Lacole’s efforts. It simply found, contrary to Lacole’s assertion, that she had not made substantial progress. We discern no erroneous exercise of discretion.

¶23 Lacole’s final assertion is a single sentence that states: “It is clear from the dispositional hearing that the court severed Lacole’s parental rights based on her prior history of drug addiction.” We disagree. At the dispositional phase in a termination of parental rights case, the prevailing factor considered by the trial

court is the best interests of the child. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶28, 255 Wis. 2d 170, 648 N.W.2d 402; WIS. STAT. § 48.426(2). Consistent with this legal standard, the trial court's focus was on the children's best interests. The court discussed Lacole's drug use only when it considered the sixth factor, and that discussion was entirely appropriate. The court's decision demonstrates a consideration of appropriate factors, and a reasoned decision based on those factors. In short, the court properly exercised its discretion and found termination was warranted. It did not simply sever Lacole's parental rights based on her drug use.

¶24 For the foregoing reasons, having reviewed the trial court's decision and the record, we conclude the court properly exercised its discretion when it terminated Lacole's parental rights to Aaliyah and Melvin. Therefore, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

