STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2021AP000739, 2021AP000740, 2021AP000741
and 2021AP000742

In re the termination of parental rights to:
C.T., M.T., T.T., and A.T., persons under the age of 18:

State of Wisconsin,
Petitioner-Respondent-Respondent,

vs.

T.T.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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II. Did the trial court erroneously exercise its discretion when it found that termination of T.T.'s parental rights was in the best interest of his children?

Court of Appeals and Trial Court Treatment: In ordering termination of T.T.'s parental rights to his children, the trial court found that the evidence presented at the disposition hearing was sufficient for its findings. The Court of Appeals affirmed the trial court finding.

CRITERIA FOR REVIEW

The issue decided by the Court of Appeals involved the exercise of the trial court's discretion. The Court of Appeals here held that the trial court properly exercised its discretion. The Supreme Court has granted discretionary appellate review where the only issue presented is the proper exercise of discretion. *See State v. Grant,* 139 Wis. 2d 45, 406 N.W.2d 744

(1987). In that case, the issue was whether Court of Appeals properly applied the harmless-error rule to trial court's erroneous admission of the expert testimony and its interpretation of Wis. Stat. §48.415(2(a)3. Given the frequency of the issues of the proper exercise of discretion in termination of parental rights cases and the frequency of its application by the trial courts, a review by the Supreme Court may be in order at this time.

STATEMENT OF FACTS

T.T. is the father of the child, C.T., M.T., T.P.-T[1]., and A.T. (Record, 1:1)[2] The children were adjudicated to be a Children in Need of Protection or Services (CHIPS) in Milwaukee County Case 17 JC 866-869, on April 6, 2018.

On August 1, 2018, in Milwaukee County Cases 19 TP 151-154, petitions were filed to terminate T.T.'s parental rights to his children. (1:1) The petitions alleged the grounds of 1) Continuing Need of Protection under Wis. Stat. § 48.415(2)(a) and 2) Failure to Assume Parental Responsibility under Wis. Stat. § 48.415(6). *Id.*

At a hearing held on January 3, 2020, T.T. indicated his desire to contest the petition. (86:1) The judge ordered T.T. to appear personally at each hearing in the case and to cooperate with his attorney and the discovery process or risk the court striking his ability to contest the grounds alleged in the petition. (86:1)

At a hearing on October 7, 2020, T.T. waived his right to a jury and asked to proceed with a fact-finding hearing to the

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[1] The child T.T. will be called T.P.-T., utilizing the last name of the biological mother C.P., to differentiate the child from the father T.T.

[2] References to the record are to the record in Appeal Case No. 21AP739, unless otherwise noted.

court. (93:1) The court accepted the jury waiver, and the fact-finding hearing was scheduled to commenced on October 26. 2020. (93:17)

On October 26, 2020, the first witness called was the father, T.T. (94:5) T.T. testified that:

T.T. began a sexual relationship with C.P. in 2010. (94:8) C.P. gave birth to C.T., but T.T. was not aware that he was the father. (94:7) During 2012 and 2013, T.T. babysat for the children of C.P. (94:8) M.T. was born in 2013, but T.T. was not aware that he was the father. (94:9) C.P. became pregnant with T.P.-T. at the beginning of 2015. (94:10) In the fall of 2015, T.T. and C.P. began residing together with the children. (94:10) They continued to reside together until the children's removal in September 2017. (94:10) A.T. was born in August 2017. (94:10) T.T. believed that A.T. was his child since he was residing with the mother. (94:10) T.T. was not aware that C.T., M.T. and T.P.-T. were his children until DNA testing was done in October 2017. (94:11) T.T. worked and paid child support. (94:12) After the removal of the children, T.T. took involved himself in AODA treatment with Glenda Matthews at Renew Counseling. (94:15) T.T. and C.P. began couples counseling at Renew. (94:17) T.T. was approved to have 12 hours of unsupervised visits with the children in June 2019.

(94:21) T.T. continued to send cards and letters to the children. (94:24)

On October 27, 2020, T.T. continued his testimony. (95:167) He testified that:

He was in C.T.'s life from her birth. (95:167) He saw her every day. (95:167) The same was true for M.T. (95:167) T.T. provided care for C.T. and M.T. prior to living with them. (95:168) The care involved changing diapers, game playing, teaching and other activities. (95:168) Because C.P. was attending school, T.T. began attending to the children to assist her and ultimately moved in with C.P. (95:168) T.T. was acting as a stay-at-home parent despite the lack of DNA testing. (95:169) T.T. completed an AODA evaluation prior to his incarceration. (95:171) T.T. was involved with counselling at Renew. (95:171) He completed a parenting classes and worked with a parent aide. (95:172) T.T. was involved with couples counselling that contained a domestic violence component. (95:172) T.T. participated in visits with the children. (95:173) Prior to T.T. incarceration, he was able to provide a home, food, shelter and love for his children. (95:173) T.T. was interested in his children's education. (95:174) He attended the children's IEP meetings when he was not incarcerated. (95:175) T.T. met the condition of return number 3, because there was not violence in the home of in front of the children.

(95:176) Condition four was being met because he, along with C.P. was able to provide a safe and clean home. (95:177) T.T. maintained communication with the children by writing letters and drawing pictures. (95:178) T.T. introduced evidence in Exhibits 201 through 209, involving letters and drawings to the children. (95:180)

Among the other witnesses testifying were initial assessment worker Katrice Babiasz, Melissa Clausen, Probation and Parole Agent, ongoing worker, Mick Johnson and the biological mother, C.P. (94:2)

At the conclusion of the testimony the court found that the State had proven unfitness on both grounds for termination of parental rights. (96:30-38; Appendix)

The disposition hearing took place on July 18, 2018. (79:1) The court heard testimony and argument about the best interest of the children. T.T. testified that:

T.T. was in custody but could be released as soon as May 2021. (97:56) He is aware of what is necessary to raise a child. (97:57) Prior to his incarceration, he provided for the needs of the children during the visits. (97:57) The children call him "daddy." (97:58) T.T. believed that he was not treated properly because of his incarceration and that he would be treated differently if he were on "the street." (97:59) T.T. is actively engaging in services at the institution where is located. (97:70)

He has maintained contact with the children and maintained a relationship through letters, email, and drawings. (97:70) The children are bonded to one another. (97:58)

After testimony and argument, the court found that it was in the best interest of the children that the parental rights of T.T. be terminated. (97:71-79; Appendix)

It is from the orders terminating T.T.'s parental rights that T.T. appealed to the Court of Appeal. (82:1-3) In an order dated July 23, 2021, the Court of Appeals affirmed the orders of the trial court. (Appendix p. 2)

ARGUMENT

I. The trial court erroneously exercised its discretion when it found T.T. to be an unfit parent.

A. Standard of Review

Wis. Stat. § 805.17(2) provides that in all actions tried upon the facts without a jury, the trial court's findings of fact shall not be set aside unless clearly erroneous. See also *Tourtillott v. Ormson Corp.,* 190. Wis.2d 291, 294-95, 526 N.W.2d 515 (Ct. App. 1994) The appellate courts will review the trial court's findings of fact under a clearly erroneous standard, and it reviews the trial court's conclusions

of law de novo. *See Id.* at 295, 526 N.W.2d 515. Thus, we have a two-part standard of review.

T.T. does not argue on appeal that the trial court applied the wrong law, so the question is whether its findings that the grounds for termination of parental rights and parental unfitness, have support in the record.

During the fact-finding stage of a proceeding to terminate parental rights, the parent's rights are paramount. *State v. Lamont D.*, 2005 WI App 264, ¶19, 288 Wis. 2d 485, 709 N.W.2d 879. Accordingly, the petitioner has the burden of proving grounds to terminate parental rights by clear and convincing evidence. Wis. Stat. § 48.31(1). Each of the grounds alleged here require the resolution of factual disputes at a fact-finding hearing before a determination of parental unfitness can be made. *Steve V. v. Kelley H.*, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856. In reviewing findings made in a trial to the court, appellate court reviews the evidence in the light most favorable to the findings made by the trial court. *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶19.

B. There Was Insufficient Evidence as a Matter of Law to Support the Trial Court's Conclusion that the Children of T.T. were In Continuing Need of Protection or Services.

The trial court found that the State had proven that there were grounds to terminate T.T.'s parental rights to his children

under Wis. Stat. § 48.415(2)(a) – Continuing Need of Protection or Services. (78:68; Appendix) To demonstrate a continuing need of protection or services as a ground for TPR in this case, the following four elements must be proven by clear and convincing evidence:

(1) The children have been adjudged to be a in need of protection or services and placed, or continued in a placement, outside the parent's home for a cumulative total period of six months or longer pursuant to one or more court orders under one of the enumerated statutory sections;

(2) The agency has made a reasonable effort to provide the services ordered by the court;

(3) T.T., has failed to meet the conditions established for the safe return of the child to the home; and

(4) There is a substantial likelihood that T.T. will not meet these conditions within the 9-month period following the termination fact-finding hearing.

See, Wis. Stat. § 48.415(2)(a)2.b and 3; *see also* Wis JI-Children 324.

The first of these elements was determined by the circuit court and was not contested in this case.

The court found that the agency had done all that it reasonably could have to help T.T. and that he had satisfied the conditions of return. (96:36) T.T. takes issues with the second

element, regarding the actions of the agency and with the extent to which he had met the conditions of return.

State v. Raymond C., 187 Wis.2d 10, 15, 522 N.W. 2d 243 (1994) tells us that whether the agency made a diligent effort to provide court-ordered services is a fact-sensitive inquiry that must consider the totality of circumstances as they exist in each case. Here, the agency's efforts to provide T.T. with court-ordered services must be examined considering T.T.'s limitations, including the fact that he was incarcerated late in the CHIPS proceedings and had accomplished most of his goal up to that point. (95:167-180)

The difficulties with the conditions of return here include the father's disparaging treatment by the agency. The agency made it more difficult, not easier, for T.T. to attempt to reunite with his children. Despite his limitations, T.T. accomplished the following:

After the removal of the children, T.T. took and involved himself in AODA treatment with Glenda Matthews at Renew Counseling. (94:15) T.T. and C.P. began couples counseling at Renew. (94:17) T.T. was approved to have 12 hours of unsupervised visits with the children in June 2019. (94:21) T.T. continued to send cards and letters to the children. (94:24)

T.T. completed an AODA evaluation prior to his incarceration. (95:171) T.T. was involved with counselling at Renew. (95:171) He completed a parenting classes and worked with a parent aide. (95:172) T.T. was involved with couples counselling that contained a domestic violence component. (95:172) T.T. participated in visits with the children. (95:173) Prior to T.T. incarceration, he was able to provide a home, food, shelter and love for his children. (95:173) T.T. was interested in his children's education. (95:174) He attended the children's IEP meetings when he was not incarcerated. (95:175) T.T. met the condition of return number 3, because there was not violence in the home of in front of the children. (95:176) Condition four was being met because he, along with C.P. was able to provide a safe and clean home. (95:177) T.T. maintained communication with the children by writing letters and drawing pictures. (95:178) T.T. introduced evidence in Exhibits 201 through 209, involving letters and drawings to the children. (95:180)

T.T.'s incarceration was a disability and the agency needed to take that into consideration when working with him. Whether or not the agency efforts were reasonable, diligent and sufficient under § 48.415(2)(b) must be determined in light of T.T.'s limitations, nevertheless.

"Wis. Stat. § 48.415(2) requires that the court-ordered conditions of return be tailored to the particular needs of the parent and child." *Kenosha County v. Jodie W.*, 2006 WI 93, ¶ 51, 293 Wis. 2d 530, 716 N.W.2d 845. There was neither evidence here that the conditions of return were constructed with the T.T. in mind nor evidence that the agency implemented the orders of the CHIPS court with the father's limitations in mind. The findings of the court as to the TPR ground of continuing chips were clearly erroneous.

C. There Was Insufficient Evidence as a Matter of Law to Support the Trial Court's Conclusion That T.T. Had Failed to Assume Parental Responsibility for His Children?

Failure to assume parental responsibility was a ground here for terminating T.T.'s parental rights, it is established "by proving that the parent … [has] not had a substantial parental relationship with the child." Wis. Stat. § 48.415(6)(a). "'[S]ubstantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Wis. Stat. § 48.415(6)(b). A nonexclusive list of factors that the court may consider in determining whether the parent has a "substantial parental relationship" with the child includes:

[W]hether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy. *Id.*

T.T. had begun a sexual relationship with C.P. in 2010. (94:8) C.P. gave birth to C.T., but T.T. was not aware that he was the father. (94:7) During 2012 and 2013, T.T. babysat for the children of C.P. (94:8) M.T. was born in 2013, but T.T. was not aware that he was the father. (94:9) C.P. became pregnant with T.P.-T. at the beginning of 2015. (94:10) In the fall of 2015, T.T. and C.P. began residing together with the children. (94:10) They continued to reside together until the children's removal in September 2017. (94:10) A.T. was born in August 2017. (94:10) T.T. believed that A.T. was his child since he was residing with the mother. (94:10) T.T. was not aware that C.T., M.T. and T.P.-T. were his children until DNA testing was done in October 2017. (94:11) T.T. worked and paid child support. (94:12)

T.T. was in C.T.'s life from her birth. (95:167) He saw her every day. (95:167) The same was true for M.T. (95:167) T.T. provided care for C.T. and M.T. prior to living with them.

(95:168) The care involved changing diapers, game playing, teaching and other activities. (95:168) Because C.P. was attending school, T.T. began attending to the children to assist her and ultimately moved in with C.P. (95:168) T.T. was acting as a stay-at-home parent despite the lack of DNA testing. (95:169) Prior to his incarceration, T.T. had obtain approval for 12 hours per week of unsupervised visits with his children. (95:49) It is preposterous to believe that T.T. could have this level of contact with children without having had a substantial relationship with them.

There are actions by the father vis-à-vis his children that demonstrate that he has had a substantial relationship with his children. The trial court's findings that T.T. failed to assume parental responsibility, under Wis. Stat. § 48.415(6)(b), are clearly erroneous.

II. The finding that the termination of T.T.'s parental rights was in C.T., M.T., T.P.-T., and A.T.'s best interest was an erroneous exercise of discretion.

A. Standard of review and relevant case law.

There are two phases in an action to terminate parental rights. First, the court determines whether grounds exist to terminate the parent's rights. *Kenosha County. DHS v. Jodie W.*, 2006 WI 93, ¶10 n.10, 293 Wis. 2d 530, 716 N.W.2d 845.

In this phase, "`the parent's rights are paramount.'" *Id.* If the court finds grounds for termination, the parent is determined to be unfit. *Id.* The court then proceeds to the dispositional phase where it determines whether it is in the child's best interest to terminate parental rights. *Id.*

Whether circumstances warrant termination of parental rights is within the circuit court's discretion. *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, the reviewing court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. *See Rock Cnty. DSS v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "A determination of the best interests of the child in a termination proceeding depends on the first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court." *David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 4 (1993) Therefore, "[a] circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion." *Id.* However, a trial court's finding of fact will be set aside if it is against the great weight and clear preponderance of the evidence. *Onalaska Elec. Heating, Inc. v. Schaller,* 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

In making its decision in a termination of parental rights case, the court should explain the basis for its disposition on the record by considering all of the *factors* in Wis. Stat. § 48.426(3) and any other factors it relies upon to reach its decision. *Sheboygan Cty. Dep't of Health & Human Servs. v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

In order to determine whether termination of parental rights is in the best interests of the child, under Wis. Stats. §48.426(3), the Court must consider the following factors:

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; and

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.

B. Terminating T.T.'s parental rights was an erroneous exercise of the court's discretion.

At the dispositional hearing, the court heard testimony. Of note was the testimony of T.T. himself. As required by Wis. Stat. § 48.426, the court weighed each of the required factors. T.T. believes that the court's weighing was erroneous in this case.

Regarding 48.426(3)(a) - The likelihood of the child's adoption after termination, there was testimony was testimony that the children had adoptive resources. This testimony alone would not cause one to favor of termination of T.T.'S parental rights.

Regarding 48.426(3)(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, the following testimony was heard:

Regarding 48.426(3)(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, the following testimony was heard: T.T.

was in custody but could be released as soon as May 2021. (97:56) He is aware of what is necessary to raise a child. (97:57) Prior to his incarceration, he provided for the needs of the children during the visits. (97:57) The children call him "daddy." (97:58) T.T. believed that he was not treated properly because of his incarceration and that he would be treated differently if he were on "the street." (97:59) T.T. is actively engaging in services at the institution where is located. (97:70) He has maintained contact with the children and maintained a relationship through letters, email and drawings. (97:70) There is a substantial relationship between the children and T.T. (97:46) The children are bonded to one another. (97:58) T.T. believes that this evidence is sufficiently persuasive to have weighed against termination of T.T.'s parental rights in this case.

Regarding 48.426(3)(d) – The wishes of the child were not expressed because of their young ages. (97:46) This testimony certainly does not cry out for a need to terminate T.T.'s parental rights.

Regarding 48.426(3)(d) – The duration of the separation of the parent from the child, there was testimony that the children had been in out of home care for about four years. (97:51)

Regarding 48.426(3)(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. The testimony was only that the foster parent would likely attempt to continue contact with the parents. (97:46) This evidence here appears to weigh against the termination of T.T.'s parental rights.

While the decision by the court at the dispositional hearing is one of discretion, after reviewing the facts and the finding made here, the findings are not fully supportive on this record where the court found that it was in the children's best interest that the parental rights of T.T. be terminated.

As to discretionary decisions, the courts have said that, despite the broad range of factors that a court may consider in the exercise of its discretion, the exercise of discretion is not unlimited. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016). The consideration of irrelevant factors or the undue emphasis of one factor above all other factors can create an erroneous exercise of discretion. Here the court appears to overly rely on the incarceration and the age differential between the parents as a factor. T.T. has done many positive things toward his children that should

outweigh the one questionable act that resulted in his reincarceration.

T.T. believes that the termination of his parental rights given the evidence and factors examined by the court constitutes an erroneous exercise of its discretion.

CONCLUSION

The finding that T.T. is an unfit parent was erroneous. This matter should be remand for a new fact-finding determination.

The finding that it is in C.T., M.T., T.P.-T., and A.T.'s best interest to have T.T.'s parental rights terminated was erroneous. The Court should accept this matter for review.

Dated: August 14, 2021

Signed:

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Signature Required by Wis. Stat. sec. 809.107(6)(f):

Respondent-Appellant-Petitioner

CERTIFICATIONS

CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4476 words.

Dated: August 14, 2021

Signed:

Gregory Bates
Attorney at Law, 1018846

CERTIFICATE OF COMPLIANCE

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic or by paper copy.

Dated: August 14, 2021

Signed:

Gregory Bates
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