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SUPREME COURT

**STATE OF WISCONSIN
SUPREME COURT
Case No. 2022AP531**

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner- Respondent-Respondent,

V.

Brown County Case No. 19TP27

K.Y.T.

Respondent-Appellant – Appellant.

RESPONSE TO PETITION FOR REVIEW

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REASONS FOR DENYING REVIEW

I. K.Y.T. WAS APPROPRIATELY FOUND UNFIT UNDER WIS. STATS. § 48.415(1)(a)(2), 48.415(1)(a)(3), and 48.415(6) BASED ON THE JURY VERDICTS AND THE FINDING OF UNFITNESS BY THE CIRCUIT COURT.

a. The evidence was sufficient for the three-month abandonment ground.

When determining if a parent has abandoned their child under Wis. Stat. § 48.415(1)(a)(2), at a fact finding hearing a jury is first asked two questions:

1. Was (child) placed, or continued in a placement, outside the (parent)'s home pursuant to a court order which contained the termination of parental rights notice required by law?

2. Did (parent) fail to visit or communicate with (child) for a period of three months or longer? Wis. JI-Children 313 (2019).

The burden is on the petitioner to prove each of these elements by clear and convincing evidence. Id. If the jury answers "yes" to these two questions the burden then shifts to the respondent to prove by the greater weight of the credible evidence the "good cause" questions, including

Answer question 3 only if the answers to questions 1 and 2 are "yes."

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer question 4 only if the answer to question 3 is "yes":

4. Did (parent) have good cause for having failed to communicate with (child) during that period? Id.

For K.Y.T. the jury answered "yes" to questions one, two and three, but answered "no" to question four. R. at 116:1-2. In order for the Court to invalidate these verdicts there would have to be no credible evidence to support the jury's answers to verdict questions.

In K.Y.T.'s petition for review, he cites to the facts most favorable to him - primarily from his own testimony when questioned by his attorney. This was a three day jury trial with seven witnesses and seventy-three (73) exhibits. To only assert facts from specific testimony and exhibits in a light most favorable to K.Y.T. is not an accurate description of the presentation of the facts.

In briefing for the court of appeals, the Department and M.Z.'s guardian ad litem outlined facts on the record that support jury's findings as to each verdict question for the three-month abandonment ground.

The court of appeals reviewed the record and found that there was a sufficient record to support the jury's finding under the three-month abandonment

ground. The decision specifically highlighted, M.Z.'s placement outside of her parents' home; evidence of 3,405 phone calls made by K.Y.T. with only two being to the foster parents; K.Y.T.'s testimony that he only wrote M.Z. a "couple times;" and that he only had two visits with M.Z. while incarcerated. R. at 267:7. The court of appeals further discussed that the statutory language for abandonment distinguishes between communication with and communication about the child. R. at 267:7. Many of the letters cited in K.Y.T.'s petition for review were not addressed to the child, but sent to other individuals asking about the child.

There was sufficient evidence for the jury to find for the three-month abandonment ground for K.Y.T., and thus the court was mandated under Wis. Stat. § 41.424(4), to find K.Y.T. unfit.

b. The evidence was sufficient for the six-month abandonment ground.

When determining if a parent has abandoned their child under Wis. Stat. § 48.415(1)(a)(3), at a fact finding hearing a jury is first asked three questions:

1. Was (child) left by (parent) with a relative or other person?
Answer question 2 only if the answer to question 1 is "yes."
2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts?

Answer question 3 only if the answer to question 2 is "yes."

3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer? Wis. JI-Children 314 (2019).

The burden is on the petitioner to prove each of these elements by clear and convincing evidence. *Id.* If the jury answers "yes" to these three questions the burden then shifts to the respondent to prove by the greater weight of the credible evidence the "good cause" questions, including

Answer question 4 only if the answer to question 3 is "yes."

4. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer question 5 only if the answer to question 4 is "yes."

5. Did (parent) have good cause for having failed to communicate with (child) during that period? *Id.*

The facts for these verdict questions are similar to the facts for the three-month abandonment ground. See discussion *supra* Sec. I.b.

The court of appeals reviewed the record and for this ground found there was sufficient evidence for the jury's findings. The court's decision highlighted that M.Z. had been out of K.Y.T.'s care since 2017; K.Y.T. was aware where M.Z. was; and had her foster parents' phone number. R. at 267:9. The decision also

discussed that any incidental contact between K.Y.T. and M.Z. does not prevent the jury from finding that a parent has failed to visit or communicate. R. at 267:9.

There was sufficient evidence for the jury to find for the six-month abandonment ground for K.Y.T., and thus the court was mandated under Wis. Stat. § 41.424(4), to find K.Y.T. unfit.

c. The evidence was sufficient for the failure to assume ground.

The jury instructions read for the ground under Wis. Stat. § 48.415(6) in this case was specific to a parent who is incarcerated. R. at 190:39. The verdict question for this ground simply states, "Has (parent) failed to assume parental responsibility for (child)?" Wis. JI-Children 346B (2018).

For this ground to be established, the petitioner must prove by clear and convincing evidence that the parent does not have a substantial relationship with the child. Id. A substantial relationship is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care" of the child and is based on the totality of the circumstances throughout the child's

entire life. Id., See Barron Cty. Dep't of Health & Human Servs. v. Christopher B. (In re Aliyana G.-B.), 2014 WI App 63, 354 Wis. 2d 326, 847 N.W.2d 427.

In this case the jury instruction defined a "substantial parental relationship" if a parent is incarcerated. R. at 190:39-40, Wis. JI-Children 346B(2018). Factors and evidence the jury can consider include reasons for incarceration, nature of underlying criminal behaviors, if the parent knew that engaging in that behavior would prevent him from assuming his parental duties, and what efforts were made by the parent to establish a substantial parental relationship despite being incarcerated. Id.

There was significant evidence provided through multiple days of testimony and over 70 exhibits that would allow a jury to find that K.Y.T. failed to assume parental responsibility. The court of appeals found sufficient evidence in the record to support the jury's finding. The decision stated that K.Y.T. "simply contends that his testimony and evidence should be given more weight than other evidence in this case." R. at 267:11. However, the decision stated that the record contained credible evidence to support the jury's verdict. The decision highlighted that

K.Y.T. had been in and out of incarceration since M.Z. was born and during those times he was unable to provide direct care for the child. R. at 267:11. Further that K.Y.T tried to pause his child support obligations, had minimal visits and phone calls with the child, and wrote her only a couple letters.

There was sufficient evidence for the jury to find that K.Y.T. failed to assume parental responsibility for M.Z., and thus the court was mandated under Wis. Stat. § 41.424(4), to find K.Y.T. unfit.

II. THERE WAS SUFFICIENT EVIDENCE TO DETERMINE THE TERMINATION OF PARENTAL RIGHTS OF K.Y.T. WAS IN THE BEST INTEREST OF M.Z.

The circuit court's decision to terminate a parent's rights should be upheld as long as there is a "proper exercise of discretion." State v. Margaret H. (In re Darryl T.-H.), 2000 WI 42, 234 Wis. 2d 606, 622, 610 N.W.2d 475, 482. "A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand." Id. The correct legal standard for a dispositional hearing in a termination of parental rights case is the "best interests of the child." Wis. Stat. § 48.426(2). Further the statute codifies the factors the court

must consider when determining whether termination is the appropriate decision. Margaret H. at 623.

The factors to be considered when determining if termination is appropriate are:

- (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. Wis. Stat. § 48.426(3).

When analyzing these factors, the court should not isolate one factor as more important or significant as another but use all factors together in determining the best interest of the child. Margaret H. at 623.

In this case the circuit court was correct in the application of the factors to determine the best interest of M.Z. The circuit court went through each of the factors after providing a summary of the

proceedings through the dispositional hearing. R. at 218:5-6. The circuit court specifically stated that each factor under Wis. Stat. § 48.426 was going to be taken "one factor at a time." R. at 218:7. The court of appeals agreed stating that "The court's analysis balanced the competing testimonies, giving the weight to [K.Y.T.]'s testimony that it deemed appropriate." R. at 267:14. The record from the dispositional hearing and the court of appeals decision both discussed the evidence for each factor and the court's decision to terminate K.Y.T.'s rights was not erroneous.

Conclusion

For the reasons stated above, the Department respectfully requests that the Court deny K.Y.T.'s petition for review.

Date this 8 day of November, 2022

Respectfully submitted,

By: 

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules
contained in Wis. Stat. § 809.19(8)(b) and (c) for a
brief produced with a monospaced font - 12 point
Courier New - at 10 characters per inch. The length
of this brief is 11 pages, 1787 words.

Dated this 8th day of November, 2022.



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CERTIFICATION OF THIRD PARTY COMMERCIAL DELIVERY

I certify that on November 8, 2022, this brief was
delivered to a third-party - Alphagraphics, 221 King
Street, Madison, WI 53703 - for printing and delivery
to the State of Wisconsin Supreme Court on November
8, 2022.

Dated this 8th day of November, 2022.



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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an
appendix that complies with § 809.62(3) and that
contains the unpublished decision and opinion of the
court of appeals.

Dated this 8th day of November, 2022.



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