

FILED
11-24-2023
CLERK OF WISCONSIN
SUPREME COURT

State of Wisconsin
Supreme Court
Appeal Case No. 23AP1404

In re the termination of parental rights to K.S., a person under the
age of 18:

Jefferson County Human Services Department,
Petitioner-Respondent,

v.

C.T.S.,
Respondent-Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED

- I. Was the trial court's finding that grounds exist for termination of parental rights clearly erroneous?

Prior Treatment: The trial court found C.T.S. to be an unfit parent under the grounds of Continuing Chips and Failure to Assume Parental Responsibility. The Court of Appeals affirmed that decision.

- II. Was there sufficient evidence to have found that termination of C.T.S.'s parental rights was in the child's best interest?

Prior Treatment: The trial court here answered yes when it entered the orders terminating C.T.S.'s parental rights. The Court of Appeals affirmed that decision.

CRITERIA FOR REVIEW

While the issues here also involve the exercise of court discretion, there is precedent for courts granting discretionary appellate review even where the only issue presented is the discretionary actions of the circuit court of and the Court of Appeal's review of those issues. *See State v. Grant*, 139 Wis. 2d 45, 406 N.W.2d 744 (1987) (single issue was whether court of appeals properly applied harmless-error rule to trial court's erroneous admission of other-acts evidence) and *In the Interest of X.S.*, 2022 WI 49 (a reversal of a discretionary juvenile waiver decision by a trial court.).

Given the nature of the rights involved in this case, it may be worthy of review by this court.

STATEMENT OF CASE

A petition to terminate the parental rights (TPR) of C.T.S., to his child, was filed on May 25, 2022, in the Jefferson County Circuit Court. (Record, 3:1) The petition alleged grounds under Wis. Stat. sec. 48.415(2)(a), Continuing Need of Protection or Services and Wis. Stat. sec. 48.415(6)(a), Failure to Assume Parental Responsibility. *Id.*

At a hearing on July 11, 2022, C.T.S. indicated that he was contesting the termination of his parental rights and the matter was scheduled for a fact-finding hearing on the petition. (113:4)

The fact-finding hearing was held on December 27, 2022, as a trial to the court. (112:1) Witnesses called by the County were Dr. Ronald May, H.H., the placement provider, Dr. Amy Gurka, and case manager Jennifer Witt. (112:8, 112:38, 112: 77, 112:94) C.T.S. testified as well. (112:167)

Of note, C.T.S. testified that he was meeting the conditions of return in that he had attended parenting classes. (112:168) He attended a course that was initially set up by him and he completed the course. (112:168) Upon completion of the course, Jennifer Witt indicated that the course was not authorized and that he needed to complete an additional parenting course. (112:168) C.T.S. attempted to attend doctor visit for his child. (112:168) He was informed that he would not be allowed to attend the visits in-person but would need to sit in the hallway. (112:69) C.T.S.'s child protection case took place during the period of Covid-19, so the courts had gone remote. (112:169) During many hearings and in general, C.T.S. had difficulty with Zoom connections. (112:169) He would often be disconnected and then

reconnected, or often just “kicked out” of hearings. For the protection of his child and others, C.T.S. requested that visit be via Zoom and not in person. (112:170) At the time, C.T.S. was driving semi and had a lot of contact with other people and he did not want to be a transmitter of viruses. (112:170) C.T.S. did get his Covid shots and request of Jennifer Witt to resume in-person visits, but she never effectuated the resumption of in-person visits. (112:170) C.T.S. had many issues with phone numbers during the time of the child protection case. (112:171) The issues involved phone breakage and the need to get new phones and new phone numbers. (112:171) This resulted in C.T.S. not being able to obtain information about court hearing and visitation information. (112:171) During visit with K.S., despite his efforts, arrangements were not made to allow K.S. to be attentive to the visit that were occurring. (112:171-2) The placement, and by extension the Department, allowed distractions to be present and did not adequately position the camera to allow C.T.S. to view K.D. during the entire visit. (112:172)

After testimony, the court found grounds for termination of C.T.S.'s parental rights under both grounds alleged in the petition. (112:199-211) The matter was scheduled for a disposition hearing. (112:213)

At the disposition hearing, the court heard testimony from Jennifer Witt, the ongoing social worker. (112:7) C.T.S. elected not to appear at this hearing but was represented by counsel. (112:6) After argument and testimony, the court found that it was in the best interest of K.S. that the parental rights of C.T.S. be terminated and entered that

order. (112:25, 79:1) It is from the judgment and order that C.T.S. appealed to the Court of Appeal.

In a decision dated November 2, 2023, the Court of Appeals affirmed the circuit court's decision. (Appendix.) C.T.S. now petitions for review of that decision.

ARGUMENT FOR REVIEW

I. The finding that C.T.S. is an unfit parent was clearly erroneous.

A. Standard of Review.

In a challenge to the sufficiency of the evidence, the proper standard of review is a question of whether there is any credible evidence to sustain the verdict. *Sheboygan Cnty. DHHS v. Tanya M.B.*, 2010 WI 55, ¶ 49, 325 Wis.2d 524, 785 N.W.2d 369. *St. Croix County D.H.H.S. v. Matthew D.*, 2016 WI 35, ¶ 29, 368 Wis. 2d 170, 889 N.W.2d 107

B. The County is required to prove each element of both the Continuing CHIPS ground and the Failure to Assume Parental Responsibility ground for parental unfitness.

In *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 21, 246 Wis.2d 1, 629 N.W.2d 768, the court said that “due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions. Although termination proceedings are civil proceedings, *M.W. v. Monroe County Dep't of Human Servs.*, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984), the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that “[i]n order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate.” (Citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982)).

Thus, pursuant to the Fourteenth Amendment and the Wisconsin Children's Code, Wis. Stat. §§ 48.31 and 48.424, prior to

determining that grounds existed to terminate C.T.S.'s parental rights, the circuit court had the duty at the jury trial to find by clear and convincing evidence that all of the elements of § 48.415(2) had been satisfied. If there is no evidentiary support, the court cannot make an unfitness finding.

The evidence was not sufficient as to the Continuing Chips ground.

The elements of Continuing Chips from Wis. Stat. § 48.415(2)(a), read that:

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:

(a)

1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

2.a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court *which takes into consideration the characteristics of the parent* or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case. (Emphasis added.)

b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court. ...

3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., not including time spent outside the home as an unborn child; that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

C.T.S. testified that he was meeting the conditions of return in that he had attended parenting classes. (112:168) He attended a course that was initially set up by him and he completed the course. (112:168) Upon completion of the course, Jennifer Witt indicated that the course was not authorized and that he needed to complete an additional parenting course. (112:168) C.T.S. attempted to attend doctor visit for his child. (112:168) He was informed that he would not be allowed to attend the visits in-person but would need to sit in the hallway. (112:69) C.T.S.'s child protection case took place during the period of Covid-19, so the courts had gone remote. (112:169) During many hearings and in general, C.T.S. had difficulty with Zoom connections. (112:169) He would often be disconnected and then reconnected, or often just

“kicked out” of hearings. For the protection of his child and others, C.T.S. requested that visit be via Zoom and not in person. (112:170) At the time, C.T.S. was driving semis and had a lot of contact with other people and he did not want to be a transmitter of viruses. (112:170) C.T.S. did get his Covid shots and request of Jennifer Witt to resume in-person visits, but she never effectuated the resumption of in-person visits. (112:170) C.T.S. had many issues with phone numbers during the time of the child protection case. (112:171) The issues involved phone breakage and the need to get new phones and new phone numbers. (112:171) This resulted in C.T.S. not being able to obtain information about court hearing and visitation information. (112:171) During visits with K.S., despite his efforts, arrangements were not made to allow K.S. to be attentive to the visits that were occurring. (112:171-2) The placement, and by extension the Department, allowed distractions to be present and did not adequately position the camera to allow C.T.S. to view K.S. during the entire visit. (112:172)

The testimony would suggest that C.T.S. was working diligently on his conditions of return. Also, the efforts by the agency were far from diligent and reasonable, under the circumstances, in light of the Covid limitations, the need for video visits with K.S. and the lack of efforts by the agency to assure productive visits between C.T.S. and K.S.

Based on the above evidence, the findings that the Continuing Chips ground had been proven was clearly erroneous.

The evidence was not sufficient as to the Failure to Assume Parental Responsibility ground.

Failure to assume parental responsibility, an additional ground here for terminating C.T.S.'s parental rights, 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 mother 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.*

In this case K.S. had been in the H.H. foster home since October 2019. (112:95) This was about six months before the Covid pandemic. C.T.S. attempted to attend doctor visits for his child. (112:168) He was informed that he would not be allowed to attend the visits in-person but would need to sit in the hallway. (112:69) Later, C.T.S. made a request to Jennifer Witt to resume in-person visits, but she never effectuated the resumption of in-person visits. (112:170)

There are actions by C.T.S. vis-à-vis K.S., that demonstrated that he has had, during the life of K.S., assumed parental responsibility for K.S. and has had a substantial parental relationship with his child.

Based on the above evidence, C.T.S. believes that the finding that he failed to assume parental responsibility was clearly erroneous.

II. There was insufficient evidence to determine that termination of C.T.S.'s parental rights was in the child's best interest.

A. Standard of Review

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, appellate courts apply 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.* Furthermore, a trial court's finding

of fact will not be set aside unless 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).

The factors that give contour to the standard are codified under Wis. Stat. § 48.426(3) serves to guide courts in gauging whether termination is the appropriate disposition. *State v. Margaret H.*, 2000 WI 42, ¶34 234 Wis. 2d 606, 610 N.W.2d 475.

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.

While it is within the province of the circuit court to determine where the best interests of the child lie, the record should reflect adequate consideration of and weight to each factor. *Margaret H.*, 2000 WI 42 at ¶35. Failure to apply the appropriate legal standard constitutes an erroneous exercise of discretion.

B. Terminating C.T.S.'s parental rights was an erroneous exercise of discretion.

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.

At the dispositional hearing, the court heard testimony from the social worker, Jennifer Witt. As required by Wis. Stat. § 48.426, the court weighed the required factors. C.T.S. believes, however, that the court's weighing was erroneous given the outcome and decision to terminate his parental rights.

While the decision by the court at the dispositional hearing is one of discretion, after reviewing the facts and the findings made here, C.T.S. believes that there was not support on this record for the court's finding that it was in the child's best interest that his parental rights be terminated.

Here the court appears to focus on the fact that C.T.S. did not appear at the hearing in this case and thus he forfeited his parental rights to K.S. (100:5-6)

There are a range of factors that a court may consider in the exercise of its discretion, but the exercise of discretion is not above review. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016). Terminating C.T.S.'s parental rights given the evidence and factors examined by the court was an erroneous exercise of its discretion in this case.

CONCLUSION

There was insufficient evidence for the trial court to have made a finding of unfitness under the grounds of Continuing CHIPS and Failure to Assume Parental Responsibility. There was not sufficient evidence to have found that terminating the parental rights of C.T.S. was in the best interest of the child. This matter should be remanded to the circuit court for a hearing on both grounds and disposition.

Dated: November 23, 2023

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3468 words.

A paper copy of this brief and certificate has been served on all non-electronic parties.

Dated: November 23, 2023

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