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SUPREME COURT

State of Wisconsin
Supreme Court
Appeal Case No. 23AP1884

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

Sheboygan County Department of Health and Human Services,
Petitioner-Respondent,

v.

J.L.,
Respondent-Appellant.

PETITION FOR REVIEW

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Statutes

Wis. Stats. §48.4268, 9, 10

ISSUE PRESENTED

1. Was there sufficient evidence for the court to have found that it was in the best interest of S.L. to terminate the parental rights of the mother, J.L.?

Treatment by trial court: The trial court answered “yes” when it entered its findings and orders after the disposition hearing.

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 was filed in Sheboygan County Circuit Court to terminate the parental rights (hereinafter, TPR) of J.L. to his child, S.L. on June 16, 2022. (Record, 4:1) The petitions alleged grounds under 1) Wis Stat. § 48.415(1)(a)2, Abandonment, 2) Wis. Stat. § 48.415(2), Continuing CHIPS and 2) Wis. Stat. § 48.415(6), Failure to assume parental responsibility. *Id.*

J.L. initially contested the allegations in the petition, but at a hearing on February 10, 2023, J.L. stipulated to grounds under Wis. Stat. § 48.415(2), Continuing CHIPS. (67:1-2, 111:18) The matter was continued for a disposition hearing on April 14, 2023. (110:1)

At the disposition hearing, testimony was received from the case worker, Janna Harrington and J.L., the biological father. (110:13, 110:52)

Of note, J.L. testified that he is 42 years old. (110:53) He was present when S.L. was born. (110:53) He has been engaged with S.L. since her birth. (110:53) J.L. visited with S.L. every chance that he was allowed to do so. (110:53) During visits with S.L., J.L. would hold her, feed her, change her and spend as much time with here as he could. (110:54) J.L. would hug and kiss S.L. and try to make her know that he was her father. (110:54) J.L. would get giggles from S.L. during his visits. (110:54) S.L. would smile and laugh when he spoke with her. *Id.* J.L. would attempt to get S.L. to show affection, but she appeared

hesitant at first, but eventually came around. Id. Much of the interaction between them was limited because of S.L.'s age. (110:55)

J.L. sent Christmas presents to S.L. every year, spending \$200 to \$300 on presents alone. (110:55) He reiterated that he loves S.L. so much. Id. Present were provided to S.L. through the paternal grandmother. Id. The presents would consist of brand-new bikes, brand-new tricycles, clothes and toys. (110:56)

After testimony and arguments, the court found that it was in S.L.'s best interest that the parental rights of J.L. should be terminated. (110:82, 110:93, 90:1-2) It is from this order that J.L. appealed to the Court of Appeals.

In a decision dated January 2, 2024, the Court of Appeals affirmed the circuit court orders. (Appendix p. 2.)

ARGUMENT

I. There was insufficient evidence to determine that termination of J.L.'s parental rights was in S.L.'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 J.L.'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 several witnesses. As required by Wis. Stat. § 48.426, the court weighed the required factors. J.L. believes that the court's weighing was erroneous given the outcome and decision to terminate his parental rights.

The evidence adduced at the dispositional hearing was J.L. testified that he is 42 years old. (110:53) He was present when S.L. was born. (110:53) He has been engaged with S.L. since her birth. (110:53) J.L. visited with S.L. every chance that he was allowed to do so. (110:53) During visits with S.L., J.L. would hold her, feed her, change her and spend as much time with here as he could. (110:54) J.L. would hug and kiss S.L. and try to make her know that he was her father.

(110:54) J.L. would get giggles from S.L. during his visits. (110:54) S.L. would smile and laugh when he spoke with her. Id. J.L. would attempt to get S.L. to show affection, but she appeared hesitant at first, but eventually came around. Id. Much of the interaction between them was limited because of S.L.'s age. (110:55)

J.L. sent Christmas presents to S.L. every year, spending \$200 to \$300 on presents alone. (110:55) He reiterated that he loves S.L. so much. Id. Present were provided to S.L. through the paternal grandmother. Id. The presents would consist of brand-new bikes, brand-new tricycles, clothes and toys. (110:56) While the decision by the court at the dispositional hearing is one of discretion, after reviewing the facts and the findings made here, there was not support on this record for the court's finding that it was in the children's best interest that the parental rights of J.L. be terminated.

J.L. does not have a problem with becoming and remaining clean and sober. (110:57) He has been and remains open to engaging in any services requested of him so that he can have his daughter returned to him. (110:57) Anything includes humbling to go to AODA appointments, being cooperative with the social worker, and meeting the conditions required by the foster parent. (110:57)

The evidence suggests that there is a substantial relationship between J.L. and S.L. that would lead to harm in its severance. Also, given the positive interactions displayed by S.L. during her contact with J.L., this would suggest the wish and desire of S.L. not to terminate J.L.'s parental rights. Given that the other factors under sec. 48.426, fall

as neutral on the issue of termination, these factor should hold a greater weight given the overwhelming evidence against granting termination.

While there are a range of factors that a court may consider in the exercise of its discretion, 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) and *In the Interest of X.S.*, 2022 WI 49, 402 Wis. 2d 481, 976 N.W.2d 425 (a reversal of a discretionary juvenile waiver decision by a trial court.) Terminating J.L.'s parental rights given the evidence and factors examined here by the trial 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 that it was in the S.L.'s best interest to terminate J.L.'s parental rights. This matter should be remanded for a new disposition hearing.

Dated: January 29, 2024

Respectfully Submitted:

Electronically signed by Gregory Bates

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



Respondent-Appellant-Petitioner

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2067 words.

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

Dated: January 29, 2024

Electronically signed by Gregory Bates

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