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COURT OF APPEALS

State of Wisconsin
Court of Appeals
District I
Case No. 24AP907
Circuit Court Case No. 23 TP 8

In re the termination of parental rights to A. N. W., Jr., a person under the age of 18:

Sheboygan County Department of Health & Human Services,
Petitioner-Respondent,
v.
A.N.W., Sr.,
Respondent-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT BRANCH 1, THE HONORABLE SAMANTHA BASTIL, PRESIDING.

BRIEF OF THE RESPONDENT-APPELLANT

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State v. Salas Gayton,
2016 WI 58, 370 Wis. 2d 264, 882 N.W.2d 459 ....

Waukesha County v. Steven H.,
2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607 ....

Statutes

Wis. Stat. § 48.415(2)(a) ....

Wis. Stat. § 48.422(3) ....

Wis. Stat. sec. 48.426(3) .... *passim*

ISSUE PRESENTED

I. Was there sufficient testimonial evidence in the record to allow a finding of unfitness against A.N.W., Sr.?

Treatment by trial court: The court answered "yes" when it entered the order denying A.N.W., Sr.'s post-disposition motion.

II. Was the termination of A.N.W., Sr.'s parental rights in the best interests of A.N.W., Jr.?

Treatment by trial court: The court answered "yes" when it entered the order terminating A.N.W., Sr.'s parental rights.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not believe that oral argument is necessary in this case in that it is believed that the brief will be sufficient to address the issues raised in this case.

The Respondent does not believe the publication will be warranted. This is a one-judge appeal, and the issue raised would not warrant a request for a three-judge panel.

STATEMENT OF CASE

A petition was filed in Sheboygan County Circuit Court to terminate the parental rights of A.N.W., Sr. to his child, A.N.W., Jr., on April 13, 2023. (Record, 4:1-4) The petition alleged grounds under 1) Wis. Stat. sec. 48.415(2), Continuing Need of Protection or Services and 2) Wis. Stat sec. 48.415(6), Failure to Assume Parental Responsibility. *Id*.

A.N.W., Sr. initially contested the petition, but on December 11, 2023, he entered a no-contest plea to the allegation of Continuing Need of Protection or Services. (89:1) The case continued to disposition on January 26, 2024. *Id*.

Disposition Hearing

The disposition hearing was on January 26, 2024. (95:1) Disposition testimony and statements were received from social workers Tonya Desarmo, M.S., a foster parent, and A.N.W., Sr. *Id*.

The testimony of Ms. Desarmo discussed the disposition factors.(95:8) M.S. testified to her intent to continue to care for and adopt A.N.W.,Jr. (95:85)

A.N.W., Sr. gave a statement to the court. (95:114) A.N.W., Sr. disputes several points in the court report, which he believed contained false information. (95:115) He denied that his report to CPS was an act of retaliation, instead stating that it was a protective measure due to concerns about the mother's drug use. (95:115) He also denies forcing the foster parents to put Adrian Jr. on the phone during calls and claims he requested visits with his son that were not

arranged. (95:115-117)#A.N.W., Sr. stated that the court report contains numerous inaccuracies and lies. (95:116) He denies threatening the foster parent and suggested that his phone calls with her were recorded, which could prove his claim. (95:116) He stated that his requests for visits with his son were ignored. (95:116)

A.N.W., Sr. discussed his struggle to maintain contact with his son while being incarcerated. (95:116) He mentioned that initial visits were freelance, but later a schedule was set for phone calls between 10:00 a.m. and 7:00 p.m. on Sundays. *Id*. He stated Ms. Desarmo and M.S., limited his contact to a 30- minute window from 10:00 to 10:30 a.m., which was challenging due to prison regulations. (95:116-117) He believed that they intentionally kept him from his son, despite his efforts to set up Zoom visits and have his mother involved. (95:119)

A.N.W., Sr. refuted allegations that he purposely avoided phone calls with his son. (95:119) He explains that there were instances where the prison phone system was down, preventing him from making calls. (95:118) He believes that Ms. Desarmo and M.S. misrepresented these instances as intentional avoidance and believes that they deliberately prevented him from being involved in his son's life. (95:118)

A.N.W., Sr. discussed his attempts to arrange in-person visits with his son. (95:119-120) He stated that Ms. Desarmo provided various excuses to prevent these visits, including concerns about the child visiting an institution and the long drive. (95:120) A.N.W., Sr.

believes that these excuses were unfounded, as the institution resembles a nursing home and has a play area for children. (95:119)

A.N.W., Sr. discussed his mother's attempts to get involved with his son and her desire to gain custody after her husband's death. (95:119) He stated that Ms. Desarmo and M.S. ignored her attempts to contact them and did not respond to her paperwork for custody. (95:119-120) He again denied the allegations of threatening M.S. (95:119-121)

A.N.W., Sr. stated that he. has been participating in anger management and self-meditation programs while in prison. (95:114) He believes that these programs have helped him manage his emotions and reactions. (95:114) He acknowledged that there are inconsistencies in his participation, and he was dismissed from an anger management program due to his behavior. (95:106-107)

After testimony and arguments, the court found that it was in the A.N.W., Jr. best interest that the parental rights of A.N.W., Sr. should be terminated. (95:108, 127:1-2) It is from this order that A.N.W., Sr. brings this appealed.

Remand Proceedings

After filing the notice of appeal, the Court of Appeals maintained its jurisdiction, but this matter was remanded for the filing of a post-disposition motion. The motion stated that the no-contest plea was invalid because the circuit court failed its required duty to take testimony establishing a factual basis for the no-contest plea. (112:1)

The circuit court denied the motion. (120:45) The court found sufficient testimony was taken at the disposition hearing to make an unfitness finding. (120:23) The court also found an insufficient basis for allowing A.N.W., Sr. to withdraw his no-contest plea.

A.N.W., Sr. further appeals the order denying his post-disposition motion.

ARGUMENT

I. The circuit court erred when it failed to receive testimonial evidence to permit a finding of unfitness.

A. Standard of Review

Whether the circuit court's error was harmless presents a question of law that this court reviews de novo. See *State v. Jackson*, 2014 WI 4, ¶44, 352 Wis. 2d 249, 841 N.W.2d 791. In determining whether a parent is prejudiced, the court must review the entire record and the totality of the circumstances. See *Waukesha County v. Steven H.,* 2000 WI 28, ¶4.233 Wis. 2d 344, 607 N.W.2d 607.

B. Relevant Case Law

"The due process protections of the 14th Amendment apply in termination of parental rights cases. When the State seeks to terminate familial bonds, it must provide a fair procedure to the parents, even when the parents have been derelict in their parental duties." *State v. C.L.K.*, 2019 WI 14, ¶15 n.8, 385 Wis. 2d 418, 922 N.W.2d 807 (quoting *Brown County v. Shannon R.*, 2005 WI 160, ¶56, 286 Wis. 2d 278, 706 N.W.2d 269). "Although they are civil proceedings, termination of parental rights proceedings deserve heightened protections because they implicate a parent's fundamental liberty interest." *Shannon R.*, 286 Wis. 2d 278, ¶59. "Recognizing the fundamental importance of parental rights, the Wisconsin legislature has mandated numerous procedural protections in TPR proceedings." *Waukesha County v. Steven H.*, 233 Wis. 2d 344, ¶40. The statute

provides that "[i]f the petition is not contested the court *shall* hear testimony in support of the allegations in the petition." Sec. § 48.422(3) (emphasis added). Our supreme court has "conclude[d] that the legislature intended the circuit court to hear testimony in support of the allegations because testimony safeguards accurate fact-finding and protects the parents." *Steven H.*, 233 Wis. 2d 344, ¶56.

The key to these appeals is not determining whether the circuit court violated Wis. Stat. § 48.422(3) by failing to hear testimony in support of the allegations in the petitions for termination of A.N.W., Sr.'s parental rights—it did. Rather, the question is whether A.N.W., Sr. was prejudiced by the court's error. *See Steven H.*, 233 Wis. 2d 344, ¶2. This court is instructed to review "the entire record and the totality of the circumstances" to determine if there was prejudice to A.N.W., Sr.. *Id.*, ¶4.

At the grounds/fitness hearing in *Steven H.*, the circuit court was asked to take judicial notice of a termination of parental rights report that "set forth information supporting the factual allegations," but was filed four months after it was authored. *Steven H.*, 233 Wis. 2d 344, Our supreme court held that "[t]he Report standing alone is not testimony." *Id.* Relying upon Wis. Stat. § 902.01(2), it further held that it "doubt[ed] whether a circuit court can take judicial notice of the facts contained in the Report because the facts are subject to reasonable dispute." *Steven H.*, 233 Wis. 2d 344, ¶53. Notwithstanding the violation of Wis. Stat. § 48.422(3), the court determined that that error alone did not justify reversal of a

termination of parental rights unless the parent has been prejudiced. *Steven H.*, 233 Wis. 2d 344, ¶57. Appellate courts are to discern whether "[a] factual basis for … the allegations in the petition can be teased out of the testimony of other witnesses … when the entire record is examined." *Id.*, ¶58.

C. Failure to take grounds testimony after the no-contest plea and prejudice.

Before proceeding to disposition, the circuit court was required to find that A.N.W., Sr. was unfit. Although A.N.W., Sr. entered a no-contest plea to the unfitness allegations in the petition to terminate his parental rights to his child, is not equivalent to admitting the allegations in a petition." *See Steven H.*, 233 Wis. 2d 344, ¶52.

The County had proven that there were grounds to terminate A.N.W., Sr.'s parental rights to his child under Wis. Stat. § 48.415(2)(a) – Continuing Need of Protection or Services. To demonstrate a continuing need of protection or services as a ground for TPR in this case, the following elements must be proven by clear and convincing evidence:

(1) A.N.W., Jr. had been adjudged to be 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 Sheboygan DHHS has made a reasonable effort to provide the services ordered by the court;

(3) A.N.W., Sr. has failed to meet the conditions established for the safe return of the child to the home.

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

Each of these elements needed to be established outright or by witness testimony at other hearings and exhibits accepted by the circuit court. The problem in this case is that there was not testimony specifically related to these elements, looking at the record as a whole.

The first element is normally provided by documentary proof. (See Comments to Wis JI-Children 324.) In this case, there was not a presentation via an exhibit showing that a properly produced order existed. Any court ruling on the substance of the order in the CHIPS case would be pure speculation and is not a part of the record in this case.

The second element requires a subjective finding that the Sheboygan County DHHS made a reasonable effort to provide the services ordered by the court in the CHIPS case. The same problem is presented here: the lack of evidence about the CHIPS order. It is impossible to determine if reasonable efforts were made to provide unknown services. Again, finding that Sheboygan County DHHS made a reasonable effort to provide services ordered by the CHIPS court would be pure speculation, given that the services ordered are not a part of the record in this case.

The third element requires knowledge about the services ordered by the CHIPS court that A.N.W., Sr. did not complete. The

record here does not include the services ordered for A.N.W., Sr. and his family. To say that "A.N.W., Sr. has failed to meet the conditions established for the safe return of the child to the home" is impossible, given that the services are unknown based on the record of this case.

In determining whether a parent is prejudiced, the court is to review the entire record and the totality of the circumstances. See *Waukesha County v. Steven H.,* 2000 WI 28, ¶4.233 Wis. 2d 344, 607 N.W.2d 607. The totality of the entire record would not allow a finding of Continuing Need of Protection or Services under Wis. Stat. § 48.415(2)(a)2.b and 3 or the ensuing unfitness finding.

II. The finding that the termination of A.N.W., Sr.'s parental rights was in A.N.W., Jr.'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 County 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 the factors in Wis. Stat. § 48.426(3) and any other factors it relies upon to reach its decision. *Sheboygan County Dept. 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;

c. 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;

d. 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 A.N.W., Sr.'s parental rights was an erroneous exercise of the court's discretion.

At the disposition hearing, the court heard testimony from several witnesses, including the social workers and A.N.W., Sr. As required by Wis. Stat. § 48.426, the court weighed each of the required factors. A.N.W., Sr., nevertheless, believes that the court's weighing produced an erroneous result in this case.

Viewing the testimony, the court made its findings under sec. 48.426(3). When considering the likelihood of adoption, under sec. 48.426(3)(a), the court determined that the foster parents were committed to adoption of A.N.W., Jr. (95:123) The court stated, regarding sec. 48.426(3)(b), that the child has have been separated

from A.N.W., Sr. for three quarters of his life. (95:125) As to sec. 48.426(3)(e) and (f), the court found that the child deserves stability. (95:128-9) Likewise, A.N.W., Sr. went into custody, causing a long period of physical separation from his child. (95:128-9) The court accepted the guardian ad litem's position as the child's. (95:128)

The court decided contrary to the credible testimony presented at the disposition hearing. Ms. Desarmo's testimony discussed the disposition factors. (95:8) M.S. only testified to her intent to continue to care for and adopt A.N.W., Jr. (95:85)

A.N.W., Sr. stated several important facts to the court. (95:114) A.N.W., Sr. disputes several points in the court report, which he believed contained false information. (95:115) He denied that his report to CPS was an act of retaliation, instead stating that it was a protective measure due to concerns about the mother's drug use. (95:115) He also denies forcing the foster parents to put Adrian Jr. on the phone during calls and claims he requested visits with his son that were not arranged. (95:115-117)#A.N.W., Sr. stated that the court report contains numerous inaccuracies and lies. (95:116) He denies threatening the foster parent and suggested that his phone calls with her were recorded, which could prove his claim. (95:116) He stated that his requests for visits with his son were ignored. (95:116)

A.N.W., Sr. discussed his struggle to maintain contact with his son while being incarcerated. (95:116) He mentioned that initial visits were freelance, but later, phone calls were scheduled between 10:00 a.m. and 7:00 p.m. on Sundays. *Id*. He stated Ms. Desarmo and M.S.

limited his contact to a 30-minute window from 10:00 to 10:30 a.m., which was challenging due to prison regulations. (95:116-117) He believed that they intentionally kept him from his son despite his efforts to set up Zoom visits and have his mother involved. (95:119)

A.N.W., Sr. refuted allegations that he purposely avoided phone calls with his son. (95:119) He explains that there were instances where the prison phone system was down, preventing him from making calls. (95:118) He believes that Ms. Desarmo and M.S. misrepresented these instances as intentional avoidance and believes that they deliberately prevented him from being involved in his son's life. (95:118)

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A.N.W., Sr. discussed his mother's attempts to get involved with his son and her desire to gain custody after her husband's death. (95:119) He stated that Ms. Desarmo and M.S. ignored her attempts to contact them and did not respond to her paperwork for custody. (95:119-120) He again denied the allegations of threatening M.S. (95:119-121)

A.N.W., Sr. stated that he. has been participating in anger management and self-meditation programs while in prison. (95:114)

He believes that these programs have helped him manage his emotions and reactions. (95:114) He acknowledged that there are inconsistencies in his participation, and he was dismissed from an anger management program due to his behavior. (95:106-107)

The disposition testimony reflects a substantial relationship between A.N.W., Sr. and his child that would be harmful to them if severed. Given this evidence, termination is not clearly in A.N.W., Jr.'s best interest as to this factor. See Wis. Stats. § 48.426(3)(c).

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 supported on this record where the court found that it was in A.N.W., Jr.'s best interest that the parental rights of A.N.W., Sr. be terminated. As to discretionary decisions, the courts have said that, despite the broad range of factors that a court may consider in exercising 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). Terminating A.N.W., Sr.'s parental rights, given the evidence and factors examined by the court, constitutes an erroneous exercise of its discretion.

CONCLUSION

There was insufficient testimonial evidence in the record to find that the TPR ground had been proven and to find A.N.W., Sr. an unfit parent. This matter should be remanded for a hearing on the grounds of termination of parental rights.

The finding that it is in A.N.W., Jr.'s best interest to have A.N.W., Sr.'s parental rights terminated was erroneous. These matters should be remanded to the trial court for further proceedings on the disposition of this case.

Dated: September 8, 2024

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CERTIFICATIONS

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 3909 words.

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

Dated: September 8, 2024

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