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STATE OF WISCONSIN
COURT OF APPEALS
District II
Case No. 2024 AP 907

IN RE THE TERMINATION OF PARENTAL RIGHTS TO:

A.N.W., Jr.,
A Person Under the Age of Eighteen.

SHEBOYGAN COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v.

A.N.W., Sr.,

Respondent-Appellant.

On Appeal from the Circuit Court of Sheboygan County
Case No. 2023 TP 008
The Honorable Samantha R. Bastil

**PETITIONER-RESPONDENT’S RESPONSE TO
RESPONDENT-APPELLANT’S BRIEF-IN-CHIEF**

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STATEMENT ON ORAL ARGUMENT

Petitioner-Respondent does not request oral argument. Oral argument is not necessary because Respondent-Appellant, A.N.W., Sr., raises issues already decided in Wisconsin. Publication is not requested, because this is a one-judge appeal pursuant Wis. Stat. § 752.31(2) and (3).

ARGUMENT

Respondent-Appellant, A.N.W., Sr. (hereafter A.N.W., Sr.), raises two issues on appeal. First, he claims the trial court failed to comply with Wis. Stat. § 48.422(3) by not hearing testimony in support of the allegations in the petition after A.N.W., Sr. entered a no-contest plea to the allegations in the petition. Second, he asserts the trial court erroneously exercised its discretion finding that a termination of parental rights was in A.N.W., Jr's. best interests.

I. The Testimony Presented to the Trial Court was Sufficient to Support a Factual Basis for the Allegations in the Petition

A. Standard of Review and Relevant Case Law

Wis. Stat. §48.422(3) states that, if the petition is not contested, the trial court shall hear testimony in support of the allegations in the petition. If the trial court fails to comply with Wis.

Stat. §48.422(3), appellate courts may review the entire record and the testimony of other witnesses at other hearings to “tease[] out” a factual basis for the allegations. *Waukesha County v. Steven H.*, 2000 WI 28, ¶ 58, 233 Wis. 2d 344, 607 N.W.2d 607. Whether the trial court’s error in failing to comply with Wis. Stat. §48.422(3) was harmless presents a question of law the appellate court reviews de novo. *See State v. Jackson*, 2014 WI 4, ¶ 44, 352 Wis. 2d 249, 841 N.W.2d 791. When determining whether the appellant was prejudiced, the appellate court is to review the entire record and the totality of the circumstances. *See Steven H.*, 233 Wis. 2d 344, ¶ 4. If the appellate court is able to tease out a factual basis for the plea from the record, the appellant is not prejudiced by the trial court’s failure to comply with Wis. Stat. §48.422(3). *See Steven H.*, 233 Wis. 2d 344, ¶ 57.

B. Testimony Supporting the Allegations in the Petition was Heard by the Trial Court Following A.N.W., Sr.’s No-Contest Plea

In December 2023, A.N.W., Sr. entered a no-contest plea to the grounds in the petition alleging A.N.W., Jr. was in continuing need of protection or services. (89:2). The Petitioner-Respondent, Sheboygan County Department of Health and Human Services

(hereafter the County), agreed to dismiss the grounds set forth in count two of the petition alleging a failure to assume parental responsibility. (89:8-9). The trial court went through a colloquy with A.N.W., Sr. to insure, in part, he understood the grounds to which he was entering a plea and to insure his plea was being made voluntarily. (89:3-8). At the conclusion of the colloquy, the trial court asked if the County was calling the social worker assigned to the case, Tanya DesArmo, to provide factual testimony in support of the allegations in the petition. (89:9). The County proposed offering the testimony of the social worker at the dispositional hearing. (89:9). Counsel for A.N.W., Sr. was asked if that was acceptable, and he responded that it was. (89:9-10).

In a proceeding to terminate parental rights on grounds of continuing need of protection or services, the petitioner must establish: (1) that the child has been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law; (2) that the County Department of Social Services made a reasonable effort to provide the services ordered by the court, and; (3) that the parent has failed to meet the conditions established for

the safe return of the child to the parent's home. Wis. Stat. § 48.415(2)(a).

The dispositional hearing was held January 26, 2024. The County called social worker DesArmo who testified as follows. She stated that A.N.W., Jr. was born September 27, 2019. (95:10). He was removed from the home August 26, 2020 when he was just eleven months old. (95:10). He was adjudged to be in need of protection or services on October 26, 2020 and continued in placement out of home. (95:10). On April 19, 2021 A.N.W., Sr. was adjudicated A.N.W., Jr.'s. father and the dispositional order was amended to include A.N.W., Sr. (95:11). A.N.W., Jr. has been in continuous out-of-home placement since he was originally removed August 26, 2020. (95:10). A.N.W., Sr. was incarcerated in April 2020 and he is not scheduled for release from prison until April 2026. (95:10; 95:72). Social worker DesArmo also stated that A.N.W., Sr. has not been consistent with any rehabilitative programming in prison, and that he was kicked out of the anger management program at the Drug Abuse Correctional Center (DACC). (95:108).

Testimony concerning the court report prepared by social worker DesArmo was also offered at the dispositional hearing. In *Steven H.*, 2000 WI 28 at ¶ 53, where no testimony was provided

regarding the allegations in the petition, the Court remarked that the trial court took judicial notice of the social worker's court report, and the Court stated that the court report standing alone was not testimony that satisfied the requirements of Wis. Stat. § 48.422(3). However, it has been recognized that where the social worker testified she prepared a report and that the information in the report is true and correct, the report is not "standing alone" as discussed in *Steven H.*, and the information in the report may be considered testimony or evidence in support of the allegations under Wis. Stat. §48.422(3). See *In re the termination of parental rights to Adrianna K.*, 2012 WI App. 73, ¶ 18-20, 342 Wis. 2d 253, 816 N.W.2d 353 (UNPUBLISHED OPINION cited only for its persuasive value pursuant to Wis. Stat. §809.23(3), a copy of which opinion is filed and served with this brief). Social worker DesArmo testified that she prepared a court report and filed it with the court on January 18, 2024, a week prior to the disposition hearing. (95:7). She testified that by signing the report she was acknowledging having reviewed it, and she testified that the information in the report was true and accurate. (95:9). She further testified that her supervisor also reviewed the report before it was filed. (95:9). The court report identifies the conditions under the dispositional order

that need to be met for the safe return of A.N.W., Jr. to the home. (67:4-7). It further includes an extensive explanation of the various efforts made by the Department of Social Services to provide services and it describes in detail A.N.W., Sr's. failure to meet the conditions. (67:4-10).

Regardless of whether the trial court strictly complied with Wis. Stat. §48.422(3), A.N.W., Sr. was not prejudiced, because the facts necessary to support the allegations in the petition can, at a minimum, be teased from the entire record, and more particularly the testimony of social worker DesArmo.

II. The Trial Court Properly Exercised its Discretion when it Terminated A.N.W., Sr's. parental rights to A.N.W., Jr. at the dispositional hearing

A. Standard of Review

A circuit court's decision to terminate parental rights is discretionary. *State v. Margaret H.*, 2000 WI 42, ¶ 27, 234 Wis. 2d 606, 610 N.W.2d 475. Appellate courts will sustain a trial court's discretionary decision unless the trial court erroneously exercised its discretion. *Id.*, ¶ 32. "A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and using a demonstrated rational process reaches a conclusion

that a reasonable judge could reach.” *Dane Cnty. Dep’t of Hum. Servs. v. Mable K.*, 2013 WI 28, ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198.

B. The Trial Court’s Exercise of Discretion was Proper

A termination of parental rights proceeding involves two phases, the grounds phase and disposition. Wis. Stat. §48.415 and §48.424(4). At disposition, the best interests of the child is the prevailing factor to be considered by the court. Wis. Stat. §48.426(2). In considering the best interests of the child, the court is to consider, but is not limited to, the following six factors:

- (a) The likelihood of the child’s adoption after termination.
- (b) The age and health of the child, both at the time of 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).

Wisconsin law does not “mandate the relative weight” to be placed on any one factor, but the record “should reflect adequate consideration of and weight to each factor.” *Margaret H.*, 2000 WI 42 at ¶¶29, 35.

A.N.W., Sr. disputes certain facts in the court report. He specifically argues that the disposition testimony shows he had a substantial relationship with A.N.W., Jr. and that severing the relationship would be harmful to A.N.W., Jr. There is ample evidence in the record, however, to support the trial court’s finding that A.N.W., Jr. did not have a substantial relationship with A.N.W., Sr., and that the trial court properly exercised discretion in terminating A.N.W., Sr.’s parental rights.

The trial court heard testimony at disposition from social worker Tanya DesArmo regarding A.N.W., Jr.’s relationship with A.N.W., Sr. Social worker DesArmo testified that she was the ongoing social worker managing A.N.W., Jr.’s case since December 16, 2020. (95:8). Part of her responsibilities in managing the case included conducting home visits with A.N.W., Jr. (95:13-14). She testified he’s in excellent health and loves sports. (95:12). He believes he is part of his foster parent’s family and has no recollection of living with A.N.W., Sr. (95:15). A.N.W., Sr. went to

prison in April 2020 when A.N.W., Jr. was only seven months old. (95:74). A.N.W., Jr. has gone extended periods without contact from both parents, and based on social worker DesArmo's observations, it does not concern him. (95:16). He goes three to six months without seeing or talking to a parent, and his last contact with A.N.W., Sr. was a telephone call on October 7, 2023, more than three months prior to disposition. (95:16-17). Aside from phone calls, some written letters and cards, A.N.W., Sr. had a few visits with A.N.W., Jr. by video, but A.N.W., Sr. has not met A.N.W., Jr. (95:65). Foster parent M.S. occasionally has to force A.N.W., Jr. to have a conversation with A.N.W., Sr. (95:66). A.N.W., Jr. does not ask to call A.N.W., Sr. (95:68).

A.N.W., Sr. claimed he was calling A.N.W., Jr. weekly. (95:67). He provided his phone records to social worker DesArmo to review, and social worker DesArmo testified that after reviewing the records, there were various periods of time where A.N.W., Sr. wouldn't call for three to five weeks. (95:67). Social worker DesArmo testified that in October 2023, A.N.W., Sr. was "in the hole" and couldn't call, but otherwise his decision to go weeks without calling A.N.W., Jr. was his choice. (95:67).

Foster parent, M.S., also testified at the dispositional hearing telling the court that she is an adoptive resource for A.N.W., Jr. who has been living with her since July 30, 2021. (95:85; 95:89). All of A.N.W., Jr.'s contact with A.N.W., Sr. has been by telephone or video. (95:89). A.N.W., Jr. also received some letters. (95:88). She confirmed A.N.W., Jr.'s last contact with A.N.W., Sr. was October 7, 2023, by telephone. (95:89). A.N.W., Jr. doesn't ask about A.N.W., Sr. or comment about him. (95:90). He doesn't really understand that A.N.W., Sr. is his father; he just takes phone calls from him because he's asked to do it. (95:92).

Counsel for A.N.W., Sr. offered an audio CD as an exhibit, which contained jail phone recordings of phone calls between A.N.W., Sr. and A.N.W., Jr. accompanied by his foster parent, M.S. (95:82-84). The parties agreed the trial court could listen to the recordings off the record during a break, and the court could consider the recordings in making its findings. (95:82). When making its decision and reviewing the six statutory factors, the trial court stated that the three phone calls on the CD make it clear A.N.W., Jr. does not have a substantial relationship with A.N.W., Sr. (95:126). The court went into detail about the contents of the calls, explaining that the calls reveal A.N.W., Jr. doesn't understand

the individual on the phone is dad, and M.S. has to try and redirect A.N.W., Jr. during the calls to even pay attention to A.N.W., Sr. (95:125-126).

The trial court considered the relevant evidence and testimony finding that A.N.W., Jr. did not have a substantial relationship with A.N.W., Sr., and as a consequence, it would not be harmful to sever the relationship. (95:125-127). The trial court further applied the proper standard of law. In doing so, the court demonstrated a rational process reaching a reasonable conclusion.

The trial court made a clear record addressing each of the six factors under Wis. Stat. §48.426(3). (95:122-130). It observed that the guiding principal for the trial court at disposition is the best interests of the child. (95:122). The court then considered the first factor, the likelihood of adoption. (95:123). The court noted that A.N.W., Jr. has been in the foster home of M.S. for the past two and a half years, and that M.S. is an adoptive resource who is willing to adopt A.N.W., Jr. (95:123). The court found there is a high likelihood of adoption after termination. (95:123).

The court next found that A.N.W., Jr. is currently four years old, happy, healthy, active and thriving in M.S.'s home. (95:123). The court noted that at the time A.N.W., Jr. was removed from the

home, he had some delays in his development. (95:124). However, he had progressed to the point that he is now enrolled in both 3k and 4k school programs. (95:123).

The court then considered A.N.W., Jr's. relationship with the only family member with whom he had any real contact, namely A.N.W., Sr's. daughter, Adrianna. (95:125). The trial court determined there is no longer a relationship that exists between Adrianna and A.N.W., Jr. (95:125). The trial court noted that social worker DesArmo testified Adrianna was not interested in maintaining a relationship, and that things were clearly not going well while A.N.W., Jr. was at her residence in her care. (95:125).

The trial court moved on to consider the wishes of A.N.W., Jr. (95:128). The court observed that A.N.W., Jr. is too young to verbally express what he wants, but his wishes could be gleaned from his actions and behavior. (95:128). The court considered that A.N.W., Jr. doesn't ask for dad despite not having heard from him in months. (95:128). He refers to M.S. as mom and lacks interest in wanting to engage with A.N.W., Sr. on the phone when he does call, leading the court to conclude he is happy in the home of M.S. and wants to remain there. (95:128). The court further noted that A.N.W., Jr. has been in M.S.'s home over half his life. The court then considered the

duration of the separation of A.N.W., Sr. from A.N.W., Jr. by pointing out that A.N.W., Sr. went to prison when A.N.W., Jr. was six months old. (95:128).

The trial court finally addressed whether A.N.W., Jr. would be able to enter into a more stable and permanent family relationship as a result of the termination. (95:128-129). The court again noted that A.N.W., Jr. was thriving in the home of M.S. where he had been placed the past two and a half years. (95:129). The court alluded to the fact that the three prior households providing care to A.N.W., Jr. were unable to manage his care as M.S. had done, and as a result, A.N.W., Jr. would be able to enter into a more stable family relationship upon termination of parental rights. (95:129).

The trial court concluded by stating that its findings were based on the evidence submitted in the case, the court report submitted by social worker DesArmo, the testimony, and arguments of counsel. (95:130). The record provides substantial insight into the court's assessment of each factor and its reasoning for its findings and decision. It considered each of the enumerated factors under §48.426(3) without giving particular deference to any one factor recognizing that the law does not "mandate the relative weight" to be placed on each of the factors. *Margaret H.*, 2000 WI 42 at ¶ 29.

The trial court applied a rational process in making its findings that resulted in a reasonable conclusion to terminate parental rights.

A.N.W., Sr. has provided no reason to disturb the trial court's findings or decision.

CONCLUSION

For the foregoing reasons, the Sheboygan County Department of Health and Human Services requests that the appeal of A.N.W., Sr. seeking a remand of this case to the trial court for a fact-finding hearing on grounds for termination of parental rights be denied.

Dated this 23rd day of September, 2024.

Electronically signed by Herbert C. Humke III

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief and appendix complies with the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a 13-point proportionately spaced serif font. The length of this brief is 2,879 words.

Dated: September 23, 2024.

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CERTIFICATE OF ATTORNEY

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under Wis. Stat. §§ 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order of judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portion of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: September 23, 2024.

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