STATE OF WISCONSIN
IN THE COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP000907

In re the termination of parental rights to A.N.W. Jr., a Person Under the Age of Eighteen Years;

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

Petitioner-Respondent,

v.

A.W., Sr.,

Respondent-Appellant.

On Appeal from the Judgment and Order Terminating Parental Rights Entered in the Circuit Court of Sheboygan County, with the Honorable Samantha Bastil presiding (Case Number 2023TP08)

BRIEF OF GUARDIAN AD LITEM IN RESPONSE TO BRIEF OF RESPONDENT-APPELLANT

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I. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The undersigned is in agreement with A.W., Sr.'s statement. Oral argument or publication is likewise not requested by the undersigned.

II. ARGUMENT

A. STANDARD OF REVIEW

In his appellate brief, A.W., Sr. correctly sets for the standard of review. Id. at 9 and 13.

B. The grounds elements were proven; or alternatively A.W. Sr. was not prejudiced by the court's failure to comply with Wis. Stat. 48.422(3)

The subject statute for termination of parental rights in this action is Wis. Stat. 48.415(2)(a)—Continuing Need of Protection or Services. At pages 11-12 of his brief, A.W. Sr. sets forth the three elements to support a WI Stat. 48.415(2)(a) action.

1. The ground elements were proven

A.W., Sr. argues,

> "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." Brief at 12.

Yet there was testimony looking at the record as a whole. The first element requires testimony that was one or more court

orders relating to the out of home placement of the child for six months or longer, and that there was the requisite T.P.R. warning provided in at least one of such orders.

The following includes testimony from A.W., Sr. during the July 11, 2024 motion hearing, as related to the first element:

> "MR. MORGAN: I'd like to re-ask that. I'm going to -- I apologize. I'm confusing you.
> Q In this case, you actually were not brought into the case until later because you established paternity, correct?
>
> A [A.W., Sr.] Correct.
>
> Q Okay. So let me start with -- there was an October 22nd of 2021 hearing. It was called a revision of dispositional order hearing. If the record shows that you participated in that with Judge Hoffmann, would you have any reason to disagree with that?
>
> A If the record shows that I participated?
>
> Q Yeah. Basically you were being added to the order because you were now adjudicated.
>
> A I believe so, yes.
>
> Q And if the record shows that as a standard with the clerk's office, a TPR -- the warnings were attached to that revision and dispositional order and mailed out at that same time period in October of 2020, did you receive a copy of that paperwork?
>
> A With warnings?
>
> Q That were attached to the revision order, yes.
>
> A I can't recall.
>
> Q You may have?
>
> A I may have.

Q Okay. If the record shows that there was a permanency review hearing with Judge Hoffmann on July 29th of 2022, do you have any reason to dispute that you would have participated?

A I participated. I remember that.

Q Okay. And if the record shows that as a standard the permanency order was mailed out with TPR warnings at that same time, do you believe that you received a copy of that?

A It's possible.

Q And then finally there was -- the record shows there was a permanency review hearing on July 28th of 2023, and it shows that you participated. Do you recall that?

A July of 2023?

Q It would have been –

A Yes.

Q -- just last year basically.

A Yes.

Q Okay. And if the record shows that as a standard of a permanency order, the TPR warnings were sent out, do you recall receiving a copy of that?

A The TPR order?

Q The TPR warnings –

A The warnings?

Q -- that were attached to the order?

A It's possible.

MR. MORGAN: Okay. I have no other questions.” [R120: 35-37]

In addition, social worker Tanya DesArmo testified about the first element during the dispositional hearing of January 26, 2024.

Q [Attorney Humke] Let's start off with [A.W.,] Jr.'s date of birth. What is it?

A [Ms. DesArmo] 09/27 of '19.

Q So he's four years old; is that correct?

A Yes.

Q And do you know when he was removed from the home?

A 08/26 of '20.

Q So at removal, he would have been about 11 months old; is that accurate?

A Yes.

Q Has he been returned to the home, either in his mother's care or father's care, since that removal?

A No, he has not." [R95:9-10]

and

"Q [Attorney Humke] A dispositional order was made in this case when?

A [Ms. DesArmo] It was filed in September of 2020, and then it was approved on October 26th of 2020.

Q Okay. So the dispositional order was made by the Court in October of 2020; is that accurate?

A Granted by the courts, yes.

Q Yeah. Okay. And, at that time, the dispositional order only applied to [the mother]; is that correct?

A Yes.

Q And why is that; do you know?

A Because [A.W.], Sr. had not been adjudicated as the father yet at that time.

Q Do you recall when [A.W.], Sr. was adjudicated the father of Junior?

A 04/19 of '21 he was adjudicated as the father.

Q And then at that point, correct me if I'm wrong, the dispositional order was revised to add him to that order; is that correct?

A Yes." [R95: 10-11].

The second element of 48.415(2)(a) is whether Sheboygan County DHHS made a reasonable effort to provide the court ordered services. During the July 11, 2024 hearing, A.W., Sr. admitted, to his own attorney during direct questioning, that he understood that the government was required to prove the reasonable effort element:

"Q (Attorney Bates) Did you understand that they needed to prove that the County department needed to provide -- reasonably provide the services ordered by the CHIPS court? Did you understand that?

A [A.W., Sr.] Yeah." [R120:27].

The third element is that A.W., Sr. did not complete the court ordered (Dispositional Order) conditions. A.W., Sr. argues that the, "record here does not include the services ordered for A.W., Sr. and his family." Brief at 13.

Yet the testimony of A.W., Sr. shows he knew of the conditions. First, as stated above, A.W., Sr. testified during the July 11, 2024 motion hearing about his participation in the revision of dispositional hearing:

> Q [Attorney Morgan] Okay. So let me start with – there was an October 22nd of 2021 hearing. It was called a revision of dispositional order hearing. If the record shows that you participated in that with Judge Hoffmann, would you have any reason to disagree with that?
>
> A [A.W.,Sr.] If the record shows that I participated?
>
> Q Yeah. Basically you were being added to the order because you were now adjudicated.
>
> A I believe so, yes." [R120:35].

Second, in the same July 11, 2024 motion hearing, A.W., Sr. revealed his knowledge of the court ordered conditions:

> Q [Attorney Bates] Did you believe that you had met the conditions for safe return of the child to you?
>
> A Do I believe that I met the concerns for the safe return of my child?
>
> Q To you.
>
> A To me? I believe that I was – yeah, that I was working towards that, that I was doing everything necessary to meet those conditions." [R120:27].

2. <u>If this court finds that that there was not compliance with Wis. Stat. 48.422(3), A.W., Sr. was nonetheless not prejudiced by the lack of statutory compliance</u>.

If this court finds there was not compliance with Wis. Stat. 48.422(3), this court can apply the <u>Waukesha County v.</u>

Steven H., 233 Wis. 2d 344, 607 N.W. 2d 607 (2000) case to conclude that A.W., Sr. was not prejudiced by the non-compliance.

A.W., Sr. correctly quotes from Steven H., which states,

> " ¶ 4. Regarding the second issue presented, although the circuit court erred by failing to follow Wis. Stat. § 48.422(3), we conclude on review of the entire record and the totality of the circumstances that Steven H. was not prejudiced by the error. Accordingly, we reverse the decision of the court of appeals." Id.; see also A.W., Sr. brief at 13.[1]

In Steven H. there was no testimony (from the social worker or anyone else) in support of the TPR Grounds, yet the court still found no prejudice. Id. at para. 53-54. In the present

[1] Steven H. also found the following:

> "¶ 56. We conclude 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. Wisconsin Stat. § 48.422(3) required Waukesha County in this case to call a witness to testify in support of the allegations in the petition. We therefore agree with Steven H. that the circuit court erred in failing to comply with Wis. Stat. § 48.422(3).
>
> ¶ 57. Nevertheless, under the circumstances of this case we conclude that Steven H. cannot rely on this error to reverse the termination proceedings because he was not prejudiced by the circuit court's failure to comply with the statute.
>
> ¶ 58. A factual basis for several of the allegations in the petition can be teased out of the testimony of other witnesses at other hearings when the entire record is examined." Id.

case there was testimony from social worker DesArmo as well as from A.W., Sr. himself to establish the TPR elements. The totality of the entire record allows this court to conclude that A.W., Sr. was not prejudiced.

C. The court's finding that the termination of A.W., Sr.'s parental rights is in the best interests of A.N.W., Jr. was not an erroneous exercise of discretion

A.W., Sr. correctly states the standard of review, that,

> "[a] circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion." David S. v. Laura S., 179 Wis. 2d 114, 150, 507 N.W. 2d 4 (1993). See also A.W., Sr. Brief at 14.
>
> and
>
> A trial court's finding of fact will be set aside if it is against the great weight and clear preponderance of the evidence. See Onalaska Elec. Heating Inc. v. Schaller, 94 Wis. 2d 493, 501, 288 N.W. 2d 829 (1980). See also A.W., Sr. Brief at 14.

The circuit court's decision that it was in the best interests of A.N.W., Jr. to terminate the parental rights of A.W., Sr. is not against the great weight and clear preponderance of evidence.

A.W., Sr. admits that,

> "At the disposition hearing [January 26, 2024], the court heard from several witnesses, including the social workers and A.N.W., Sr. As required by Wis. Stat sec. 48.426, the court weighed each of the required factors." Brief at 15.

The transcript of the dispositional hearing shows that the court carefully considered and applied the statutory factors of

WI Stat. 48.426. The following is the court's application of same at the hearing:

> "The first factor, the likelihood of adoption after TPR. [M.S., foster parent] testified that she is an adoptive resource for Adrian and there is a high likelihood of adoption after termination of parental rights and [A.N.W., Jr.] has been -- I should say Junior has been in her household for the last two-and-a-half years. And before I go through each of the factors, what I think is important is that other than the first factor that I just mentioned, the rest of the factors all include the child. It is not about Senior's relationship or what he believes his relationship to be with Junior, the wishes of Senior, whether he's going to enter a more stable and permanent family relationship. It's not about his health and his incarceration status. It's about Junior.
>
> And the second factor is the age and health of Junior at the time of the disposition. At the time of the disposition, he's 40 -- I'm sorry. Forty. He's four years old. He is happy, healthy, active, thriving at Ms. Schlueter's residence. He is enrolled in both 3K and 4K, which I've never heard of before, and so that says just how well he's doing. He is -- what I thought was interesting is his fear of water, and that must have taken a tremendous amount of patience and work to go from having a child that can't -- that's so afraid of water that another child had to put his or her feet in the kitchen sink in order to get them to bathe where he's jumping into the water. And I heard, frankly, Senior shocked when he went to the dells on the jail call, and he was going down the water slide, and I think Senior acknowledges how far Junior came in that regard. But at this point in time, he is a pleasant, rambunctious, young boy who has been -- is thriving in [M.S.'s] residence. At the time he was removed from the home, he had some delays in his development. He was residing in a house where domestic violence was occurring, and he was residing in a house where mom was using illegal controlled substances. I do give Mr. -- Senior credit for contacting CPS. And what I meant by the power and control, I'm talking about more the whole timeline of events and the phone calls, which he doesn't want to talk, and things of that nature, but I think Attorney Humke's correct, that that isn't relevant

for the purpose of the dispositional phase; so I'm not going to go into it too much. But at the time he was removed from the home, he was under one. He was living in a drug environment home. He tested positive for cocaine. He had developmental delays. He went to two foster homes, one of which was [A.W., Sr.'s] sister, prior to living with [M.S] -- there's an L in there -- and is now doing well. He also has been outside of the home for essentially more than three-fourths of his life. He has been at [M.S.'s] home for more than half of his life.

The third factor, whether the child has a substantial relationship with a parent or other family member, and I stress that the factor is whether the child has a substantial relationship. And I don't think it's disputed that there is no longer a relationship with Senior's [sic] sister for various reasons. Ms. Desarmo testified that she's not interested in having that relationship anymore, and clearly things did not go well while Junior was at her residence. The main question is whether Junior has a substantial relationship with Senior, first of all, and then I'll address the second factor. When I listened to just those three calls -- and, again, Junior has not had any contact with Senior in at least three months now -- I hear Junior refer to [M.S., foster parent] as mom. I hear Junior wanting to talk with mom, frankly, and engage with mom more than Senior on the call. That may be because she's there in person and he's on the phone, but I can hear [M.S.] try to redirect Junior to the attention of Senior and try to facilitate these calls. And I also recognize he's three, turning four, at -- during these calls, but those calls make it very clear that he does not have a substantial relationship with Senior. He does refer to Junior [sic] as dad, and in the second call what was interesting to this Court is that -- I think it was [mother] who made a life book for Junior, and Junior was -- looked -- there were pictures of [mother] and Senior in this book and Junior is talking with Senior on the phone and looking at the picture in the book and commenting that he has two dads, and he couldn't understand because he doesn't make the connection that the person on the phone, who he refers to as dad, that being Senior, is the man in that picture, because he doesn't know what he looks like. And that, to me, shows that there is not a substantial relationship between Junior and Senior, even though [mother] is trying to show pictures, [M.S.] is trying to

facilitate these pictures of Senior. Those phone calls are sporadically happening and this three-, four-year-old understands that he's supposed to call the dad on -- the person on the phone dad, but he's not able to make that connection of there being a substantial relationship. It's clear, though, that they have a relationship. And as Attorney Morgan points out, it goes to the emotional and psychological connection to the child's dad, that being Senior, and the birth family, and it's clear that there is that connection. And it's also clear -- although this isn't a factor, [A.W., Sr.]-- that you love your son and that you care about him, and so I don't want you to think, sir, that that goes unnoticed, because I can hear, [A.W., Sr.], in your voice -- and you even mention this on the call -- how happy that you are to hear Junior's voice. But that's not the factor for the Court to consider, how happy he makes you or what your view of your relationship with him is. It's whether he has a substantial relationship with you and whether it would be harmful to him to sever that relationship. And so given that there is a relationship but it is not a substantial relationship, I do find that it would not be harmful -- and I hesitate because, as I've said before in other hearings, how can I say that it's not harmful to a child to have their biological parents parental rights terminated? The aftermath of the affect on children on termination of parental rights sometimes can't be seen until later in life, and there is no doubt in my mind that this will have an affect on this four-year-old boy. But given the lack of a substantial relationship, I do not find that it would be harmful, which is the standard for the Court to consider, to sever that relationship. Again, it will likely have an affect on him, but I do not find it to be harmful to him.

The fourth factor: In looking at the wishes of Junior, I think Ms. Desarmo has recited on the record what she's seen, what she's heard, and it's clear that Junior doesn't ask for dad. He hadn't heard from him in three months, and he hadn't asked for that. And he's too young to say, I want to live with [M.S.] or I want to live with this person on the phone that I don't even know what he looks like, but it's clear from his comments in referring to [M.S.] as mom, it's clear from his lack of wanting to engage with Senior on the phone that he is happy where he is, he is healthy where he is, and that he's okay where he is. And so I

> interpret his wish based on his actions and how he is behaving to want to remain at [M.S.]'s home and where he has been for over half of his life.
>
> The fifth factor: The duration of separation of parent from child. Again, it's been -- well, actually he was six months old when [A.W., Sr.] went into custody -- I'm sorry, [A.W., Sr.] went into custody, and so it's been a very long period of time that he has been physically separated from Senior. Whether Junior will be able to enter a more stable and permanent family relationship upon termination of parental rights, taking into account the conditions of the current placement. He is living in a residence with a single mother who balances seven -- eight children with [A.N.W., Jr.], and so I heard on one call -- and I understand that Senior wants -- would probably prefer that on Sundays everybody waited around for him to call whenever he was able to have to call from prison, but that doesn't work for a four-year-old and that doesn't work for a household where there's other siblings, and, frankly, that's not in Junior's best interest to sit around on Sundays and wait for a phone call from dad from prison. But it's clear that the conditions of his current placement, that he's thriving in it, that there's a lot going on, but that works for him and he is doing well in his current placement.
>
> The likelihood of future placement will be exactly what he's had for the last two-and-a-half years. And in looking at the results of prior placements, frankly [M.S.] has been able to manage, and not just manage but thrive, [A.N.W., Jr.'s] needs, and it's clear that she has been able to do what two other households -- frankly, three other households have been unable to do. And so he will be able to enter a more stable and permanent family relationship with [M.S.] and the other children residing in that house. I'm also considering the recommendation of the Guardian ad Litem as to whether the termination of parental rights is warranted. And based on the evidence submitted in this case, as well as the court report and the testimony and the arguments of counsel, I do find that the termination of parental rights is warranted." [R95:123-130].

The above transcript portion shows the court did not erroneously exercise her discretion. The court provided an

articulate, well thought out decision based upon the court report, testimony of witnesses, guardian ad litem recommendation, and arguments of counsel. This court should deny A.W., Sr.'s argument.

III. CONCLUSION

As guardian ad litem for A.N.W., Jr., it is respectfully requested that the judgment of the trial court be affirmed.

A.W., Sr.'s arguments are not supported by the record. First, there was adequate testimony from various hearings in this TPR action to articulate the grounds for the subject Continuing Need of Protection or Services. If this court is nonetheless not satisfied that the circuit court complied with Wis. Stat. 48.422(3), this court may still conclude that A.W., Sr. is not prejudiced by the non-compliance per the case law of Steven H. Finally, the circuit did not erroneously exercise her discretion at the dispositional hearing. The court carefully and correctly applied the statutory factors of Wis. Stat. 48.426.

Dated this 25th day of September 2024 in Sheboygan, Wisconsin.

Electronically signed by
Attorney Andrew H. Morgan
Guardian ad Litem for A.N.W., Jr.
State of WI Bar No. 1001491

CERTIFICATION

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 monospaced word font. The length of this brief is thirteen pages.

Electronically signed by:

Attorney Andrew H. Morgan
State Bar of WI 1001491
September 25, 2024