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SUPREME COURT

State of Wisconsin
Supreme Court
Appeal Case No. 24 AP 985

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

Dane County,
Petitioner-Respondent-Respondent,
v.
J.B.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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Statutes

Wis. Stats. §48.42611, 12, 13

ISSUE PRESENTED

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

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 Dane County Circuit Court to terminate the parental rights (hereinafter, TPR) of J.B. to his child, R.B. on January 12, 2023. (Record, 3:1-8) The petitions alleged grounds under Wis. Stat. § 48.415(2), Continuing Need of Protection or Services. *Id.*

J.B. initially contested the allegations in the petition, but at a hearing on October 13, 2023, J.B. was defaulted for failing to appear in court. (88:1, 88:17) The court heard testimony on grounds and the matter was continued for a disposition hearing on October 30, 2023. (88:17-18)

At the disposition hearing, testimony was received from the case worker, Diane Dengler, S.A., the foster parent, and J.B., the biological mother. (86:6, 86:24, 86:37)

Diane Dengler, a social worker with 19 years of experience, was assigned to R.B.'s case in April 2021. (86:8-10) She testified that R.B. was placed into foster care in January 2020 and has resided in the Acker Foster Home since then. (86:8-10) She has observed positive interactions between R.B. and his foster parents and mutual affection. (86:8-10) At the time of removal from his mother's care, R.B. was almost five years old. (86:7-8) He will be nine in January. The termination of parental rights is based on the continuing need for protection or services. (86:7-8) R.B. has been living in the A. Foster Home since January 2020. (86:9-10) He has a positive relationship with his foster parents and another child in the home, Elliott. (86:9-10) The A's are an adoptive resource for R.B... (86:9-10). R.B. has needed extra

help in school and currently has an Individualized Education Program (I.E.P.). (86:10) R.B. has been part of an Individual Education Plan (IEP) process and has received individual counseling between 2019 and now. (86:11) The A.'s, have been responsible for ensuring R.B.'s consistent participation in therapy. (86:11) There are no concerns about the A.'s understanding of R.B.'s mental health needs or their ability to meet them in the future. (86:11)

R.B.'s relationship with his mother is described as both positive and negative, with R.B. expressing concerns about his mother's unpredictable behavior. (86:12-13) R.B. also has relationships with other maternal family members, including an aunt and cousins. (86:12-13) The Department had explored the possibility of the maternal aunt becoming a long-term placement for R.B., but she declined due to her own family needs. (86:12-13)

Most of the visits between R.B. and his mother, Ms. J.B., have been supervised. (86:13-15) In spring 2023, visits were briefly partially supervised but returned to full supervision after an incident in April where Ms. J.B. took R.B. to unplanned locations and behaved erratically. (86:15)

Dr. Claire Patterson conducted an Attachment and Bonding Psychological Evaluation on Ms. J.B. at the Department's request. (86:19) The report diagnosed Ms. J.B. with PTSD and borderline personality disorder and identified an insecure attachment between R.B. and his mother. (86:19) She believes consistent positive interactions are required to repair an insecure attachment between a child and a parent. (86:20-21)

Ms. Dengler stated that she had observed the A's, the foster parents, making attempts to co-parent with Ms. J.B... These attempts were primarily observed through email communications over the years, which included coordination of contact, updates on concerns, and positive developments regarding R.B. (86:20-21) Ms. Dengler felt that Ms. J.B.'s mental health is a significant barrier preventing her from meeting her son's needs. (86:20-21) The unmanaged mental health issues result in unpredictable responses and decisions, which interfere with her ability to prioritize and understand her son's needs. (86:20-21)

S.A., the foster parent, testified about his experience with R.B., who had been in his care for four years. (86:27-28) S.A. described R.B. as a great kid with a kind heart who loves to read. (86:28) He also mentioned that R.B. has made progress in school despite struggling with math. (86:28) S.A. expressed no concerns about his ability to continue supporting R.B.'s education. (86:28) R.B. has a brotherly relationship with Elliott, another child in the home. (86:29) They engage in typical sibling activities such as arguing, watching movies together, sharing popcorn, and playing sports like baseball, basketball, and football. (86:29) R.B. has shown significant improvement in his ability to play these sports since his arrival. (86:29)

R.B. has visits with his aunt from his side of the family. (86:29) He is also involved with other extended family, including grandparents and cousins. (86:29) The foster parents are open to maintaining communication with R.B.'s half-siblings and his mother, Ms. J.B. (86:29)

R.B. is currently receiving therapy or counseling services at River Stone Counseling, which the foster parents are committed to continuing. (86:30-31) Elliott, R.B.'s foster brother, has a black mentor arranged by the foster parents, and they are willing to arrange a similar mentorship for R.B. in the future. (86:31) The foster parents, who are white, are committed to fostering and honoring R.B.'s blackness. (86:30-31) They take both children to an African American barber and attend the UMOJA conference, which focuses on white parents adopting children of different races. (86:30-31)

J.B., the mother, testified that she is familiar with the factors the court needs to consider in the dispositional hearing, one of which is the relationship between the parent and the child, (86:38) She expresses concerns about the foster care process, particularly the lack of co-parenting and the focus on keeping R.B. away from her. (86:44-45) However, she does not have specific concerns about the foster home where R.B. is currently placed. (86:45) She has been informed about R.B.'s doctor's appointments and school appointments. (86:45)

J.B. described her relationship with R.B. as great, filled with laughter, play, and happiness. (86:45) They engage in activities together during visits, such as reading and playing with toys. (86:45) She believes that R.B. is a happy child who smiles a lot, a sentiment echoed by the foster parent. (86:45)

Ms. J.B. further stated that she can provide a stable home. (86:58-60) She believes that she has been unfairly portrayed and that she has struggled with obtaining visitation. *Id.* She indicated that she is mentally stable and capable of caring for a child. (86:58:60)

Court's Findings

Judge Mitchell discussed the factors he must consider in deciding whether to terminate parental rights. (86:56-58) These include the child's best interest, the likelihood of adoption post-termination, the child's relationship with the parent, and the stability of the child's current environment. *Id.* The judge acknowledges the emotional toll of the decision and emphasizes that legal severance does not sever love. *Id.* He also notes the importance of the child's need for consistency and stability. (86:58) Judge Mitchell decided that it was in R.B.'s best interest to terminate Ms. J.B.'s parental rights. (86:58)

After testimony and arguments, the court found that it was in R.B.'s best interest that the parental rights of J.B. should be terminated. (86:53-60, 67:1) It is from this order that J.B. appealed.

The court of appeals affirmed the trial court in a decision dated July 24, 2024. (Appendix.) J.B. now petitions for review.

ARGUMENT

I. There was insufficient evidence to determine that termination of J.B.'s parental rights was in R.B.'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. *Dane 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.B.'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.B. believes that the court's weighing was erroneous given the outcome and decision to terminate his parental rights.

The evidence was introduced at the dispositional hearing from J.B., the mother, testifying that she is familiar with the factors the court needs to consider in the dispositional hearing, one of which is the relationship between the parent and the child. (86:38) She expressed concerns about the foster care process, particularly the lack of co-parenting and the focus on keeping R.B. away from her. (86:44-45) However, she does not have specific concerns about the foster home

where R.B. is currently placed. (86:45) She has been informed about R.B.'s doctor's appointments and school appointments. (86:45)

J.B. described her relationship with R.B. as great, filled with laughter, play, and happiness. (86:45) They engage in activities together during visits, such as reading and playing with toys. (86:45) She believes that R.B. is a happy child who smiles a lot, a sentiment echoed by the foster parent. (86:45)

Ms. J.B. further stated that she can provide a stable home. (86:58-60) She believes that she has been unfairly portrayed and that she has struggled with obtaining visitation. *Id.* She indicated that she is mentally stable and capable of caring for a child. (86:58:60)

The evidence suggests that there is a substantial relationship between J.B. and R.B. that would lead to harm in its severance. Also, given the positive interactions displayed by R.B. during her contact with J.B., this would suggest that R.B. wishes not to terminate J.B.'s parental rights. Given that the other factors under sec. 48.426, fall as neutral on the issue of termination. These factors should hold a greater weight, given the overwhelming evidence against granting termination.

While a court may consider a range of factors in exercising 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.B.'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 found that it was R.B.'s best interest to terminate J.B.'s parental rights. These matters should be remanded for a new disposition hearing.

Dated: August 10, 2024

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

   
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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 2688 words.

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

Dated: August 10, 2024

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