STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Appeal No. 2024AP001174

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

E.S.,
Petitioner-Respondent,
vs.

K.R.K.
Respondent-Appellant.

APPEAL FROM THE ORDER TERMINATING PARENTAL RIGHTS ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE BRAD D. SCHIMEL PRESIDING

AMENDED GUARDIAN AD LITEM'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

I. Whether Wis. Stat §48.426 and the statutory scheme controlling the best interests stage of the termination-of-parental rights proceeding is unconstitutional on its face.

II. Whether K.R.K. is entitled to a new dispositional hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. §§ 752.31(2) and (3), and therefore, a request for publication is prohibited under Wis. Stat. § 809.23(4)(b). The Guardian ad Litem does not request oral argument.

STATEMENT OF THE CASE AND FACTS

The minor child, J.S., was born on October 20, 2010. The Petition for Termination of Parental Rights was filed on August 9, 2024, in the Waukesha County Circuit Court. The petition alleged abandonment and failure to assume parental responsibility under Wis. Stat. §48.415(1)(a) and §48.415(6). K.R.K. contested the petition and the case was set for trial. E.S. filed a Motion for Summary Judgment, and the Circuit Court granted the Motion for Summary Judgment as to the grounds portion of the case. Subsequently, jury trial was removed, and the matter was set for Disposition.

The case proceeded to the disposition hearing. During that hearing, the circuit court heard arguments from both parties and received evidence. The court found that it was in the best interest of J.S. to terminate the rights of K.R.K. Through counsel, K.R.K., then filed the Notice of Intent to Pursue Post-Dispositional Relief. Additionally, K.R.K., through counsel, filed a Notice of Appeal.

STANDARD OF REVIEW

Whether a statute and the application of a statute are constitutional are questions of law that are reviewed independently. *Dane Cnty. Dep't of Human Servs. v. Ponn P.*, 2005 WI 32, ¶14, 279 Wis. 2d 169, 694 N.W.2d 344.

ARGUMENT

I. Under *Santosky v. Kramer*, the Wisconsin statutory scheme controlling the best interests stage of the termination of parental rights proceeding is constitutional.

A parent's interest in the parent-child relationship and the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982). Through the protections of the Fourteenth Amendment, a parent's rights cannot be terminated without due process. *Id*. at 747. In Wisconsin, through a two-step inquiry, parents are afforded due process during the first step. Wis. Stat. §48.415.

Terminating parental rights involves a two-step inquiry that begins with the moving party pleading one of ten grounds for involuntary termination under Wis. Stat. §48.415. First, the moving party must prove these grounds by "clear and convincing evidence." Wis. Stat. §48.31(1). The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights. Wis. Stat. §48.427(2). However, if the court finds grounds exist for the termination of parental rights, the court shall subsequently find the parent unfit. *Sheboygan Cnty. Dep't of Health & Human Servs. v. Julie A.B*., 2002 WI 95, ¶26, 255 Wis. 2d 170, 648 N.W.2d 402.

Once the court determines that grounds have been pled sufficiently by clear and convincing evidence, the court moves on to the second step of the inquiry. Wis. Stat. §48.426. The primary focus of the dispositional hearing in the second step is the child's best interests. *Sheboygan Cnty v. Julie A.B.*, 2002 WI 95, ¶30. However, with no law cited as support, Respondent-Appellant claims that the lack of a clear and convincing evidentiary standard at the second step is facially unconstitutional. Appellant's Br. 13. Because this challenge attacks the law itself as drafted by the legislature, a presumption of constitutionality exists. *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶1, 333 Wis. 2d 273, 797 N.W.2d 854. Therefore, it is the Respondent-Appellant's responsibility to persuade the court that the heavy burden to overcome the presumption of constitutionality has been met and that there is proof beyond a reasonable doubt that the statute is unconstitutional. *Id.* However, Respondent-Appellant fails to meet this heavy burden.

A. Applying *Santosky* to the Wisconsin Statutory Framework

i. First Step: Fact-Finding Hearing

There is no dispute that a parent's interest in a parent-child relationship is a fundamental liberty interest protected by the Fourteenth Amendment. *Santosky v. Kramer,* 455 U.S. at 753. When there is a fundamental liberty interest at risk, there must also be a fundamentally fair procedure in place. *Id.* at 747. As such, the Wisconsin legislature requires the moving party in a TPR proceeding to prove by clear and convincing evidence that there are grounds to find a parent is unfit. Wis. Stat. §48.31(1). Under *Santosky*, this procedure is considered fundamentally fair and protects the fundamental rights of the parent. *Santosky,* 455 U.S. at 748. Upon a finding of parental unfitness, the child's best interests become the paramount consideration. Wis. Stat. §48.426(2).

Guardian ad Litem does not dispute that *Santosky* requires a clear and convincing evidence standard at the fact-finding stage in the first step of the inquiry. However, by the Respondent-Appellant's admission, and the *Santosky* Court ruling, this clear and convincing evidentiary standard does extend beyond the first step in the TPR inquiry. Appellant's Br. 9; *Santosky,* 455 U.S. at 760-61. While Respondent-Appellant would like to expand the clear and convincing standard beyond the first step, a reading of the *Santosky* ruling does not provide for that action. Petitioner-Appellee satisfied the burden of proof required at the first step of the inquiry on a motion for summary judgment.

ii. Second Step: The Dispositional Phase

Once a finding of unfitness has been made, the inquiry moves to the second step. S*heboygan Cntv. v. Julie A.B.*, 2002 WI 95, ¶28. During this phase, the court considers the best interests of the child as the prevailing factor when determining whether to terminate a parent's rights. Wis. Stat. §48.426(2).

The main part of Respondent-Appellant's central argument is that a parent maintains their fundamental interest throughout the two-step inquiry. Guardian ad Litem does not dispute this. Case law further supports that statement. However, case law does not support the Respondent-

Appellant's extension of the corresponding clear and convincing evidentiary burden. The Respondent-Appellant argues that the Petitioner-Appellee must prove, by clear and convincing evidence, that terminating a parent's legal rights is in the best interests of the child at the dispositional stage. Appellant's Br. 7-16. In making this argument, Respondent-Appellant relies solely on *Santosky* for support. *Id*. However, the *Santosky* decision does not address the burden of proof at the dispositional phase. In fact, while the *Santosky* Court did not discuss the dispositional phase in-depth, it mentioned that courts may assume at the dispositional stage that the interests of the child and the natural parents diverge. *Santosky,* 455 U.S. at 760. Immediately after stating that, the *Santosky* Court cited to Fam. Ct. Act § 631, which states in part: "[the] judge […..] has no obligation to consider the natural parents' rights in selecting dispositional alternatives." *Id*. While the *Santosky* Court did not go further in its analysis, this acknowledgment of a diversion of interests is consistent with Wisconsin's procedure at the dispositional hearing and goes directly against what the Respondent-Appellant is arguing for.

The Respondent-Appellant fails to cite any Wisconsin case law addressing whether evidence concerning the child's best interests must meet a specific standard of proof. Simply put, no cases supporting this argument of an additional clear and convincing evidentiary burden at the dispositional phase exist. *State v. A.G.* 2023 WI 61, ¶33, 408 Wis. 2d 413, 439, 992 N.W.2d 75, 88. In *State v. A.G.*, the Wisconsin Supreme Court acknowledged that the circuit court wrongly held the State to a clear and convincing standard at the dispositional phase. *Id.* at ¶4. While holding the State to this standard did not raise an issue suitable for reversal, the Court made it very clear that this was not a required burden under Wisconsin law. *Id.* at ¶33. It is clear by the language of Wis. Stat. §48.46(2) that the legislature did not intend to impose a burden on the moving party to prove that termination is in the child's best interests. *Id*.

B. Respondent-Appellant fails to meet their heavy burden to overcome the presumption of constitutionality

While Respondent-Appellant may seek to raise a facial challenge to the constitutionality of the best interest stage, Respondent-Appellant fails to provide evidence showing that the State

cannot enforce the law under any circumstances. *Blake v. Jossart*, 2016 WI 57, ¶26, 370 Wis.2d 1, 884 N.W.2d 484, 492. While a parent's fundamental interest remains present throughout the dispositional phase, the second phase focuses exclusively on the best interests of the child. Wis. Stat. §48.426. Therefore, by prioritizing the best interests of the child at the dispositional phase, as required by Wisconsin law, and acknowledged by the *Santosky* Court, the circuit court appropriately ruled that terminating the Respondent-Appellant's parental rights was in the child's best interest.

II. K.R.K is not entitled to a new dispositional hearing.

Guardian ad Litem is unclear as to whether Respondent-Appellant would like this court to decide consistent with its holding in *State v. H.C.*, 2024 WI App 25, 411 Wis. 2d 672, 6 N.W.3d 288. On one page of their brief, Respondent-Appellant describes this court's decision as "suspect." Appellant's Br. 17. On the very next page, Respondent-Appellant asks this court to find that K.R.K. is entitled to a new dispositional hearing based on the holding in *State v. H.C.* Appellant's Br. 18. Throughout this brief, Guardian ad Litem has maintained the position that Wis. Stat. §48.426 does not explicitly state that the moving party must meet a clear and convincing burden of proof at the dispositional stage. This argument is consistent with the court's decision in *State v. H.C.* This court held that Wis. Stat. §48.426(3) is not facially unconstitutional for not defining a specific burden of proof at the dispositional phase. State v. *H.C.,* 2024 WI App 45. And if this court relies on its decision in *State v. H.C.*, Guardian ad Litem requests a conclusion in the present case consistent with that decision.

As this court stated in *State v. H.C.*, the ultimate decision to terminate parental rights is committed to the circuit court's discretion. *Id.* at ¶38. This court further stated that it will not overturn a discretionary decision if it applied the correct standard of law to the facts and reached a conclusion that a reasonable judge could reach. *Id.* The circuit court in the present case heard arguments from both parties and received evidence that helped them when looking at the factors outlined in Wis. Stat. §48.426(3). Upon analyzing the evidence presented, the court determined that terminating K.R.K.'s parental rights was in the best interests of the child. If the *State v. H.C.*

court saw fit to affirm the circuit court's decision to terminate H.C.'s parental rights even though the statute did not state a burden of proof, and while relying on the circuit court's discretion, this court should also find that K.R.K. is not entitled to a new dispositional hearing.

CONCLUSION

For the reasons listed above, Guardian ad Litem asks that this court find that Wis. Stat. §48.426 is not facially unconstitutional and that K.R.K. is not entitled to a new dispositional hearing.

Dated at Waukesha this 29th day of July, 2024

Thelen & Associates, LLC
Guardian ad Litem

Electronically signed by Alina R. Flink

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CERTIFICATIONS BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1814 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 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 or 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 portions 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 at Waukesha this 29th day of July, 2024

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