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**08-09-2024**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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No. 2024AP001174

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

E.S.,

Petitioner-Respondent

vs.

K.R.K.

Respondent-Appellant

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

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RESPONDENT-APPELLANT'S REPLY BRIEF

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The guardian ad litem argues that *Santosky v. Kramer*, 455 U.S. 745 (1982) only applies to the grounds phase of the termination process. See guardian ad litem's brief at page 2. It is true that the court in *Santosky* only addressed the grounds phase of the TPR process. However, the reason for this was because the only challenge made by the parents in that case was to the grounds phase of the termination process. See *Santosky v. Kramer*, 455 U.S. at 751-752. The parents did not challenge the dispositional framework as KRK does in this case.

Nonetheless, KRK contends, as discussed in KRK's brief-in-chief at pages 7 to 16, that the principles which require a clear and convincing standard at the grounds phase, equally require such a standard at disposition.

Next, the guardian ad litem argues that KRK fails to "cite any Wisconsin case law addressing whether evidence concerning the child's best interests must meet a specific standard of proof." See guardian ad litem's brief at page 3. This is incorrect. KRK's brief specifically discusses this court's decision in *State v. H.C.*, No. 2023AP1950 (Wis. Ct. App. March 5, 2024). See KRK's brief-in-chief at pages 16 to 19. Curiously, the guardian ad litem's brief

likewise discusses this case. See guardian ad litem's brief at pages 4-5. In *State v. H.C.*, this court stated as follows:

Having considered all three factors, we therefore concluded that due process requires that the best interest of the child be proven by a preponderance of the evidence standard at the dispositional phase of a proceeding to terminate parental rights. *State v. H.C.* at ¶ 34.

While *State v. H.C.* has only persuasive value, it is nonetheless a Wisconsin case which specifically addresses whether evidence concerning a child's best interests must meet a specific standard of proof.

Further, as discussed in KRK's brief-in-chief, while KRK obviously agrees with this court's assessment that due process requires the application of a burden of proof, KRK disagrees with other aspects of the court's decision. Primarily, to the extent that due process indeed requires application of a burden of proof, the statute on its face is unconstitutional because it fails to provide for any such burden.

*In State v. Bush*, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the Wisconsin Supreme Court explained the implications of a facial challenge to the constitutionality of a statute. The court explained that "if the facial attack is correct, the statute would be null and void, and the court would be without the power to act

under the statute.” See *id.* at ¶17. Such is the case here. The remedy is for the legislature to amend the statute, and for this court to vacate the judgment terminating KRK’s parental rights. As discussed in KRK’s brief-in-chief, *State v. H.C.* is problematic in that it imposes a burden of proof, albeit a lesser burden of preponderance of the evidence, and imposes it upon both parties. *State v. H.C.* additionally applies such burden of proof to the facts set forth in the record to affirm the judgment. See Ap.18-19. In this regard, *State v. H.C.*, while only persuasive in nature, overreaches. The proper result was for the court to find the statute facially unconstitutional, and vacate the judgment. Such is the result this case requires.

### *CONCLUSION*

For the above reasons and those stated in KRK’s brief-in-chief, this court should vacate the order terminating parental rights.

Dated this 9<sup>th</sup> day of August 2024.

Electronically signed by:

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CERTIFICATION 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 563 words.

Dated this 9<sup>th</sup> day of August 2024.

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