STATE OF WISCONSIN

SUPREME COURT

Case Nos. 21AP2035-2039

In re the Termination of Parental Rights to: A.P., Z.W., Z.W., Z.W., and Z.W., Persons Under the Age of 18:

STATE OF WISCONSIN,
Petitioner-Respondent-Respondent,

v.

N.H.,
Respondent-Appellant-Petitioner.

GUARDIAN AD LITEM'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

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INTRODUCTION

This petition concerns a typical appeal of a termination of parental rights (TPR) case. It asserts that the evidence did not support the jury verdicts in the first phase that grounds existed to terminate parental rights or the trial court's determination in the second phase that it was in the children's best interests to terminate parental rights.

While N.H. may disagree with the jury verdicts and the trial court's ultimate decision to terminate her parental rights, this petition presents "no special and important reasons" for this Court's review. *See Wis. Stat. §809.62(1)(r) (Supreme Court review is a matter of discretion, not of right, and will be granted only when special and important reasons are presented.)* The Court should deny this Petition for Review.

Like all TPR cases, this case consists of two phases. The first phase is the grounds phase a court or jury determines whether there are reasons to terminate N.H.'s rights to her children. This phase focuses on the parent. *See Sheboygan Cnty. H.H.S. v. Julie A.B.,* 2002 WI 95 ¶25, 255 Wis. 2d 170, 648 N.W.2d 402. In the present case, a jury found that there were two grounds or reasons to terminate N.H.'s parental rights: that she failed to assume parental responsibility for her children pursuant to Wis. Stat. § 48.415(6) (hereinafter "failure to assume") and that the children continued to be in need of protection and care pursuant to Wis. Stat. § 48.415(2). (hereinafter "continuing need")

When a factfinder determines that there are grounds to terminate parental rights, Wis. Stat. § 48.424(4) requires that the trial court find the parent unfit.

Once grounds are found, a trial court changes its focus from the parent to the child. Wis. Stat. § 48.426(2) This second phase requires the trial court to decide whether termination of parental rights is in a child's best interests. *See Julie A.B. at ¶¶ 24-28*. The Court must consider the six factors listed in § 48.426(3)(a-f) (hereinafter "best interests" factors)

The trial court in this case determined that it was in all the children's best interests to terminate parental rights after considering each factor.

N.H. maintains that the Supreme Court should take this case because the trial court's exercise of discretion in this case represents a real and significant questions of state and federal constitutional law. (Pet. for Review at 5). She asserts that the Fourteenth Amendment and Wis. Stats. §§ 48.31 and 48.42 requires the trial court, at a jury trial, to find by clear and convincing evidence that all the elements of the continuing need and failure to assume ground have been satisfied before making an unfitness finding. (See Pet. for Review at 10)

N.H. suggests that her constitutional rights were violated because the evidence was not sufficient to support the verdicts and the trial court erred when it did not review the evidence after the jury verdicts were returned. Essentially N.H. asserts that the trial court should make a separate unfitness finding. This issue was not raised before the lower courts and should not be addressed by the Supreme Court. It is a fundamental principle of appellate review that constitutional issues must be preserved in the circuit court to be raised on appeal. *State v. Huber,* 2000 WI 59 ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

Even if N.H. properly raised the issue in the lower courts, a trial court is not required to make a separate unfitness finding after a jury returns favorable verdicts. The only determining factor for unfitness is a finding of grounds. Wis. Stat. § 48.424(4).

N.H.'s putative constitutional challenge to the continuing need and the failure to assume termination grounds is illusory. The jury's findings as to the continuing need ground were factual determinations based the jury's assessment of the child welfare agency's efforts to provide court ordered services to N.H. The jury's finding that N.H. failed to assume parental responsibility was a factual determination under the well-established "totality of the

circumstances" analysis for determining whether N.H. had a "substantial parental relationship" with the children.

N.H.'s quarrel with how the jury assessed the reasonable efforts of the child welfare agency and how the jury assessed the totality of her relationship with the children does not give rise to a basis for Supreme Court review as a constitutional issue.

The second issue N.H. raises is the trial court's determination under Wis. Stat. § 48.426(3)(a)-(f) that termination of parental rights was in the children's best interest. N.H. argues that the court abused its discretion in making this determination because it did not consider that N.H. loved her children and expressed a desire to have them ultimately returned to her. (Pet. for Review at 17)

It is clear from the record that the trial court examined the evidence properly, considered each factor under Wis. Stat. § 48.426(3), and reached a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). N.H. claims that review of the trial court and Court of Appeals' decision is appropriate but does not state why the trial court's discretionary best interests decision represents an issue of significance to the Court. She merely notes that the Supreme Court should review this case because it involves issues of significance to the petitioner. (Pet. for Review at 6)

The Court should deny this Petition for Review. It does not meet any of the criteria of Wis. Stat. § 809.62(1) for review. This case involves the application of well-settled principles to a factual situation.

STATEMENT OF THE CASE

Background and CHIPS Proceedings

N.H. has five children. Her first three children, A.P., Z.C.W., and Z.MN.W. were born on July 25, 2012, August 1, 2014, and July 20, 2015, respectively. (R. 107:54)

They were removed from N.H.'s care in June of 2016 when her third child, Z.MN.W. was brought to the hospital and diagnosed with failure to thrive. (R. 123:53-54) Z.MN.W. had a protruding stomach and was described as frail. *Id.* Her rib bones and the bones of her arms were plainly visible. *Id.* At 11 months of age, Z.MN.W. weighed just over nine pounds after being born weighing eight pounds. (R. 123:63,76)

The trial court took temporary physical custody of Z.MN.W. but denied the request as to the two older children. (R. 123:65) A Child in Need of Protection and Services (CHIPS) petition was filed as to Z.MN.W. only. The two older children were then sent to live with relatives in Chicago, Illinois. (R. 103:46)

N.H. was ultimately convicted of child neglect causing bodily harm and sentenced to probation. (R. 123:93) Child welfare reports indicated that prior to the children's removal that N.H. was transient and at one point lived in a car with the children. (R. 123: 62,66:107:54,81) There were also reports of domestic violence between N.H. and the father of the four youngest children. (R. 123:82-83; 107:68) N.H. further admitted abusing prescription medication, and alcohol and using those substances while pregnant with all five children. (R. 123:88)

A CHIPS Dispositional Order was entered on January 10, 2017. Just prior to the Order being entered N.H. gave birth to her fourth child, Z.DN.W. on October 27, 2016. (R 107:6)

The Dispositional Order required the child welfare agency to make reasonable efforts to provide case management services, a psychological evaluation and any recommended

services in the evaluation, a parenting assessment, and visitation services to N.H. (R. 103:30) N.H. was also required to meeting particular conditions for behavioral change prior to Z.MN.W. being returned to her care. *Id.*

In August of 2017, the child welfare agency began a trial reunification of Z.MN.W. with N.H. even though the conditions and services were not completed by N.H. (R. 103: 47, 57; 107:14) N.H.'s two older children that were not taken into protective custody by the court also came back to live with N.H. during this time.

On October 31, 2017, N.H. gave birth to her fifth child, Z.CN.W.

On November 27, 2017, the child welfare agency received another referral for an injury to Z.MN.W as well as neglect and injuries to the other children. When they investigated, it was discovered that the oldest child, A.P., had a scar above her eye. (R. 103:87) A.P. reported that the scar was from when N.H. punched her. (R: 103:91) A.P. also had bruising on her abdomen and nipple. (R. 103:92)

The second oldest child, Z.C.W. had a loop mark on the bottom of his foot and bruising on his back. (R. 103:93; 107:25) Z.MN.W., the third child who was home on a trial reunification and still under a Dispositional Order, had a black eye and scratches on her face. (R. 103:93) She appeared to have lost weight again. *Id.*

N.H.'s fourth and fifth children, Z.DN.W and Z.CN. W. appeared small and underweight. (R. 103:87) Z.DN.W. had a laceration on her lip that should have received stiches and a torn frenulum. (R. 103:87-88, 107:23) At the hospital she was diagnosed with failure to thrive, and it was discovered that she had two broken bones in her arm. (R. 103:95) Z.CN.W., at one month old, was underweight and also had a torn frenulum. (R. 103:95)

The two oldest children and two youngest children were taken into protective custody and the trial reunification on the third child was revoked and she was returned to her foster home. (R. 103:97)

In addition to having her probation immediately revoked, N.H. was charged with physical abuse- intentional causation of bodily harm. (R. 107:26) She was convicted and sentenced to six to eight years in prison. (R. 107:89) She was ordered to have no contact with any of her children. (R. 107:26)

On June 5, 2018, CHIPS Dispositional Orders were entered on the four children who were previously not under a Dispositional Order. (103: 30-31; 107:44) These Dispositional Orders were similar to the Dispositional Ordered entered on the third child, Z.MN.W, but added three additional conditions: control your mental health; commit no crimes and control your emotions (physical abuse). (R. 103:42; 107:64)

TPR Proceedings

On February 3, 2020, the State of Wisconsin filed a Petition to Terminate the Parental Rights (TPR) of N.H. to all her children pursuant to Wis. Stats. § 48.415(2) ("Continuing Need") and § 48.415(6) ("failure to assume parental responsibility"). (R. 6)

Grounds/Fact-Finding Hearing

On April 5, 2021, a jury trial commenced to determine whether there was evidence to support the above grounds to terminate parental rights. (R. 105) N.H. testified she has remained incarcerated since her four other children were removed from her care and that the no contact order with her children has remained in place.

As to court-ordered services, N.H. reported she has participated in parenting classes at the prison. (R. 103:7,12; 107:33) She also reported she completed a psychological evaluation, completed a couple of sessions with a mental health professional (PSU), and takes medication. (R. 107:31-33) She

reports she is on a waiting list for anger management. (R. 103:92; 107:34) She has not participated in individual therapy. (R. 103:92)

N.H. never signed consents for her case manager to obtain information concerning these services or to speak to N.H.'s prison social worker about the services. (R. 103:41,87; 107:33) The case manager could not even discuss the Dispositional Order with the prison social worker. (R. 103:87) N.H.'s case managers were unaware that she had completed a psychological evaluation at the prison or that she had participated in any programming other than the 2019 core parenting class. (R. 103:40; 91) A case manager testified that without N.H.'s releasing the psychological evaluation and other mental health information, she cannot assess whether this condition is met. (R. 103:102)

As to making behavioral changes and meeting the conditions, N.H. admitted that she has not controlled her emotions. She was placed in segregation four separate times for a total of 120 days. (R. 107:37-38,44)

N.H. has also failed to understand her own mental health and how that impacts her parenting. She does not even know what her diagnosis of bipolar means. (R. 107:50) N.H. reported that when she tried to commit suicide when A.P. was in her care, A.P. was there and said "Mommy, I need you."

N.H. did not demonstrate that she understood her children's needs or that she could meet those needs. Although she admits receiving information about the children's medical care, education, and other services, she did not contact any of the professionals to learn about her children. (R. 103:51,8398; 107:39) She was able to contact others through her prison social worker but chose not to. (R. 103:14, 52) She attended one Individualized Education Plan (IEP) meeting for one child over the four years she has been in prison. (R. 103:100; 107:41)

When one case manager discussed what she learned in her parenting class in 2019 with N.H., N.H. could give a

general overview of working on relationships or redirecting her children but struggled to apply that information to her own children. (R. 103: 91)

N.H. connected with the children's therapists briefly in October of 2020. (R. 103: 9,99;107:44) The contact was initiated by the therapist. (R. 103:8) At the time of trial N.H. did not know of any diagnosis for any of the children. (R. 107:108) Interestingly, she did not tell the children's therapists about trauma the children may have experienced in her care such as sleeping in a car, seeing her attempt suicide, or her use of drugs while pregnant. (R. 107:108)

N.H. failed to demonstrate that she understood the trauma the children went through and the impact her actions were having on them or the severity of their injuries. (R. 103:45) For example, N.H. physically disciplined A.P. for bathroom accidents. (R.103:109). A.P. still wears pullups at night sometimes. Id.

N.H. continued to fail to understand the trauma her children experienced throughout the case. Even though she was informed multiple times that she could not have contact with the children because of the criminal court order, she attempted contact with the children and attempted to have them respond to her. (R. 103: 43,97-98; 107:42-43)

Four of the five children were in therapy at the time of the Disposition hearing. (R. 103: 112) A.P. is diagnosed with reactive attachment disorder, Z.C.W. is diagnosed with Post Traumatic Stress Disorder (PTSD) and Attention Deficit Hyperactivity Disorder (ADHD), Z.MN.W. is diagnosed with PTSD, and Z.DN.W. is diagnosed with adjustment disorder and PTSD. (R. 103:112-114) N.H. has not articulated any of her children's mental health diagnosis and lacks insight as to her children's needs. (R. 103:114)

Case manager, Lauren Miller, summarized N.H.'s actions noted above on the case and testified that N.H. did not

meet her conditions at of the date of the filing of the TPR petition, February 3, 2020. (R. 103:101)

As to the failure to assume ground, N.H. was never responsible for the daily supervision and care of her children. (R. 103:54,116) When she did have the children in her care, they were neglected and abused as described above. She has never provided financial support for her children when they were not in her care. (R 103:54) N.H. never provided sufficient food to meet their nutritional needs. (R. 103:54,116) N.H. agreed that someone else has been providing daily care, protection, and education to her children since they were removed in 2017. (R. 107:49)

After three and one-half days of testimony, the jury returned verdicts favorable to the State of Wisconsin, finding that N.H. had failed to assume parental responsibility as to each of her children and that all her children continued to be in need of protection and services. On April 8, 2021 the trial court entered judgment on the verdicts and found N.H. unfit. (R. 104: 68-73)

Best Interests Hearing/Disposition

On April 8, 2021, the trial court began hearing testimony concerning the best interests of the children. (R. 121)

The five children are placed in three different foster homes. All the foster parents work together to maintain at least monthly contact. (R. 121:9) The case manager reports that the children are bonded to their foster homes and view their foster families as their family. (R. 121:6,8,11,13,14,17,115) If for some reason, their foster families are unable to adopt them, the children are adoptable and other placements could be located. (R. 121:23)

The children do not have a substantial relationship with N.H. that would be harmed by severing the legal relationship. (R. 121:46) All foster parents are open to future contact between the children and N.H. once the no-contact order is

done. (R. 121:48) The case manager did report that the third child, Z.NM.W. has asked about N.H. but she is the only one. (R. 121:45) Z.NM.W.'s foster parent has an expressed a desire to continue a relationship between Z.MN.W. and N.H. (R. 121:47,101)

The children have had contact with three maternal family members, the grandmother, the great grandmother, and an aunt. Although all three had periodic contact with the children, they were deemed not safe or appropriate for placement of any of the children. (R. 121:27-30) There were also periods of time that some of the children did not want contact with them. (R. 121:30) The case manager testified that the children did not have a substantial relationship with these relatives. (R. 121:32,40,44) The foster parents have maintained contact with some of the relatives and have expressed a willingness to allow the children to have contact with the maternal family in the future. (R. 121:32,37,45,95,123)

The children do not have a substantial relationship with their fathers. (R. 121:24) A.P.'s father is unknown. (R. 121:27) The father of the four youngest children has not had contact with his children for a long period of time. (R. 121:25) With regards to Z.C.W., who he allegedly sexually abused; the case manager testified it would benefit him to have his father's rights terminated. *Id.* There has been no contact with other paternal family members. *Id.*

The children have been separated from N.H. since 2017 when they were neglected and abused by her. (R. 121:51)

The case manager has no concerns about each of the children's placements providing a stable and permanent family life for the children. (R. 121:51, 52) The case manager described this set of foster parents as one of the "strongest knit set of foster parents as it pertains to siblings" that she has worked with. *Id.* If the children were left to linger in the foster care system, it would negatively impact them. *Id.*

The trial court also heard testimony concerning each child individually.

A.P. and Z.MN.W (First and Third Child)

A.P. is the oldest child of N.H.'s five children. She was almost 5 years old when she was removed and is currently 8 years old. (R. 107:48) Z.NM.W. is the third oldest child and was eleven months old when she was removed. She is now 5 years old. (R. 107:48 121:20) A.P. and Z.MN.W. live in the foster home of Kenneth and Maggie Oelke and they are her adoptive resource. (R. 121:5) The Oelkes are licensed to adopt and understand the children's special needs. (R. 121:16,18,90-91)

A.P. has resided with the Oelkes since February of 2021. (R. 121:6) Prior to February of 2021, she lived with the Oelke Family for six months in 2017 and maintained contact with them from that period through February of 2021. *Id.*

A.P. has recovered physically from her injuries but continues to have behavioral issues. She has struggled to focus on school and has required redirection. (R. 121:10) She is diagnosed with reactive attachment disorder. (R. 103:112) She is in individual therapy. (R. 121:18) She continues to have some instances of wetting the bed at night. *Id.* It is reported that this may be related to N.H.'s using physical discipline with her when she was younger and had accidents. (R. 121:63) These bed-wetting incidents have increased when she has had contact with the maternal family. *Id.*

Z.MN.W. has resided with the Oelkes since her original removal in June of 2016, except for the brief trial reunification with N.H. (R. 121:10) The case manager often sees her snuggled into Ms. Oelke for comfort when she is in the home. (R. 121:11)

Z.MN.W. was diagnosed failure to thrive when she was younger and continues to be monitored for that. (R. 121:21) She participates in occupational therapy due to sensory

concerns. *Id.* Behaviorally, Z.MN.W. is diagnosed with adjustment disorder and PTSD. (R. 103:112-114) She receives individual therapy. (R. 121:21) Her PTSD has caused her to act out with physical aggression on the bus and in the home. (R. 121:64-65) It was recently recommended that she undergo a neuropsychological evaluation. *Id.* The Oelkes understand these needs and continue to be committed to adopting her. (R. 121:21)

Both A.P. and Z.MN.W. have expressed a desire to be adopted by their foster parents. (R. 121:49-50)

Z.C.W (second child)

Z.C.W. was three years old when he was removed and is now six years old. (R. 107:48) Z.C.W. is placed in the foster home of Elizabeth and Travis Mueller who wish to adopt him and have been approved to adopt. (R. 121:5,16) He has been there since June of 2018. (R. 121: 13) They understand his special needs and are committed to meeting those needs. (R. 121:19)

Z.C.W. has recovered from his physical injuries but continues to struggle with the trauma he has experienced. A.P. previously resided in this home with Z.C.W. but was moved when there were some concerns about him sexually acting out with A.P. (R. 121:8) He disclosed at that time that he was sexually abused by his father and had witnessed sexual encounters. (R. 121:13)

Z.C.W. is diagnosed with PTSD and ADHD. (R. 103:112-114) He does receive individual therapy and has undergone a psychological evaluation. (R. 121:19) He was hospitalized due to his behaviors in December of 2019. *Id.* He has since continued in specialized treatment with a facility that focuses on youth who have difficulty with sexual perpetration. (R. 121:64)

Z.C.W. has also struggled with sleeping with the bedroom door closed or not having a night light. (R. 121:64)

He has some nightmares. *Id.* He describes his early years as his "bad life". *Id.* Z.C.W. has expressed a desire to be adopted by his foster parents. (R. 121:50)

Z.DN.W. and Z.CN.W. (Fourth and Fifth children)

Z.DN.W. was removed when she was one year old, and she is now four years old. (R. 107:47) Z.CN.W. was removed when she was two months old, and she is now three years old. (R. 107:47)

Z.DN.W. was diagnosed with adjustment disorder but that has been modified to PTSD. (R. 103: 112-114; 121:21). She participates in individual therapy. (R. 121:21) She exhibits physical aggression towards others including hair pulling, screaming, and biting. (R. 121:65) She does show some sensitivity to having enough food. (R. 121:65)

Z.CN.W. has some sensory related needs which require occupational therapy. (R. 121:22) Once she progresses in occupational therapy, the plan is to start mental health therapy. (R. 121:22) She displays many of the same behaviors that her sister does in the home. (R. 121:66) She frequently wants to be held and has also had trouble letting her foster mother out of her sight. (R. 121:67)

Both girls are placed together in the foster and proposed adoptive home of Mitch and Allison Romens. (R. 121:5) They were placed in the home in January of 2020. (R. 121:15) The Romens are licensed to adopt the children and are committed to meeting the needs of the children. (R. 121: 16,21,23,118)

After hearing all of the testimony, the trial court determined that termination of parental rights was in all the children's best interests on April 9, 2021. (R. 108:61)

On April 14, 2021, N.H. filed a Notice of Intent to Pursue Post-Disposition Relief. (R. 96) On November 29, 2021, N.H. filed a Notice of Appeal. (R. 133)

Court of Appeals

On February 22, 2022, the Court of Appeals rejected N.H.'s argument that there was insufficient evidence to support the findings that she is an unfit parent and that it was in the best interests of the children to terminate her parental rights. (Pet. for Rev. at 4)

The Court of Appeals examined the evidence related to each ground. As to the continuing need ground the Court of Appeals found that there was sufficient evidence to support the verdict that the child welfare agency made reasonable efforts to provide the court-ordered services. It noted that most of the barriers that N.H. faced in meeting the conditions for return can be attributed to herself including the convictions for abuse and neglect, the resulting no contact order, and her refusal to sign releases that would allow the case manager to verify her services in prison and to have access to the prison social worker to communicate. (Pet. for Review at 11, ¶ 18)

The Court of Appeals also determined there was sufficient evidence to support the failure to assume determination by the jury. The Court of Appeals considered N.H. 's actions throughout the entirety of the children's lives and their exposure to a hazardous living environment as required in *Tammy W. -G. v. Jacob T.,* 2011 WI 30, ¶¶ 22-23, 333 Wis. 2d 273, 797 N.W.2d 854. (Pet. for Review at 12, ¶20) The Court of Appeals further noted that N.H. failed to participate in the children's care after they were removed from her care including contacting their teachers, therapists, and medical providers. (Pet. for Review at 13, ¶ 22)

Finally, the Court of Appeals examined the trial court's determination that termination of parental rights was in the children's best interests. It determined that the trial court considered all of the factors in § 48.426 (3) as required in *Steve V. v. Kelley H.,* 2004 WI 47, ¶ 27, 271 Wis. 2d 1, 678 N.W.2d 856. The Court of Appeals opined that it was appropriate for the trial court to consider N.H.'s convictions and incarceration when a trial court examines whether a child has a substantial

relationship with a parent under §48.426(3)(c) (Pet. for Review at 14, ¶ 25) Consequently, it held that the trial court appropriately examined the relevant facts, applied the correct legal standard and reached a reasonable conclusion that termination of parental rights was in the children's best interests.

N.H. submitted a petition for this Court to review the lower courts' rulings on March 2, 2022. The guardian ad litem received the Petition for Review electronically on March 4, 2022 and by mail on March 7, 2022.

ARGUMENT

I. THE PETITION RAISES NO SIGNIFICANT CONSTITUTIONAL ISSUE APPROPRIATE FOR REVIEW BASED UPON THE TRIAL COURT'S ENTRY OF THE UNFITNESS FINDING AFTER A JURY RETURNED VERDICTS FINDING EVIDENCE TO SUPPORT TWO TPR GROUNDS.

A. Standard of Review

A parent's relationship with their child is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that no state shall "deprive any person of life, liberty, or property, without due process of the law." *U.S. Const. Amend. XIV, § 1: See also: Quilloin v Walcott,* 434 U.S. 246, 255 (1978). Substantive due process of law protects against governmental action that "shocks the conscience… or interferes with the rights implicit in the concept of ordered liberty." *State v. Jorgenson*, 2003 WI 105, ¶ 33, 264 Wis. 2d 157, 667 N.W.2d 318. In termination of parental rights cases, substantive due process protects against a state act that is "arbitrary, wrong, or oppressive, regardless of whether the procedures applied to implement the action were fair. *Monroe County Department of Human*

Services v. Kelli B., 2004 WI 48, ¶ 1, 271 Wis. 2d 51, 678 N.W.2d 831.

The application of a TPR ground such as the continuing need or failure to assume ground must be narrowly tailored to meet the State's compelling interest of protecting a child from an unfit parent. *Winnebago County Dept. of Soc. Servs. v. Darrell A.,* 194 Wis. 2d 627, 639, 534 N. W.2d 907 (Ct. App. 1995)

In this case, N.H. asserts that that because there was insufficient evidence to support the jury's verdicts, that she was deprived of a fair trial as guaranteed by the Constitution.

Review of a jury's verdict that a ground has been established and the determination of whether the evidence presented to a jury was sufficient to sustain its verdict is a question of law. *State v. Booker,* 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676. A jury's verdict will be sustained if it is supported by credible evidence. *State v. DeLain,* 2005 WI 52, ¶ 11, 280 Wis. 2d 51, 695 N.W.2d 484. The allegations must be proven by clear and convincing evidence. *Oneida County Dep't of Soc. Servs. v. Nicole W.*, 2007 WI 30 ¶ 12, 299 Wis. 2d 637, 728 N.W.2d 652. In termination of parental rights cases, a court should be mindful that termination of parental rights is a severe action taken by a state which results in the permanent severance of the parent-child relationship under the law. *Sheboygan County Dept. of Health and Human Servs. v. Tanya M.B. and William S.L.,* 2010 WI 55 ¶ 49.

There was sufficient evidence, consistent with a parents' constitutional rights, for the jury to conclude that the children were in continuing need of protection and services pursuant to §48.415(2) and that N.H. failed to assume parental responsibility pursuant to §48.415(6). N.H.'s abusive history and neglectful treatment of the children, the harmful environment she placed them in, as well as her failure to understand and follow up with their treatment needs related to their trauma falls short of the required "substantial" parental

relationship and has caused the children to be in continuing need of protection and services

B. The Continuing Need of Protection and Services Verdict was supported by sufficient evidence.

The Continuing Need ground under § 48.415(2) has three elements: (1) that the child has been outside the home for a cumulative total of 6 months or longer, (2) that the child welfare agency has made a reasonable effort to provide court ordered services and (3) that the parent has failed to meet the conditions established for the safe return of the children to the home. *See Wis. JI: 324; § 48.415(2).*

N.H. asserts that DMCPS failed to implement the orders of the CHIPS Dispositional Order, specifically the visitation order, and failed to maintain reasonable contact with her. To support her argument that DMCPS failed to implement the Dispositional Order, N.H. simply notes that the CHIPS Dispositional Order did not have a 'no contact' provision in it and that visitation should have been provided. In making this argument, N.H. chooses to disregard the evidence which showed that a criminal court ordered no contact between N.H. and her children. N.H. fails to provide a legal basis for the notion that the child welfare agency did not have to abide by the criminal court order.

As to the second prong of his argument that the jury's verdict on the Continuing CHIPS ground was not supported by the evidence, N.H. alleges that DMCPS did not maintain reasonable contact with N.H. while she was at the county jail or in prison. N.H. does not provide an argument as to what 'reasonable contact' would be or why the contact that did occur was not reasonable.

This argument should be analyzed under the second element of the Continuing Need ground- whether "the agency responsible for the care of the child and family has made a

reasonable effort to provide the services ordered by the court." Wis. Stat. § 48.415(2)(a)2.b "Reasonable effort" is defined as an "earnest and conscientious effort" to provide court ordered services taking into account " the characteristics of the parent or child, the level of cooperation of the parent, and other relevant circumstances of the case". § 48.415(2)(a)2a

The evidence presented in this case established that the child welfare agency consistently reached out to N.H. while she was in custody and provided information to her. However, the agency was hampered by N.H.'s refusal to allow them to speak to her social worker or to provide them with information as to services she was receiving in prison. The reasonable effort standard allows a court to take into account N.H.'s failure to cooperate with the agency. It also allows a jury to consider other circumstances such as N.H.'s regular stays in segregation for behavioral issues and the criminal court's order that N.H. have no contact with her children.

The record in this case is filled with credible evidence that supports the jury's finding that the child welfare agency made a reasonable effort to provide the services ordered by the court to the extent they were able. Although not challenged by N.H., the record also supports the jury's determinations on the other elements of the Continuing Need ground.

C. The Failure to Assume Parental Responsibility Ground was supported by sufficient evidence.

The Failure to Assume Parental Responsibility ground under § 48.415(6) requires a factfinder to determine whether a parent has a substantial parental relationship with a child. In *Tammy W.-G v. Jacob T. (In re Gwenevere T.)*, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, the Supreme Court determined that § 48.415(6) "prescribes a totality-of-the circumstances test." According to the Court, "when applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's life." *Id.* at ¶3. Further, this analysis "may consider the

reasons why a parent was not caring for or supporting her child and exposure to of the child to a hazardous living environment." *Id.*

Under the Supreme Court's expansive test, the jury in this case properly considered the harsh nature of N.H.'s relationship with her very young children, her willful neglect of their needs and the "hazards" to their well-being her parenting represented. Further, the *Tammy W.-G.* analysis allowed the jury to consider, as a part of the totality of the circumstances, the lengthy time that other people had to care for the children and the 'no contact' order put in place by the criminal court. They could also consider that N.H. was convicted not once, but twice of abusing and neglecting her children.

N.H. asserts that her expression of concern for her children after their removal and her consistently expressed desire to visit with her children after she became incarcerated should outweigh her lack of involvement in the children's lives and her maltreatment and neglect of the children. In asserting that she has expressed care for her children, N.H. disregards her long incarceration, her lack of knowledge and understanding of the children's special needs, and her lack of contact with schools, doctors, and others involved with the care of her children. This singular focus on the few incidences of expressions of care and requests for visitation ignores the "totality of the circumstances" test prescribed by the Supreme Court.

The fact that a parent's behavior causes a child to be removed from a parent's home, not once, but twice, is a valid factor in the totality of whether a parent fully accepted the responsibilities of a parent throughout the entirety of the children's lives. *See: Tammy W.-G.* at ¶ 32 ("Consistent with our past decisions, under a totality-of-the circumstances analysis, the fact finder can and should consider the reasons why a parent has not supported or care for her child.") This includes the incarceration of a parent. While incarceration alone cannot be the de facto basis to terminate parental rights,

the reasons for incarceration, its duration and its impact on the children can be considered in a parental unfitness analysis. *Kenosha County Dep't of Human Servs. v. Jodie W.,* 2006 WI 93 ¶ 48, 293 Wis. 2d 530, 716 N.W.2d 845. In the instant case, separation by a 'no-contact' order and incarceration cannot be the reason for termination, but it not irrelevant where the parent bears the responsibility for the for that situation.

The jury's verdict related to the failure to assume ground and the trial court's subsequent finding of unfitness is supported by sufficient evidence. This evidence involved the totality of the circumstances of the children's lives, including the neglect, the abuse, their special needs because of the trauma, and N.H.'s failure to understand their needs.

II. N.H. FAILS TO ESTABLISH THAT THE TRIAL COURT'S DISCRETIONARY DETERMINATION THAT TERMINATION OF PARENTAL RIGHTS WAS IN THE CHILDREN'S BEST INTERESTS SATISFIES ANY OF THE CRITERIA UNDER WIS. STAT. § 809.62(1r)

Wisconsin Statutes § 809.62(1r)(a)-(e) provides criteria for the Court to consider in determining whether to grant review of a case. Review of the trial court's discretionary decision in this case to terminate parental rights does not meet any of them.

N.H. asserts that the trial court's "weighing was erroneous given the outcome and decision to terminate her parental rights" (Pet. for Review at 17) She notes that the trial court appeared to give more weight to the facts surrounding the removal of the children and N.H.'s incarceration. As a result, the trial court "did not sufficiently account for the fact that N.H. continues to express her love and desire to have her children ultimately returned to her." (Pet. for Review at 17) Further, N.H. argues that the trial court to not given any weight to her recent efforts to be involved with the children.

N.H. is seeking a different determination or outcome under the facts in this case. There is no issue of law presented in her petition. Existing caselaw in this area provides sufficient guidance to the facts presented in this case. A review by the Supreme Court will not clarify or interpret the applicable law differently.

There was sufficient evidence to support the trial court's determination that termination of parental rights was in the children's best interests.

Wisconsin Statutes § 48.426 governs the dispositional stage of TPR proceedings. Subsection two of the statute provides that the best interests of the children shall be the prevailing factor considered by the court in determining the disposition of a child. *Sheboygan County DHHS v. Julie A.B.,* 2002 WI 95 ¶4. The trial court may consider any relevant evidence, but it must consider the six factors set out in Wis. Stat. §48.426(3).

These six factors must be considered by the trial court in deciding what is in a child's best interest, but a court can consider any relevant information. *Steven V. v. Kelley H.,* 271 Wis. 2d 1, ¶ 27. The statute does not lay out the degree of weight to be assigned to each factor and only requires that a trial court give "adequate consideration of and weight to each factor." *State v. Margaret H.*, 2002 WI 42, 234 Wis. 2d 606, 623, 610 N.W.2d 475, 482.

The trial court heard testimony concerning the best interests of the children from the case manager and foster parents. It also considered the testimony during the grounds phase of the case which included the testimony of N.H., prior case managers, and evidence concerning the removal of the children. There were also a number of exhibits, a court report, and other documents in the record. After considering the evidence in the record and the arguments of the parties, the trial court determined that it was in the children's best interests to terminate the parental rights of N.H

N.H. asserts that the trial focused on the facts surrounding the removal of the children from N.H. and her incarceration and instead, it should have focused on the fact that N.H. "continues to express her love and desire to have her children ultimately returned to her" and to "efforts recently made by N.H. to continue as a significant factor in the children's lives." N.H. 's love for her children and her recent efforts were appropriately considered by the jury during the grounds phase in this case where the focus is on the parent's actions.

In the second phase, where the focus is on the child instead of the parent, love and "recent efforts" are insufficient to overcome the overwhelming evidence presented as to the best interests of the children.

The trial court properly considered all this evidence in its analysis of the factors under Wis. Stat. § 48.426(3). (R. 108: 57) In its findings, the trial court acknowledged that N.H. loves her children but that termination of parental rights was in their best interests. (R. 108: 54) While is true that the trial court did not acknowledge N.H.'s "recent efforts" to continue as a significant factor in the children's lives in its oral decision, it did not rise the level of an abuse of discretion. These two facts focus on the needs of the parent and not the needs of the children which is contrary to the required standard the court is to apply in the second phase. *See*: § 48.426(2) ("The best interests of the child shall be the prevailing factor considered by the court…")

N.H. suggests that the trial court placed too much weight on the removal of the children and N.H.'s incarceration however a court is allowed to consider "any relevant information". *Steven V. v. Kelley H.*, 271 Wis. 2d 1,¶ 27. In addition, a trial court is not required to give weight to different factors. The statute only requires that the court consider each factor in § 48.426. *State v. Margaret H.*, 2002 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475,482. The trial court's decision is supported by sufficient evidence concerning the best interests of the children. The court considered each factor under §

48.426(3) and determined they all weighed in favor of termination of parental rights. (R. 108:57) The trial court's order terminating parental rights is consistent with the mandates of Wis. Stat. § 48.426 and with caselaw.

CONCLUSION

The Guardian ad Litem respectfully requests that the Petition for Review be denied for the foregoing reasons.

Dated at Milwaukee, Wisconsin, this 16th day of March, 2022.

Respectfully submitted,

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,399 words.

Dated at Milwaukee, Wisconsin, this 16th day of March, 2022.

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Guardian ad Litem for above children

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, this 16th day of March, 2022.

Signed:

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