STATE OF WISCONSIN
SUPREME COURT

Appeal Case No. 2022AP000909

In re the termination of parental rights to D.T. II, a person under the age of 18:

State of Wisconsin
Petitioner Respondent-Respondent,

v.

D.T.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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II. Did the court err when it found that D.T. was an unfit parent?

Court of Appeals and Trial Court Treatment: This case the trial court found sufficient evidence for its unfitness finding. The Court of Appeals affirmed this decision.

III. Did the court err when it found that termination of D.T.'s parental rights was in D.T. II's best interest?

Court of Appeal and Trial Court Treatment: The trial court found that the evidence weighed in favor of terminating D.T.'s parental right. The Court of Appeals affirmed this decision.

CRITERIA FOR REVIEW

While the issues here 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 to terminate the parental rights of D.T., the father of D.T. II, in the Milwaukee County Juvenile Court on June 6, 2013. (5:1-7; Appendix) The petition alleged grounds for termination of parental right (TPR) under both Wis. Stats. Sec. 48.415(2), Continuing CHIPS and Sec. 48.415(6) AND Failure to Assume Parental Responsibility. An initial appearance was scheduled for June 29, 2020. (7:1)

On June 28, 2020, D.T. appeared at the hearing, but was not represented by counsel at this hearing. (93:1) The court rescheduled the matter. *Id.* D.T. did appear at the hearing on August 20, 2020, and was now represented by counsel. (92:1) D.T. indicated his desire to contest the termination of parental rights petition and requested a fact-finding hearing by jury. (92:11)

There were multiple intervening hearings on the case, where D.T. appeared as required. Those hearings included the dates November 20, 2020, February 9, 2021, February 26, 2021, April 23, 2021, May 17, 2021, June 7, 2021, July 8, 2021, and August 2, 2021. (78:1, 79:1, 80:1, 87:1, 90:1, 89:1, 88:1, and 86:1) These hearings were conducted remotely due to the ongoing global pandemic. *Id.*

At a hearing on August 8, 2021, the matter was scheduled for a fact-finding hearing, by jury beginning November 15, 2021. (86:1) The court advised the parties that this was the number one case for jury trial, although other cases were scheduled the same date. (86:5)

Default Finding

On November 15, 2021, the court called the case for a status on the fact-finding hearing by jury. (85:1) This was a hearing where the parties appeared remotely. *Id.* D.T. was not present and D.T.'s attorney was not able to provide a reason for his absence. (85:2) The court, on the motion of the State and the GAL, found the father in default. (85:3)

The court recessed the hearing to 11 am the same day to schedule the matter for further proceedings. (85:4) After the recess, D.T. appeared. D.T. explained that earlier in the morning, "...when I woke up this morning and my eyes couldn't focus. I wear glasses so I couldn't see the information to write – get into the Zoom. I do apologize for that." (85:6) The court on hearing this, while accepting the apology, refused to vacate the default finding. (85:6) D.T. objected to the continuation of the default finding. (85:8) The case was scheduled for prove-up as to ground and disposition. *Id.*

Prove-up to Grounds

The court heard testimony as to grounds on February 22, 2022. (81:1) After hearing testimony, the court then found that grounds existed to terminate the D.T.'s parental rights under both grounds

alleged in the petition. (81:46) The findings were based upon the testimony of the social worker, Melissa Young and case exhibits. *Id.* D.T. was found to be an unfit parent. *Id.*

Disposition Hearing

The court then proceeded to disposition after the unfitness finding. (81:51) The witnesses giving testimony were Melissa Young, the case manager, T.K., the mother, W.J.K, a paternal uncle and D.T. (81:51, 81:92, 82:3, 82:29)

Of note, W.J.K. testified that he is the paternal uncle of D.T. II. (82:4) D.T. was living with him at the time of the hearing. (82:4) The residence is in Milwaukee, and he has lived there for three years. (82:5) The apartment has three bedrooms that he also shares with his 16-year-old and seven-year-old sons. (82:5) The residence has sufficient room for both D.T. and D.T. II. (82:5) He is willing and able to ensure that D.T. II's educational and medical need are meet. (82:6) W.J.K. has been a carpenter for over 20 years and has worked five years in the home health care area. (82:6) He has sufficient household income to care for D.T. II. (82:6)

Also, D.T. testified that he continues his desire to parent and to have D.T. II returned to his care. (82:30) He is living with his brother, W.J.K. (82:30) He has his own bedroom at the residence and there is enough room for D.T. II to reside there as well. (82:30) He currently maintains visits with D.T. II. (82:31) The are weekly for four hours at the Old Fashion on 72nd and Center Street. (82:31) During the visits, D.T. engages with D.T. II in activities such as talking, watching TV and playing games. (82:31) D.T. II appears to know that D.T. is his father, and he calls him "daddy." (82:31) D.T. II is happy to see D.T. every time he visits. (82:31) D.T. has obtained certificates of achievement for the completion of an intensive six-week curriculum for anger management and domestic violence. (82:32, 64:1) D.T. also completed a fatherhood development curriculum through the Milwaukee County Pathways for Fathers and Families. (82:33, 64:2) D.T. is working with his brother doing carpentry work. (82:34) He continues to work with Reach Counseling for therapy, domestic violence and anger management issues. (82:35) He maintains information about D.T. II medical and doctor appointments. (82:36) He signs all consents for D.T. II's treatments. (82:37) D.T. has a

substantial emotional relationship with D.T. II. (82:37) He is willing and able to take immediate placement of D.T. II. (82:38)

After hearing testimony and argument, the court found under Wis. Stats. Sec. 48.456, that it was in the D.T. II's best interest that the D.T.'s parental rights be terminated and ordered the termination of his parental rights. (82:90-100; Appendix)

D.T. appealed the order terminating his parental rights and the order denying his motion to vacate the default finding. (100:1-3) The Court of Appeals affirmed the orders in a decision dated August 23, 2022. (Appendix) D.T. now brings this petition.

ARGUMENT

I. The trial court erroneously exercised its discretion when it denied the father's motion to reopen the default judgment.

A. Standard of Review

The issue in this appeal involves the question of the proper exercise of the court's discretion when it refused to reopen the default judgment entered against the father, D.T. under Wis. Stats. §806.07.

Whether to grant relief from a judgment under Wis. Stats. §806.07 is a discretionary determination for the circuit court. *Dugenske v. Dugenske,* 80 Wis.2d 64, 68, 257 N.W.2d 865, 867 (1977). The appellate courts affirm the trial court's exercise of discretion if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson,* 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). A circuit court exercises its discretion erroneously when it applies an incorrect legal standard. *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd*, 2001 WI App. 25, ¶10, 47 Wis. 2d 521, 530, 634 N.W.2d 544. Also, when the exercise of that discretion is unreasonable considering extraordinary circumstances. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶48, 326 Wis. 2d 640, 785 N.W.2d 493.

The court in *Brandon Apparel Group, Inc.,* goes further to state that to grant default judgment, the circuit court must find that the noncomplying party's conduct is without a clear and justifiable excuse and conclude that the noncompliance was either egregious or in bad faith. 2001 WI App. 25, at ¶11

B. The father's failure to appear was not egregious behavior.

On November 15, 2021, the court called the case for a status on the fact-finding hearing by jury. (85:1) This was a hearing where the parties appeared remotely. *Id.* D.T. was not present and D.T.'s attorney was not able to provide a reason for his absence. (85:2) The court, on the motion of the State and the GAL, found the father in default. (85:3)

The court recessed the hearing to 11 am the same day to schedule the matter for further proceedings. (85:4) After the recess, D.T. appeared. D.T. explained that earlier in the morning, "…when I woke up this morning and my eyes couldn't focus. I wear glasses so I couldn't see the information to write – get into the Zoom. I do apologize for that." (85:6) The court on hearing this, while accepting the apology, refused to vacate the default finding. (85:6) The father's actions based on this record is neglectful behavior at best and constitute extraordinary circumstances in this matter. This is especially true given that for the entirety of the case, D.T. was diligent with making his appearances on multiple occasions.

A circuit court has wide discretion in determining whether to vacate a judgment based on excusable neglect. *Dugenske* at 68. Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982). It is not synonymous with carelessness or inattentiveness, and it is not sufficient that the [neglectful act] be unintentional and in that sense a mistake or inadvertent, "`since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.'" *Martin v. Griffin,* 117 Wis.2d 438, 443, 344 N.W.2d 206, 209 (Ct. App. 1984).

Here the acts of the father combined with his previous consistent appearances show neglectful behavior at best and was hardly egregious. The hearing was conducted remotely, as a prelude to an in-person hearing in the afternoon. The case was recalled, and D.T. appeared after the recess in sufficient time to have commenced the afternoon jury selection.

In determining whether the party seeking relief from a default judgment has proven excusable neglect, the circuit court should

consider whether the moving party has acted promptly to remedy the default judgment, whether the default judgment imposes excessive damages, and whether vacatur of the judgment is necessary to prevent a miscarriage of justice. *Dugenske,* 80 Wis.2d at 68-69, 257 N.W.2d at 867. The circuit court must also consider that the law favors the finality of judgments, and the reluctance to excuse neglect when too easy a standard for the vacatur of default judgments would reduce deterrence or litigation-delay. *See Dugenske,* 80 Wis.2d at 70, 257 N.W.2d at 868.

Here, D.T. responded promptly and appear after the court recessed the hearing during the same morning. It is agreed that he had received the notice and was late. The circumstances of his failure to appear and his immediate actions to attempt to protect his right to contest the matter by appearing after the recess was not egregious. See, Wis. Stats. § 48.46(2). D.T.'s actions here demonstrated that he honestly wanted and diligently sought the opportunity to participate in the termination of parental right proceedings here. See, *State v. Shirley E.*, 2006 WI 129, ¶49, 298 Wis. 2d 1, 629 N.W.2d 768.

II. The finding that D.T. is an unfit parent was clearly erroneous.

A. Standard of Review.

The issue here represents a challenge to the sufficiency of the evidence presented. In a challenge to the sufficiency of the evidence, the proper standard of review is a question of whether there is any credible evidence to sustain the verdict. *Sheboygan Cnty. DHHS v. Tanya M.B.*, 2010 WI 55, ¶ 49, 325 Wis.2d 524, 785 N.W.2d 369. *St. Croix County D.H.H.S.* v. *Matthew D.*, 2016 WI 35, ¶29, 368 Wis. 2d 170, 889 N.W.2d 107.

B. The County is required to prove each element of each of the grounds alleged in the termination of parental rights petition.

In *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 21, 246 Wis.2d 1, 629 N.W.2d 768, the court said that "due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions. Although termination proceedings are civil proceedings, *M.W. v. Monroe*

County Dep't of Human Servs., 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984), the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that "[i]n order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate."" (Citing *Santosky v. Kramer,* 455 U.S. 745, 769 (1982)).

Thus, pursuant to the Fourteenth Amendment and the Wisconsin Children's Code, Wis. Stat. §§ 48.31 and 48.424, prior to determining that grounds existed to terminate D.T.'s parental rights, the circuit court had the duty at the jury trial to find by clear and convincing evidence that all of the elements of Wis. Stats. Sec. 48.415(2), Continuing CHIPS and Failure to Assume Parental Responsibility under Wis. Stat. § 48.415(6), have been satisfied. If there is no evidentiary support, the court cannot make an unfitness finding.

C. The evidence was not sufficient as to the Continuing Chips ground.

The elements of Continuing Chips from Wis. Stat. § 48.415(2)(a), read that:

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:

(a)

1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

2.a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case. (Emphasis added.)

b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court. …

3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., not including time spent outside the home as an unborn child; that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

As was testified, through the case manager, D.T. has completed and obtained a certificate for parenting services and anger management. (81:37) He has completed a psychological evaluation. (81:37) He is involved in therapy with Reach Counseling. (85:37) D.T. had visits with D.T. II for six hours per week and there was not any observed violence in his home. (81:38) There were never any concerns of violence during the visits with D.T. II. (81:39)

Based on the above, the findings that the Continuing Chips ground had been proven was clearly erroneous.

D. The evidence was not sufficient as to the Failure to Assume Parental Responsibility ground.

Failure to assume parental responsibility, an additional ground here for terminating D.T.'s parental rights, is established "by proving that the parent … [has] not had a substantial parental relationship with the child." Wis. Stat. § 48.415(6)(a). "'[S]ubstantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Wis. Stat. §

48.415(6)(b). A nonexclusive list of factors that the court may consider in determining whether the parent has a "substantial parental relationship" with the child includes:

[W]hether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the mother of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy. *Id.*

Again, D.T. had completed and obtained a certificate for parenting services and anger management. (81:37) He has completed a psychological evaluation. (81:37) He is involved in therapy with Reach Counseling. (85:37) D.T. had visits with D.T. II for six hours per week and there was not any observed violence in his home. (81:38) There were never any concerns of violence during the visits with D.T. II. (81:39)

There are actions by the D.T., vis-à-vis D.T. II, that demonstrate that he has had a substantial relationship with D.T. II.

The finding that D.T. failed to assume parental responsibility is clearly erroneous.

III. There was insufficient evidence to determine that termination of D.T.'s parental rights was in the D.T. II'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. *Sheboygan 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 D.T.'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. D.T. believes that the court's weighing was erroneous given the outcome and decision to terminate his parental rights.

Testimony at the disposition hearing by, W.J.K. was that he is the paternal uncle of D.T. II. (82:4) D.T. was living with him at the time of the hearing. (82:4) The residence is in Milwaukee, and he has lived there for three years. (82:5) The apartment has three bedrooms that he also shares with his 16-year-old and seven-year-old sons. (82:5) The residence has sufficient room for both D.T. and D.T. II. (82:5) He is willing and able to ensure that D.T. II's educational and medical need are meet. (82:6) W.J.K. has been a carpenter for over 20 years and has worked five years in the home health care area. (82:6) He has sufficient household income to care for D.T. II. (82:6)

Also, D.T. testified that he continues his desire to parent and to have D.T. II returned to his care. (82:30) He is living with his brother, W.J.K. (82:30) He has his own bedroom at the residence and there is enough room for D.T. II to reside there as well. (82:30) He currently maintains visits with D.T. II. (82:31) The are weekly for four hours at the Old Fashion on 72nd and Center Street. (82:31) During the visits, D.T. engages with D.T. II in activities such as talking, watching TV and playing games. (82:31) D.T. II appears to know that D.T. is his father, and he calls him "daddy." (82:31) D.T. II is happy to see D.T. every time he visits. (82:31) D.T. has obtained certificates of achievement for the completion of an intensive six-week curriculum for anger management and domestic violence. (82:32, 64:1) D.T. also completed a fatherhood development curriculum through the Milwaukee County Pathways for Fathers and Families. (82:33, 64:2) D.T. is working with his brother doing carpentry work. (82:34) He continues to work with Reach Counseling for therapy, domestic violence and anger management issues. (82:35) He maintains information about D.T. II medical and doctor appointments. (82:36) He signs all consents for D.T. II's treatments. (82:37) D.T. has a

substantial emotional relationship with D.T. II. (82:37) He is willing and able to take immediate placement of D.T. II. (82:38)

While the decision by the court at the dispositional hearing is one of discretion, after reviewing the facts and the findings made here, there was not support on this record for the court's finding that it was in the D.T. II's best interest that the parental rights of D.T. be terminated. Appellate courts have the duty to review lower court decision making, just as lower courts have an obligation to reasonably exercise their discretion. If lower courts erroneously exercise their discretion, appellate court have the responsibility to intervene. See, e.g., *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶48, 326 Wis. 2d 640, 785 N.W.2d 493.

Here the court appears to give great emphasis to the facts surrounding removal of the D.T. II and that D.T. has been incarcerated for much of the time of removal. (218:7; 218:8; 218:15; Appendix) The court does not sufficiently account for the fact that D.T. continues to express his love for D.T. II and the desire to have D.T. II ultimately returned to him. The court did not give any weight

to the efforts recently made by D.T. and to continue as a significant factor in D.T. II's life.

The courts have said that despite the broad range of factors that a court may consider in the exercise of its discretion, the exercise of discretion is not unlimited. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016); Hartung v. Hartung, 102 Wis. 2d 58, 66-69, 306 N.W.2d 16 (1981) ("[T]he exercise of discretion is not the equivalent of unfettered decision-making."). It has been long established that circuit courts must exercise their discretion within the bounds of reasonable decision-making. *State v. Tyler T.*, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192.

CONCLUSION

The trial court erroneous exercised its discretion by denying the father's motion to vacate the default finding. This matter should be remanded to the trial court to permit a fully litigated fact-finding hearing on the matter of grounds to terminate the parental rights of D.T.

There was insufficient evidence for the trial court to have made a finding of unfitness under the two grounds of Continuing CHIPS and Failure to Assume Parental Responsibility. There was not sufficient evidence to have found that terminating the parental rights of D.T. was in the best interest of D.T. II This matter should be remanded to the circuit court for a hearing on both grounds and disposition of this case.

Dated: September 7, 2022

Signed:

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CERTIFICATION ON FORM AND LENGTH

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 5098 words.

Dated: September 7, 2022

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APPENDIX

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

[redacted]

Respondent-Appellant-Petitioner

CERTIFICATION ON FORM AND LENGTH

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 5068 words.

Dated: September 7, 2022

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