

FILED

OCT 26 2022

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2022AP001260

In re the Termination of the Parental Right to:
M.M., a person under the age of 18:

Juneau County Department of Human Services,
Petitioner-Respondent-Respondent,

vs.

R.M.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

Gregory Bates
Attorney at Law, 1018846
PO Box 70
Kenosha, Wisconsin 53141-0070
(262) 657-3082
Gbates1407@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS	2
AUTHORITY CITED	3
ISSUES PRESENTED	5
CRITERIA FOR REVIEW	5
STATEMENT OF CASE	7
ARGUMENT	11
I. The finding that R.M. is an unfit parent was clearly erroneous.	11
A. Standard of Review.	11
B. The County is required to prove each element of each of the grounds alleged in the termination of parental rights petition.	11
C. The evidence was not sufficient as to the Continuing CHIPS ground.	12
D. The evidence was not sufficient as to the Failure to Assume Parental Responsibility ground.	16
II. There was insufficient evidence to determine that termination of R.M.'s parental rights was in the M.M.'s best interest.	17
A. Standard of Review	17
B. Terminating R.M.'s parental rights was an erroneous exercise of discretion.	20
CONCLUSION	23
APPENDIX	

AUTHORITY CITEDCases*David S. v. Laura S.,*

179 Wis. 2d 114, 507 N.W.2d 4 (1993) 19

Evelyn C.R. v. Tykila S.,

2001 WI 110, ¶ 21, 246 Wis.2d 1, 629 N.W.2d 768 .. 12, 14

Gerald O. v. Cindy R.,

203 Wis. 2d 148, 551 N.W.2d 855 (Ct. App. 1996) 18

M.W. v. Monroe County Dep't of Human Servs.,

116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984) 22

St. Croix County D.H.H.S. v. Matthew D.,

2016 WI 35, 368 Wis. 2d 170, 889 N.W.2d 107 12

Kenosha County D.H.S. v. Jodie W.,

293 Wis.2d 530, 16 N.W.2d 845 18

Onalaska Elec. Heating, Inc. v. Schaller,

94 Wis. 2d 493, 288 N.W.2d 829 (1980) 19

Rock Cnty. DSS v. K.K.,

162 Wis. 2d 431, 469 N.W.2d 881 (Ct. App. 1991) 19

Santosky v. Kramer,

455 U.S. 745, 769 (1982)	13
<i>Sheboygan Cty. Dep't of Health & Human Servs. v. Julie A.B.,</i>	
2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402	19
<i>Sheboygan Cnty. DHHS v. Tanya M.B.,</i>	
2010 WI 55, 325 Wis.2d 524, 785 N.W.2d 369	12, 23
<i>State v. Margaret H.,</i>	
2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475	19
<i>State v. Salas Gayton,</i>	
2016 WI 58, 370 Wis. 2d 264, 882 N.W.2d 459	22
<u>Statutes and Other Authority</u>	

ISSUES PRESENTED

- I. Was the trial court's unfitness finding clearly erroneous?

Court of Appeals and Trial Court Treatment: The trial court found R.M. to be an unfit parent under the Continuing Need of Protection or Services grounds and the Failure to Assume Parental Responsibility ground, based on the jury verdicts. The Court of Appeals affirmed the finding.

- II. Was there sufficient evident to have found that termination of R.M.'s parental rights was in the M.M.'s best interest?

Court of Appeals and Trial Court Treatment: The trial court here answered yes when it entered the order terminating R.M.'s parental rights. The Court of Appeals affirmed the order.

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

R.M. is the biological mother of M.M. (Record, 4:1) A petition to terminate the parental rights to her son was filed in the Juneau County Circuit Court by the Juneau County Department of Human Services (herein after, JCDHS), in case 21 TP 7 on May 27, 2021. (4:1) The petition contained termination claims under 1) Wis. Stat. sec. 48.415(2) – Continuing Need of Protection or Services and 2) Wis. Stat. sec. 48.415(6) – Failure to Assume Parental Responsibility. (4:1)

An initial appearance was held on the petition on June 25, 2021, June 25, 2021, and July 8, 2021. (148:1, 149:1, 152:1) R.M. was represented by an attorney and indicated a desire to contest the petition for termination of her parental rights. (152:8) The case ultimately went forward to trial on January 25, 2022. (155:1)

During the trial from January 25-27, 2022, there was testimony from testimony from Social Worker Kassandra Murphy, Nurse Lynn Jindrick, Psychotherapist Penny Raimer, Psychologist Joel Rooney, Mauston Police Officer Brandon Arenz and Dr. Claire Patterson. (155: 1, 156:1, 162:1)

There was testimony that R.M. was able to provide a safe home for M.M. (159:169) She was bonded with M.M. (162:52) She was maintaining visit and has a good relationship with the foster parents. (162:55, 162:113) Even though it was not required, she attempted to get M.M. in therapy during the trial reunification. (156:115) There was a failure of communication on the part of the foster parent that hampered the flow of information between the department and R.M. (155:276)

For over half of M.M.'s life, R.M. was the person who has provided for the daily supervision, education, protection, and care. He was not removed from the home until age four, so this was a period of more than half of his life. (156:70)

There were closing arguments after the conclusion of the testimony. (162:100) After deliberations, the jury returned verdicts finding grounds for termination based on the Continuing CHIPS claim and the Failure to Assume Parental Responsibility claim. (162:144) The court proceeded to find that R.M. was an unfit parent, based on these verdicts. (162:147)

The disposition hearing was held on March 14, 2022. (151:1)
There was testimony from Social Worker Kassandra Murphy.
(151:17)

A summary of her testimony was that M.M. has been in
foster care of a year and a half with S.B., an adoptive resource.
(151:18) M.M. was removed from his mother care in January 2019,
at age four. (151:19) M.M. returned to R.M.'s care in 2020, for a
trial reunification, but was removed again in November 2020.
(151:19) M.M. has recently turned six years old. (151:20)

M.M. has a substantial relationship with his mother, although
the social worker believed it to be a negative. (151:21) There has
been continued visits between M.M. and R.M. since the TPR trial.
(151:23) M.M. has continue to express her love for M.M. to him at
visits. (151:24)

The court heard arguments on the disposition. (151:42-46)
The court found that it was in M.M.'s best interest to terminate the
parental rights of R.M. (151:46-53; 134-1-2) R.M. appealed to the
Court of Appeals. (145:1) In a decision dated September 29, 2022,

the Court of Appeals affirmed the circuit court orders. (Appendix)

R.M. now petitions for review of the Court of Appeals decision.

ARGUMENT

I. The finding that R.M. is an unfit parent was clearly erroneous.

A. Standard of Review.

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 R.M.'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 Abandonment under Wis. Stat. § 48.415(1)(a)(2), Abandonment under Wis. Stat. § 48.415(1)(a)(3) and Failure to Assume Parental Responsibility under Wis. Stat. § 48.415(6), had 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.

During the trial from January 25-27, 2022, there was testimony from testimony from Social Worker Kassandra Murphy, Nurse Lynn Jindrick, Psychotherapist Penny Raimer, Psychologist Joel Rooney, Mauston Police Officer Brandon Arenz and Dr. Claire Patterson. (155: 1, 156:1, 162:1)

There was testimony that R.M. was able to provide a safe home for M.M. (159:169) She was bonded with M.M. (162:52) She was maintaining visits and has a good relationship with the foster parents. (162:55, 162:113) Even though it was not required, she attempted to get M.M. in therapy during the trial reunification. (156:115) Among the failures, that cannot be attributed to R.M., was

a failure of communication on the part of the foster parent that hampered the flow of information between the department and R.M. (155:276)

R.M. attended AODA treatment and completed it. (155:282) Anger manage was never recommended, so it was not completed. (156:10) While there were positive drug tests during the CHIPS case, there was consistent testing being done by R.M that has continued through the filing of the TPR petition. (156:30-36) There were no drugs found in her home after the drug raid in 2019. R.M. completed a psychological examination as required and anger management.

R.M. worked extremely hard to maintain communications with her son and in fact had extensive visits and communications with him. She was doing what was necessary to meet her conditions of return in this case. The finding of unfitness under the ground of Continuing Need of Protection or Services was unwarranted in this case.

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 R.M.'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.*

For over half of M.M.'s life, R.M. was the person who has provided for the daily supervision, education, protection, and care. M.M. was not removed from the home until age four, so this was a period of more than half of his life. (156:70) It is all but impossible to say that R.M. "has not had a substantial parental relationship" with M.M. given this evidence alone.

There are actions by the R.M., vis-à-vis M.M., that demonstrate that she has had a substantial relationship with M.M. The finding that R.M. failed to assume parental responsibility is clearly erroneous.

II. There was insufficient evidence to determine that termination of R.M.'s parental rights was in the M.M.'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 R.M.'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 the social worker, Kassandra Murphy. As required by Wis. Stat. § 48.426, the court weighed the required factors. R.M. believes that the court's weighing was erroneous and thus lead to the decision to terminate her parental rights.

A summary of her testimony was that M.M. has been in foster care of a year and a half with S.B., an adoptive resource. (151:18) M.M. was removed from his mother care in January 2019, at age four. (151:19) M.M. returned to R.M.'s care in 2020, for a trial reunification, but was removed again in November 2020. (151:19) M.M. has recently turned six years old. (151:20)

M.M. has a substantial relationship with his mother. (151:21) There has continued visits between M.M. and R.M. since the TPR trial. (151:23) M.M. has continue to express her love for M.M. to him at visits. (151:24)

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 M.M.'s best interest that the parental rights of R.M. be terminated.

Here the court emphasizes the facts surrounding removal of the M.M., both initially and around the cancellation of the trial reunification. The court does not sufficiently account for the fact that R.M. continues to express her love for M.M. and the desire to have M.M. ultimately returned to him. The court did not give much weight to the efforts recently made by R.M. to continue as a significant factor in M.M.'s life.

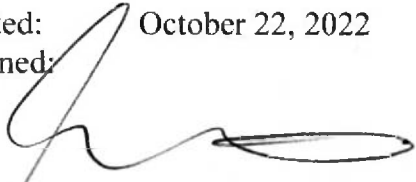
The courts have said that despite the broad range of factors that a court may consider in the exercise of its discretion, the exercise of discretion is not unlimited. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016). Terminating R.M. parental rights given the evidence and factors examined by the court was an erroneous exercise of its discretion.

CONCLUSION

There was insufficient evidence for the trial court to have made a finding of unfitness under the grounds of Continuing Need of Protection or Services and Failure to Assume Parental Responsibility. There was not sufficient evidence to have found that terminating the parental rights of R.M. was in the best interest of M.M. This matter should be remanded to the circuit court for a hearing on both grounds and disposition.

Dated: October 22, 2022

Signed:



Gregory Bates
Attorney at Law, 1018846
PO Box 70
Kenosha, WI 53141
(262) 657-3082
Gbates1407@gmail.com

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


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 3548 words.

Dated: October 22, 2022

Signed:

A handwritten signature in black ink, appearing to read 'Gregory Bates', with a long horizontal stroke extending to the right.

Gregory Bates
Attorney at Law, 1018846
PO Box 70
Kenosha, WI 53141
(262) 657-3082
Gbates1407@gmail.com

Certification on Compliance with Wis. Stat. §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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: October 22, 2022



Gregory Bates
Attorney at Law, 1018846
PO Box 70
Kenosha, Wisconsin 53141-0070
(262) 657-3082
Gbates1407@gmail.com