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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2022AP001338

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

State of Wisconsin,
Petitioner-Respondent-Respondent,

vs.

J.W.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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Statutes and Other Authority

Wis. Stats. § 48.415(2) passim

ISSUES PRESENTED

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

Trial Court Treatment: The trial court found J.W. to be an unfit parent under the grounds of Continuing CHIPS and Failure to Assume Parental Responsibility.

II. Was there sufficient evidence to have found that termination of J.W.'s parental rights was in the J.W., JR.'s best interest?

Trial Court Treatment: The trial court here answered yes when it entered the orders terminating J.W.'s parental rights.

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 FACTS

On March 17, 2021, a termination of parental rights (TPR) petitions was filed regarding J.W.'s child, in Milwaukee County case number 21 TP 64. (Document, 4:1-11)

The petition alleged two unfitness grounds, 1) Continuing CHIPS, under Wis. Stat. sec. 48.415(2) and 2) Failure to Assume Parental Responsibility, under Wis. Stat. sec. 48.415(6). J.W. appeared before the circuit court on April 16, 2021 and June 7, 2021, and indicated his desire to contest the petitions. (61:1, 73:1) A jury trial was demanded. *Id.*

To accommodate the party's schedules, the case was scheduled for a two-day jury trial beginning November 29, 2021. (57:1)

Testimony at the jury trial included that from witnesses Loren Borkenhagen, Courtney Casey and the father, J.W.

Of note, J.W. testified to the following:

Conditions of return were provided to J.W. for the return of J.W., JR. (63:1-12) J.W. had completed parenting classes. (130:6) In the classes, J.W. learned to control his anger and learned to manage J.W., JR.'s temper tantrums. (130:6) J.W. learned proper nutrition for J.W., JR. prior to his release from the hospital at birth. (130:8) J.W. was involved in therapy with AMRI Counselling. (130:8) The counselling also dealt with anger issues. (130:8) J.W. was aware of the mother's drug usage and sought to protect J.W., JR. from the behavior. (130:10) It was the behavior of the mother that has caused

the removal of J.W., JR. from the home during a time that J.W. was managing a personal health crisis. (130:11) J.W. sought to protect J.W., JR. and indicated this to his therapist at AMRI Counselling. (130:12-13) J.W. was aware of the mother's drug usage and considered it to be a problem. (130:13) J.W. did not allow the mother to reside with him because of concern about her behavior. (130:14) There was a reported sex offender in the family, and J.W. had taken steps to prevent any contact with J.W., JR. or his residence. (130:15) J.W. provided food for J.W., JR. at visits or was able to provide food for him nearby restaurants. (130:15) Communications were often difficult coordinating visits with J.W., JR. and the foster family. (130:16)

J.W. was involved in the prenatal care of J.W., JR. (130:16) He was present in the hospital at the birth of J.W., JR. (130:17) J.W. was present when J.W., JR. was required to be delivered by C-section. (130:18) J.W., JR. came home from the hospital to live with J.W., where he performed his fatherly duties for J.W., JR. (130:18) J.W. provided food, shelter and daily care for J.W., JR. when he resided with him. (130:19) J.W. was able to describe J.W., JR. as a playful and happy child. (130:20) J.W., JR. resided with J.W. until his removal in 2017. (130:18) After J.W., JR.'s removal, J.W. would visit J.W., JR. and provide for his needs at the visits. (130:19) There was regular contact with J.W., JR. by in-person visits or Facetime communications. (130:19) During visits with J.W., JR., he appeared happy to see J.W. (130:21) J.W., JR. was playful and interacted with J.W. by giving hugs and pats to the head. (130:21)

The jury returned verdicts against J.W. as to each unfitness ground. (103:1-2) The court made a finding of parental unfitness. (130:86) The matter was set over for disposition, commencing the following day. *Id.*

The dispositional hearing took place over two days. Beginning December 15, 2021, testimony was heard from Linda Hawn, M.G.-G. and J.W.

Testimony from J.W. was as follows: J.W. comes from what he described as a close-knit family. (135:84) He perceives himself the person to keep the family together. (135:85) J.W., again, has completed parenting classes. (135:86) He has learned how to manage anger and frustration. (135:87) He has learned to discuss his problems openly. (135:87) J.W. has no intention of allowing the mother to live with him in the future. (135:88) J.W. still has visits with J.W., JR. (135:90) He brings brunch foods to the visits. (135:90) They read and finger paint during the visits. (135:90) J.W., JR. appears excited to visit with J.W. (135:90) If J.W., JR. were returned to his care, J.W. would be willing to exercise his fatherly responsibilities and provide financially for J.W., JR. (135:92) J.W. has continued to express his love for J.W., JR. (135:93)

The court heard arguments before finding that it was in the best interest of J.W., JR. that the parental rights of J.W. be terminated.

J.W.'s appeal was denied in a decision dated October 4, 2022. (Appendix) J.W. now petitions for review.

ARGUMENT

I. The finding that J.W. 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 State is required to prove each element of both the Continuing CHIPS ground and the Failure to Assume Parental Responsibility ground for parental unfitness.

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 J.W.'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 § 48.415(2) had been satisfied. If there is no evidentiary support, the court cannot make an unfitness finding

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 parenting classes, J.W. learned to control his anger and how to manage J.W., JR.'s temper tantrums. (130:6) J.W. had learned proper nutrition for J.W., JR. prior to the release from the hospital at birth. (130:8) J.W. was involved in therapy

with AMRI Counselling. (130:8) The counselling also dealt with anger issues. (130:8) J.W. was aware of the mother's drug usage and sought to protect J.W., JR. from the behavior. (130:10) It was the behavior of the mother that has caused the removal of J.W., JR. from the home during a time that J.W. was managing a personal health crisis. (130:11) J.W. sought to protect J.W., JR. and indicated this to his therapist at AMRI Counselling. (130:12-13) J.W. was aware of the mother's drug usage and considered it to be a problem. (130:13) J.W. did not allow the mother to reside with him because of concerns about her behavior. (130:14) There was a reported sex offender in the family, and J.W. had taken steps to prevent any contact with J.W., JR. or the residence. (130:15) J.W. provided food for J.W., JR. at visits or was able to provide food for him at nearby restaurants. (130:15) Communication was often difficult in coordinating visits with J.W., JR. and the foster family. (130:16)

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

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 J.W.'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.*

In this case J.W. was involved in the prenatal care of J.W., JR. (130:16) He was present in the hospital at the birth of J.W., JR. (130:17) J.W. was present when J.W., JR. was required to be delivered by C-section. (130:18) J.W., JR. came home from the hospital to live with J.W., where he performed his fatherly duties for J.W., JR. (130:18) J.W. provided food, shelter and daily care for J.W., JR. when he resided with him. (130:19) J.W. was able to describe J.W., JR. as a playful and happy child. (130:20) J.W., JR. resided with J.W. until his removal in 2017. (130:18) After J.W., JR.’s removal, J.W. would visit J.W., JR. and provide for his needs at the visits. (130:19) There was regular contact with J.W., JR. by in-person visits or Facetime communications. (130:19) During visits with J.W., JR., he was happy to see J.W. (130:21) J.W., JR. was playful and interacted with J.W. by giving hugs and pats to the head. (130:21)

There are actions by the J.W. vis-à-vis J.W., JR. that demonstrated that he has had a substantial relationship with J.W., JR.

The findings that J.W. failed to assume parental responsibility was clearly erroneous.

II. There was insufficient evidence to determine that termination of J.W.'s parental rights was in J.W., JR.'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 J.W.'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. J.W. believes that the court's weighing was erroneous given the outcome and decision to terminate his parental rights.

The evidence adduced at the dispositional hearing was that J.W. comes from what he described as a close-knit family. (135:84) He perceives himself the person to keep the family together. (135:85) J.W., again, has completed parenting classes. (135:86) He has learned how to manage anger and frustration. (135:87) He has learned to discuss his problems openly. (135:87) J.W. has no intention of

allowing the mother to live with him in the future. (135:88) J.W. still has visits with J.W., JR. (135:90) He brings brunch foods to the visits. (135:90) They read and finger paint during the visits. (135:90) J.W., JR. appears excited to visit with J.W. (135:90) If J.W., JR. were returned to his care, J.W. would be willing to exercise his fatherly responsibilities and provide financially for J.W., JR. (135:92) J.W. has continued to express his love for J.W., JR. (135:93)

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 J.W., JR.'s best interest that the parental rights of J.W. be terminated.

Here the court appears to give excessive emphasis to the historic family background going back to 1999. (131:53) This was long before J.W., JR. was born. The court also appears to contribute the failures of the mother and her addiction to J.W. (131:53) The court does not sufficiently account for the fact that J.W. continues to express his love and hold the desire to have his child ultimately returned to him. The court did not give sufficient weight to the efforts recently made by J.W. to continue as a significant factor in the J.W., JR.'s life and the life of J.W.'s extended family.

There are a range of factors that a court may consider in the exercise of its discretion, but the exercise of discretion is not above review. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016). Terminating J.W. parental rights given the

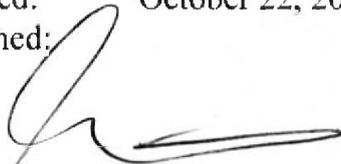
evidence and factors examined by the court was an erroneous exercise of its discretion in this case.

CONCLUSION

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

Dated: October 22, 2022

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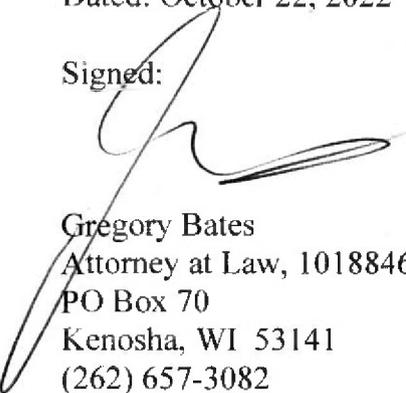

Respondent-Appellant-Petitioner

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 3825 words.

Dated: October 22, 2022

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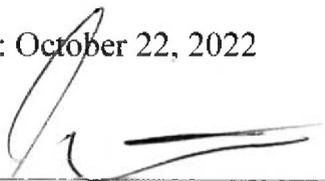
Certification on Compliance with Wis. Stat. §809.19(12)**I hereby certify that:**

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



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