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WISCONSIN SUPREME COURT

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In re the termination of parental rights to C.M.M.,
a person under the age of 18:

STATE OF WISCONSIN,

Respondent,

Appeal No. 22-AP-1028

v.

Milwaukee County
19-TP-225

J.D.C., Jr.,

Petitioner.

PETITION FOR REVIEW OF PETITIONER J.D.C., JR.

ON PETITION FROM THE SEPTEMBER 27, 2022 OPINION OF
THE WISCONSIN COURT OF APPEALS, DISTRICT I
Milwaukee County Circuit Court, Hon. Ellen R. Brostrom
Circuit Court Case No. 19-TP-225

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TABLE OF CONTENTS

| | Page(s) |
|---|----------------|
| TABLE OF CONTENTS..... | 2 |
| ISSUE FOR REVIEW | 4 |
| CONCISE STATEMENT OF CRITERIA JUSTIFYING REVIEW | 5 |
| STATEMENT OF THE CASE | 5 |
| A. Nature of the Case..... | 5 |
| B. Statement of Facts..... | 6 |
| 1. <i>Chelsea Was Under the Care of Brittany and James’s Extended Family from 2012 to 2018.</i> | 6 |
| 2. <i>James’s Family Takes in Chelsea After Abuse by Brittany’s Husband in March 2018</i> | 7 |
| 3. <i>Chelsea is Placed With Grandma Loretta From March 7, 2018 to August 15, 2019</i> | 9 |
| 4. <i>James Re-Enters Chelsea’s Life</i> | 11 |
| 5. <i>Status of Chelsea’s Relationships at the Time of Disposition</i> | 12 |
| C. The Circuit Court’s Dispositional Decision..... | 16 |
| D. The Appellate Proceedings | 18 |

ARGUMENT19

THE COURT SHOULD GRANT REVIEW TO
DETERMINE WHO, IF ANYONE, BEARS THE
BURDEN TO PROVE WHICH DISPOSITION IS IN
THE CHILD’S BEST INTERESTS DURING THE
DISPOSITIONAL PHASE OF A TPR PROCEEDING19

A. The State Should Bear the Burden to Prove
that Terminating a Parent’s Parental Rights
is in the Child’s Best Interests.....20

B. The Circuit Court’s Aversion to Placement
Alternatives Due to the Age of the
Proceeding Improperly Switched the Burden
from the State to the Parents to Prove Which
Disposition Was in Chelsea’s Best Interests,
Effectively Imposing a Presumption in Favor
of Termination22

SIGNATURES

CERTIFICATIONS

ISSUE FOR REVIEW

1. Who bears the burden during the dispositional phase of a TPR proceeding?

METHOD OR MANNER OF RAISING THE ISSUE: Petitioner J.D.C., Jr. (pseudonymously, “James”) raised the issue at pages 41 to 45 of his opening appellate brief. He argued, *inter alia*, that the Circuit Court’s scant and reluctant consideration of placement alternatives due to the age of the proceeding improperly switched the burden from the State to the parents to prove which disposition was in C.M.M.’s (pseudonymously, “Chelsea”) best interests, effectively imposing a presumption in favor of termination.

ANSWERED BY THE COURT OF APPEALS: The Court of Appeals did not directly address the argument or otherwise mention the burden issue. Recently, it held that “[t]here is not a burden of proof placed on the State” at the dispositional hearing. *State v. A.G.*, No. 21AP1476, unpublished slip op. ¶ 17 (Wis. Ct. App. Feb. 22, 2022) (P-App 577). But then a few months later, it held that “[t]he State, as the petitioner seeking to terminate [respondent’s] parental rights, ultimately bears some burden at the disposition.” *State v. M.B.*, No. 22AP89, unpublished slip op. ¶ 15 (Wis. Ct. App. July 19, 2022) (P-App 587). It further stated that, because the State is “the driving engine” seeking termination, the State must convince the court that doing so is in the child’s best interests. *Id.*

This Court is currently reviewing *State v. A.G.*, No. 22AP652, and has held the petition for review in *State v. M.B.* in abeyance pending its resolution of *State v. A.G.*

**CONCISE STATEMENT OF
CRITERIA JUSTIFYING REVIEW**

Wis. Stat. Rule 809.62(1r)(c)1-2: A decision by this Court will help develop, clarify, or harmonize the law, and the case presents a novel issue of unsettled law which will have a statewide impact

This petition meets the criteria of Wis. Stat. Rule 809.62(1r)(c)1-2 for three reasons. First, the question of which party should have the burden during the dispositional phase is crucial to TPR litigation in Wisconsin. Second, this Court has not previously weighed in on the question. Third, the Court of Appeals has issued inconsistent guidance on the question.

STATEMENT OF THE CASE

This background section is separated into the following four subsections: (A) nature of the case; (B) statement of facts; (C) the Circuit Court's dispositional decision; and (D) the appellate proceedings. Each is addressed in turn below.

A. Nature of the Case

The State instituted proceedings to terminate the parental rights of B.M. (pseudonymously, "Brittany") to several of her children. The proceedings also sought to terminate the fathers' rights to those children. One such proceeding – 19-TP-225 – involved James as the father to Brittany's daughter, Chelsea. Prior to trial, James pleaded no contest to the State's allegation that he failed to assume parental responsibility for Chelsea. At the dispositional hearing, the Circuit Court decided to terminate James's parental rights. He appealed. James argued, *inter alia*, that the Circuit Court's scant and reluctant consideration of placement alternatives due to the age of the proceeding improperly switched the burden from the State to the

parents to prove which disposition was in Chelsea’s best interests, effectively imposing a presumption in favor of termination. The Court of Appeals affirmed, never addressing this argument or mentioning the burden issue. This petition follows.

B. Statement of Facts

This fact section – which is based on the testimony and other evidence adduced during the dispositional hearing – consists of five subsections: (1) Chelsea was under the care of Brittany and James’s extended family from 2012 to 2018; (2) James’s family rescues Chelsea from Brittany’s abusive husband in March 2018; (3) Chelsea is placed with Grandma Loretta from March 7, 2018 to August 15, 2019; (4) James re-enters Chelsea’s life; and (5) Chelsea’s status at the time of the 2021 dispositional hearing.

1. Chelsea Was Under the Care of Brittany and James’s Extended Family from 2012 to 2018

Chelsea was born on January 31, 2012. (R.5-1; P-App 012.) By the time of her birth, James and Brittany had separated, and he was absent. (R.70-18; P-App 070.) James was adjudicated to be Chelsea’s father later that year. (R.76; P-App 019-020.)

Chelsea grew up with a younger half-sibling, H.J. (“Hollie,” born March 27, 2013). (P-App 063.)

Although James was uninvolved with Chelsea’s upbringing, (P-App 070), his extended family played a major role in raising Chelsea. This included James’s mother, L.R. (“Grandma Loretta”), his sisters (“the Aunts”), and his grandmother, V.R. (“Great-Grandma Victoria”). Chelsea’s family case manager (FCM) between January

2018 and April 2021, Laura Miller, testified that Grandma Loretta “had had a private guardianship of [Chelsea] and was her primary caretaker for a period of time.” (R.115-23-24) (see also R.90-15; P-App 188.) Brittany testified that Chelsea lived with Grandma Loretta for at least a year when Chelsea was two or three years old. (R.92-26-27; P-App 371-372.)

FCM Miller testified that Grandma Loretta “provid[ed] care and supervision, babysitting, and engag[ed] with [Chelsea] during her early childhood as well.” (R.106-9; P-App 088.)

Great-Grandma Victoria testified that she, too, had been helping with Chelsea since she was born. (R.88-42, 45; P-App 292, 295.) She further testified that Chelsea and Hollie had lived with her for a month or so when they were younger. (P-App 300-301.)

2. *James’s Family Takes in Chelsea After Abuse by Brittany’s Husband in March 2018*

In 2016, Chelsea married C.W., with whom she had M.H. (“Missy”), born on October 30, 2017. (P-App 062.) In addition to the three half-siblings – Chelsea, Hollie, and Missy – C.W. had a son of his own, C.W. Jr. (Id.)

Unfortunately, C.W. was an abusive man, and he tore Brittany’s family apart. On March 4, 2018, it was reported to police that C.W. punched his son, C.W. Jr. (Id.) On that same date, Brittany took her children to an undisclosed location out of concern for their safety. (P-App 062-063.) Police failed to find or apprehend C.W. at that time. (P-App 063.)

When Brittany presented to the Division of Milwaukee Child Protective Services (DMCPS) on March 5, 2018, it was clear that Hollie and Chelsea had injuries, as well. (Id.) According to Brittany, later in the day on March 4, C.W. had returned home and punched and choked Hollie, causing her to sustain a swollen bruise of her right cheek and a scratch on her neck. (Id.) C.W. also injured Chelsea, causing her to sustain an abrasion on her elbow and a mark on her body. (Id.) Brittany also reported that C.W. had been violent towards her for the past three years. (Id.) Nevertheless, Brittany did not confirm to DMCPS that she would end the relationship with C.W. or otherwise protect her children from him in the future. (Id.)

Amidst the chaos, Brittany told DMCPS on March 5, 2018 that she took five-year-old Chelsea to stay with Grandma Loretta on March 4 or 5, 2018. (R.68-4-5; P-App 024-025, 062, 068-069.) But despite increasing evidence of abuse, Brittany continued to expose her children to C.W. (P-App 063.)

On March 15, 2018, Grandma Loretta and Aunt Q.R. (one of James's sisters) alerted DMCPS that Brittany had taken Chelsea and that they feared she had returned Chelsea and Hollie back to C.W.'s residence. (P-App 067.) They informed DMCPS that Grandma Loretta had been caring for Chelsea since March 4. (Id.) But on March 14, Chelsea informed Grandma Loretta and Aunt Q.R. that Brittany had taken her to see C.W. again. (Id.) This greatly upset them, leading them to report it to DMCPS. (Id.)

During their March 15 meeting with DMCPS, Chelsea again explained that Brittany had taken her and Hollie to see C.W. (Id.) Over the next couple of days, Chelsea and Hollie gave statements to authorities, recounting the disgusting abuse that they, Missy, C.W. Jr.,

and Brittany had endured at the hands of C.W. (Id.) Grandma Loretta and Aunt Q.R. were instrumental in cooperating with DMCPs and other authorities, attempting to protect Chelsea and the others from further harm.

3. *Chelsea is Placed With Grandma Loretta From March 7, 2018 to August 15, 2019*

DMCPs officially removed Chelsea from Brittany's care on March 15, 2018, placing her with Grandma Loretta. She was granted temporary physical custody (TPC) of Chelsea on March 18, 2018. (P-App 053-055.) FCM Miller testified that, during this crucial time, Grandma Loretta "was meeting [Chelsea's] needs" and keeping her "safe." (R.115-23.)

The Circuit Court found Chelsea to be in need of protection or services on May 2, 2018, placing her with Grandma Loretta. (R.71-2; P-App 074.) On September 18, 2018, the Circuit Court continued Chelsea's placement with Grandma Loretta under the CHIPS dispositional order. (Id.; R.69-2; P-App 039.) Meanwhile, Missy and Hollie were placed with non-relative foster parents, K.S. and M.S., in August 2018. (R.89-16; P-App 153.)

Chelsea remained in Grandma Loretta's care from early March 2018 to August 2019. (P-App 024-025, 062, 068-069, 073.) Great-Grandma Victoria testified that, because she lived down the street from Grandma Loretta during this period, she spent time with Chelsea "mostly every day." (P-App 296.)

Chelsea's half-siblings, Missy and Hollie, remained with the K.S./M.S. foster family. Missy and Hollie were eventually joined by two other half-siblings, F.E. and A.E.,¹ at the K.S./M.S. household.

In August 2016, Grandma Loretta decided that it best for Chelsea to be moved to be with her half-sibling, Hollie,² whom Chelsea missed. (P-App 150, 361.) In August 2019, DMCPD placed Chelsea with K.S. and M.S., as well. (P-App 073.)

Unfortunately, Chelsea's reunion with Hollie was short lived. K.S. and M.S. requested that Hollie be placed elsewhere because they could not deal with Hollie's chronic behavior issues: "[Hollie's] level of need and her behaviors had become so exceptional that the [K.S. and M.S.] could not meet her needs in conjunction with then the five other children in their home." (P-App 153-154.) Hollie was removed in December 2020. (P-App 151-152.)

Brittany testified at the dispositional hearing: "The reason that [Chelsea] got removed from [Grandma Loretta] was because of her missing [Hollie], and we wanted both [Hollie] and [Chelsea] to be together. And now that they're not together, we're back at square one." (P-App 361.)

Additionally, at the time of the dispositional hearing, DMCPD was actively seeking to reunify the other half-siblings in the K.S./M.S. foster home – F.E. and A.E. – with their parents. (P-App 200.)

¹ F.E. and A.E. were born around the time or after Chelsea, Hollie, and Missy were removed from Brittany's care.

² Chelsea and Hollie had a close bond as compared to Chelsea and Missy – Missy was just an infant at the time they were removed.

4. *James Re-Enters Chelsea's Life*

At the time he testified at the dispositional hearing, James had been out of custody for six months, the beginning of what would be a two-year period of extended supervision. (P-App 427.) He was living with his fiancé in a two-bedroom apartment in Greenfield. (P-App 426-427, 430.) Although the place was sizeable enough for Chelsea, James and his fiancé were looking for a three-bedroom place in Oak Creek to even better accommodate Chelsea. (P-App 430.) James worked two jobs, one as a forklift and personal machine operator, the other as a personal trainer, which he had been doing for three months. (P-App 427-430.)

At the time he testified, James had telephone visits with Chelsea three times per week while she was at K.S./M.S.'s home; telephone calls with her twice more a week when she visited Brittany; and then in-person visits at least twice a month when she visited his mother, Grandma Loretta. (P-App 431-432.)

Brittany testified that, during telephone or video calls that she had observed between James and Chelsea, "[t]hey're always laughing, cracking jokes. I call [James] every visit to talk to his daughter, and she's always excited. She's always asking me, is it my turn to talk to dad? Can I call him? Is he busy? They have a great relationship. She knows who her dad is, and that's her hero." (P-App 370.) According to Brittany, Chelsea loves James, and they are very closely bonded. (P-App 370-371.) FCM Miller testified that "[Chelsea] is excited to hear from [James]," who is in turn "appropriate in his conversations." (P-App 172.)

James testified that, when he visits Chelsea at Grandma Loretta's home, it is with several family members present at a time,

usually James, Grandma Loretta, and Great-Grandma Victoria. (P-App 434.) He stated that Chelsea visited Grandma Loretta for weekend stays two or three times per month. (P-App 444-445.)

5. *Status of Chelsea's Relationships at the Time of Disposition*

Bonds With James's Family. In her testimony, Brittany characterized the relationship between Chelsea and Grandma Loretta and the rest of James's family in glowing terms:

They're very close. She adores her grandma, speaks highly of her grandma, and gets excited every time she gets to go over there. And her aunts and her cousins, she's got a big family that she does a lot of events with, does a lot of activities with. So she's very close to her other family members.

(P-App 360.)

Describing the relationship between Chelsea and Grandma Loretta specifically, Brittany testified: "It's a wonderful relationship. It's a very loving, very healthy relationship. You know, she knows that's her grandma. She wants to see her all the time. She want to spend time with her all the time. It's a pretty great relationship they have." (P-App 372-373.)

When asked whether Chelsea has a "substantial relationship" with Grandma Loretta, FCM Miller testified: "I think she does. I think that that relationship has been maintained. I think that [Grandma Loretta] has been consistent in [Chelsea's] life for her nine years of life that that relationship has been substantial and has been maintained as a substantial relationship." (P-App 189-190.)

FCM Miller testified to Chelsea's relationships with the Aunts. (P-App 174, 273.) Brittany testified that Chelsea was closely bonded with the Aunts, as well, and saw them every time she visited Grandma Loretta. (P-App 375-376.) James testified similarly, noting that limiting those interactions would be harmful. (P-App 441-442.) Nevertheless, FCM Samantha Kohnert testified that she had not reached out to any of the Aunts as potential adoptive resources. (P-App 409.)

Great-Grandma Victoria testified that she, too, had a "really great close relationship" with Chelsea and saw her each time she visited Grandma Loretta. (P-App 292-293.) FCM Miller agreed, testifying that the two visited regularly "when [Chelsea] was placed with [Grandma Loretta] because [Great-Grandma Victoria] live[d] down the street" and that, currently she "continues to see [Chelsea] when [Chelsea] visits her paternal family." (P-App 281.)

Moreover, DMCP's Court Report under Wis. Stat. § 48.425 states: "[Chelsea's] strongest relationships are with her extended paternal family members who she visits on a routine and consistent basis." (P-App 078.) The Court Report further stated that "FCM does feel that severing [Chelsea's] relationships with her paternal family would be detrimental to [Chelsea]." (Id.)

Living Preferences. With respect to the foster parents K.S. and M.S., Brittany testified that Chelsea had told her that "[s]he does not want to live with them." (P-App 377.) She testified that Chelsea told her that she wanted to live with her, James, or Grandma Loretta. (Id.) James testified that Chelsea expressed wanting to stay with either him or Grandma Loretta. (P-App 434-435; see also P-App 441.)

FCM Miller testified that Chelsea had stated multiple times that she wanted to live with Grandma Loretta, stating that “[Chelsea] loves her grandmother, and I think her grandmother spends a significant amount of time with her, and grandma’s home had been her home for a period of time” (P-App 175-176; see also P-App 190.)

Great-Grandma Victoria as an Adoptive Resource. FCM Miller testified that, in October 2020, Great-Grandma Victoria contacted her about her desire to have placement of Chelsea, and possibly her four half-siblings, as well. (P-App 278.) At the time, K.S./M.S. had not yet had Hollie removed, meaning all five half-siblings lived their roof. (See P-App 280.) FCM Miller declined Great-Grandma Victoria’s request to be a placement option, telling her that DMCPs was “not looking to recommend to either split the siblings up for placement or to move all five siblings.” (P-App 174; see also P-App 279-280.)

FCM Miller testified at the dispositional hearing to markedly changed circumstances, including that Chelsea, Hollie, and Missy were no longer placed together; that Chelsea was in her second placement, Hollie was in her third placement, and Missy was in her second placement; and that DMCPs was actively trying to reunify the other half-siblings, F.E. and A.E., with their parents, which would leave only Missy and Chelsea with K.S./M.S. (P-App 201, 203.)

Great-Grandma Victoria also took the stand. She testified that she still urged DMCPs to be an adoptive resource for Chelsea and even her other siblings, if needed. (P-App 297.) She testified that she was 61 years old, in good health, has a steady income from rental property and a parttime job as a home health aide, lives alone in a

three-bedroom, two-bathroom home in Milwaukee, and has five grown children, one of whom is Grandma Loretta. (P-App 290-291.) Great-Grandma Victoria continued: “I’m here stepping up on behalf of my great-granddaughter, and I’m sure that anybody can understand that. I love her. She’s family. I[] have always believed that family should be with family, and there’s no way that I’m going to give up fighting for [Chelsea].” (P-App 299.)

Great-Grandma Victoria also mentioned that she had been a licensed foster parent in the past and saw no problems with becoming one again. (P-App 297.) She qualified as an adoptive resource regardless because relatives need not be licensed to be considered an adoptive resource – as FCM Miller confirmed: “A child can be placed with a relative under kinship placement, and then transfer of guardianship is a form of permanency that that child is eligible for.” (P-App 286.)

Brittany testified that she supported having Chelsea and her siblings live with Great-Grandma Victoria. (P-App 374.) She emphasized that Great-Grandma Victoria had long fostered various children. (P-App 374-375.) Her house was plenty large enough for Chelsea and, if necessary, the other siblings. (P-App 375.) Likewise, James testified that Great-Grandma Victoria had the ideal housing for Chelsea, fully equipped with what she would need. (P-App 435.) He indicated that he would like to see Chelsea live with Great-Grandma Victoria. (P-App 441.)

FCM Kohnert – who took over for FCM Miller and whose testimony was given about five weeks after Great-Grandma Victoria’s – testified that Great-Grandma Victoria contacted her after testifying, requesting that DMCPs consider placing Chelsea with her.

(P-App 409.) Remarkably, FCM Kohnert rejected her request, explaining that DMCPs was “not recommending that we split [Chelsea] up from her siblings, but that if she did want to go get licensed, she could reach out to go through that process.” (Id.) FCM Kohnert testified that she took no steps to investigate whether Great-Grandma’s home was fit for a possible placement. (P-App 410.)

FCM Fleming – who took over for FCM Kohnert mid-hearing in August 2021 – testified that she knew nothing about Great-Grandma Victoria or anyone else from James’s family being a potential adoptive resource. (P-App 489-490.)

C. The Circuit Court’s Dispositional Decision

The Circuit Court did not address which party bore the burden during the dispositional phase. It began its decision by stating that it is “difficult . . . to go back and relitigate placement decisions that were previously made.” (R.101-89-90; P-App 548-549.) Although the Circuit Court “recognize[d] [it] can still consider them anew,” it clearly had misgivings about alternative placements. (Id.)

The Circuit Court stated that placing Chelsea with Great-Grandma Victoria “would effectively be a brand new placement three-and-a-half years into this story.” (Id.) It found that “[i]t doesn’t sound like [Chelsea] has a very intimate relationship with [Great-Grandma Victoria] although it sounds like she knows her.” (Id.)

The Circuit Court then stated that Grandma Loretta “did, in fact, have placement for a period of time but was unable to continue that and actually asked for the children to be removed or maybe it was just [Chelsea]. I’m not one hundred percent certain, but in any

event she'd asked for that removal and asked for her to go with [K.S./M.S.], and it was just [Chelsea] to be with her sibling." (Id.)

With respect to the parents (i.e., Brittany and the three fathers), the Circuit Court stated that "the thing that is most salient about this case is how long it's been going on and how little progress has been made by the parents on behalf of these kids." (P-App 550.) However, the Circuit Court emphasized that James was the exception:

Now, [James] is probably the exception. In his own life he is obviously getting it together. I believe he's married or with a fiancée. He's got a ring on his hand. So I think he's married. I think he has other children living in his home.

He's got just multiple certifications professionally. He's got two jobs. He's got a steady home. All of that is great

(P-App 551.)

That said, the Circuit Court questioned why James had not had visits with Chelsea in his home. (Id.) It noted that James was still doing phone visits – although it also conceded that James was having regular in-person visits with Chelsea during her visits with Brittany. (Id.) Nonetheless, the Circuit Court did not believe it was enough. (P-App 551-552.)

The Circuit Court sharply criticized the other fathers as well as Brittany, indicating that none of them were fit enough to be granted placement of the children. (P-App 552-554.) It then stated: "And so I've got [to] look at what do the kids need now? What is the best choice for the Court amongst a list of choices that frankly are not great, right?" (P-App 553.)

Thus, before even *considering* the statutory factors, (see P-App 554), the Circuit Court had already nixed placement alternatives. Its reluctance to disrupt the status quo was largely driven by its belief that it was too late in this drawn-out proceeding to consider alternative placement options. It stated, for instance: “I think that these kids need to be done with this roller coaster. . . . I don’t think it’s in these kids['] best interests to throw them back in to the CHIPS process and see what would stick” (P-App 562.) It also stated: “Familial placements that could have been used for a transfer of guardianship have not panned out and have been litigated. To start over with [Great-Grandma Victoria] at this point I think would be awfully disruptive for these kids who have already suffered just a tremendous amount of disruption in their lives.” (P-App 564.)

The Circuit Court concluded that James’s parental rights should be terminated. (*Id.*) It then issued an order to that effect. (R.95; P-App 567-568.) James appealed. (R.141; P-App 569-570.)

D. The Appellate Proceedings

James raised three issues in his opening brief: (1) that the Circuit Court inadequately examined the relevant evidence and the statutory factors; (2) that the Circuit Court’s scant and reluctant consideration of placement alternatives due to the age of the proceeding improperly switched the burden from the State to the parents to prove which disposition was in Chelsea’s best interests, effectively imposing a presumption in favor of termination; and (3) that the Court of Appeals should grant James a new trial in the interests of justice to afford the Circuit Court an opportunity to hear firsthand testimony from Chelsea’s foster parents. This petition relates only to the second issue, described more in the argument section below.

The State and GAL filed response briefs. Neither brief actually addressed the second issue, i.e., the burden-switching issue. They instead argued that it sufficed that the Circuit Court simply mentioned alternative placements. James filed a reply brief which reiterated his original position.

The Court of Appeals affirmed on September 27, 2022. (P-App 001-011.) Like the State and GAL, it did not address the second issue. Instead, it misconstrued the argument as being an objection to previously-litigated placements, (P-App 009), which makes little sense as there had been no previously-litigated placements. It ignored his burden-switching allegation altogether, never once mentioning burdens of proof at all. It simply concluded that the Circuit Court had considered alternative placements and cited “the need for stability and permanency” under Wis. Stat. § 48.426(3)(f). (Id.)

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO DETERMINE WHO, IF ANYONE, BEARS THE BURDEN TO PROVE WHICH DISPOSITION IS IN THE CHILD’S BEST INTERESTS DURING THE DISPOSITIONAL PHASE OF A TPR PROCEEDING

The Court should grant this petition to determine which party bears the burden during the dispositional phase of TPR litigation. The function of the Court is “to oversee and implement the statewide development of the law.” *State v. Beamon*, 2013 WI 47, ¶ 48, 347 Wis. 2d 559, 830 N.W.2d 681. It is, in other words, “a law-declaring court.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). It is not a forum for mere error correction. *See State v. Mosley*, 102 Wis. 2d 636, 665-66, 307 N.W.2d 200 (1981).

The Court of Appeals skirted the issue in this case. However, if granted, this petition will afford the Court the opportunity to address the issue directly.

A. The State Should Bear the Burden to Prove that Terminating a Parent’s Parental Rights is in the Child’s Best Interests.

The Court should clarify that the State must bear the burden to prove that terminating a parent’s parental rights is in the child’s best interests. The Court of Appeals is torn on the issue. On the one hand, it held that “[t]here is not a burden of proof placed on the State” at the dispositional hearing. *State v. A.G.*, No. 21AP1476, unpublished slip op. ¶ 17 (Wis. Ct. App. Feb. 22, 2022) (P-App 695-696). On the other hand, it held that “[t]he State, as the petitioner seeking to terminate [respondent’s] parental rights, ultimately bears some burden at the disposition.” *State v. M.B.*, No. 22AP89, unpublished slip op. ¶ 15 (Wis. Ct. App. July 19, 2022) (P-App 706). At present, litigants and courts are unable to reconcile these contradictory holdings.

The Court should align itself with the opinion in *State v. M.B.* A parent’s right to raise his or her children is a fundamental liberty interest. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Indeed, the United States Supreme Court has stated that “the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (holding that the due process clause protects the freedom of personal choice in matters of family life); *Pierce v. Society of the Sisters of the Holy Names of Jesus Mary*, 268 U.S. 510, 534-35 (1925)

(holding that it protects the right to bring up one's children and control their education).³ In other words, the bonds of family are sacred in our society.

The fourteenth amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The Wisconsin Constitution confers a co-extensive due process right. *See* Wis. Const. art. I, §§ 1, 8. The due process clause “guarantees more than fair process” as it also “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The United States Supreme Court has explicitly recognized the need for heightened procedural safeguards to protect parents’ fundamental liberty interests in TPR proceedings:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky, 455 U.S. at 753-54.

³ Wisconsin courts share the sentiment. *See, e.g., State v. Neumann*, 2013 WI 58, ¶ 113, 348 Wis. 2d 455, 832 N.W.2d 560; *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶¶ 39-41, 293 Wis. 2d 530, 716 N.W.2d 845; *Monroe County DHS v. Kelli B.*, 2004 WI 48, ¶ 23, 271 Wis. 2d 51, 678 N.W.2d 831.

Although parents should expect fewer due process protections after a court finds them to be unfit, such protections do not disappear completely. At the very least, as petitioner, the State should have to shoulder the ultimate burden to prove that terminating their parental rights best serves their child's interests. Requiring anything less would be inconsistent with the commands of due process.

Because neither the Circuit Court nor the Court of Appeals recognized the State's burden in this case, the Court should grant the petition to clarify that aspect of Wisconsin law.

B. The Circuit Court's Aversion to Placement Alternatives Due to the Age of the Proceeding Improperly Switched the Burden from the State to the Parents to Prove Which Disposition Was in Chelsea's Best Interests, Effectively Imposing a Presumption in Favor of Termination.

Instead of looking to whether the State met its burden, the Circuit Court here improperly demanded from James that he prove why it should consider his placement alternatives so late in a drawn-out proceeding. Its decision began as follows:

The first thing I would say is that it is difficult for me to go back and relitigate placement decisions that were previously made. I recognize I can still consider them anew, but there are number of things that I would say about that.

So, you know, [Great-Grandma Victoria] would effectively be a brand new placement three-and-a-half years into this story. It doesn't sound like [Chelsea] has a very intimate relationship with her although it sounds like she knows her. She is not the great grandmother of any of the other two children that are at issue here.

[Grandma Loretta] did, in fact, have placement for a period of time but was unable to continue that and actually asked for the children to be removed or maybe it was just [Chelsea]. I'm not one hundred percent certain, but in any

event she'd asked for that removal and asked for her to go with [K.S./M.S.], and it was just [Chelsea] to be with her sibling.

(P-App 537-538.)

This was not a good omen. Indeed, for many parents in TPR proceedings, a consideration of alternative placements is exactly what *must occur* for the parent to prevail at disposition and avoid termination. Just as troubling to James was the haste by which the Circuit Court dismissed his family's placement alternatives – in this case, two formative figures in Chelsea's life: Great-Grandma Victoria and Grandma Loretta.

It is the State, not the parents, who must convince the circuit court at the dispositional hearing. Moreover, termination is *not* the rule and dismissal the exception; rather, the circuit court's "wise and compassionate discretion" – driven by the child's best interests and enlightened by the factual record – determines whether dismissal or termination will better promote the child's interests:

No inference should be drawn . . . that, at a dispositional hearing, dismissal is the exception and termination is the rule. The best interests of the child will always drive the court's inquiry. The facts of record should influence the result. Ultimately, however, the wise and compassionate discretion of the court will determine whether termination will promote the best interests of the child.

Julie A.B., 2002 WI 95, ¶ 42 (citations, quotation marks omitted, emphasis added).

Accordingly, the case law required the Circuit Court to examine the evidence and make fact findings supporting whichever disposition best served Chelsea's interests. From the very start, this

is not what happened. Because the Circuit Court announced its reluctance to consider placement alternatives—which, as shown below, it would reiterate again before the end of its ruling—the Circuit Court imposed a tacit presumption in favor of the status quo. The evidence, rather than being a guide to whichever disposition was best for Chelsea, would instead have to weigh enough to overcome the Circuit Court’s distaste for change. This effectively switched the burden to *the parents* to persuade the Circuit Court to make an exception. Likewise, it transformed adoption and termination into the default outcomes.

Harboring bias against reconsidering placement cannot be reconciled with the law’s command that “[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition.” *Julie A.B.*, 2002 WI 95, ¶ 28. Clearly, there are situations where changing placements—even late in a drawn-out proceeding—will best serve the child’s interests. The age of the proceeding should be immaterial; at the dispositional hearing, *whenever* that might occur, the child’s best interests at that point in time is all that matters. Even in years-long TPR proceedings, it may nonetheless be in the child’s best interests to send the child back to a prior placement or to introduce the child to a new one. Courts must be willing to consider all options.

The Circuit Court demonstrated no such willingness. In fact, the rest of its ruling makes that even more clear.

Going through the statutory factors, the Circuit Court repeatedly elevated Chelsea’s relationships with K.S./M.S. over the ones with her parents, not once mentioning potential alternative placements. (P-App 543-551.) It declared that “I think that these kids

need to be done with this roller coaster.” (P-App 551.) In other words, the status quo would prevail.

The end of its ruling drawing near, the Circuit Court again professed its unwillingness to reconsider placement, again giving scant attention to alternatives:

As I said, I can't really go back and relitigate some of those placement decisions, but I think it appears there were good reasons for them.

I don't think it's in these kids['] best interests to throw them back in to the CHIPS process and see what would stick especially given the fact that there was prior litigation about this. I don't hold out high hope for that to work out any differently.

(P-App 551.) Finally, in closing, the Circuit Court again emphasized that starting over with a new placement so many years into the proceeding was out of the question, leading it to terminate James's parental rights:

Familial placements that could have been used for a transfer of guardianship have not panned out and have been litigated. To start over with [Great-Grandma Victoria] at this point I think would be awfully disruptive for these kids who have already suffered just a tremendous amount of disruption in their lives.

So I am going to order the termination of the parental rights of each of these parents.

(P-App 553.)

Because the Circuit Court's aversion to placement alternatives switched the burden from the State to the parents, the Court should grant this petition, reverse, and remand the case for a new dispositional hearing.

SIGNATURES

Dated this 18th day of October, 2022.

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Dated this 18 day of October, 2022.



J.D.C., Jr.
Petitioner

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this petition for review meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm), and (c), and Wis. Stat. § 809.62(4), as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this petition for review is **6,668** words.

Dated this 18th day of October, 2022.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(b)

I hereby certify that separately filed with this petition for review is an appendix that complies with Wis. Stat. §§ 809.19(2)(a) and 809.62(2)(f) and (4), and that contains:

- (1) A table of contents;
- (2) The decision and opinion of the court of appeals;
- (3) The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;
- (4) Any other portions of the record necessary for an understanding of the petition; and
- (5) A copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

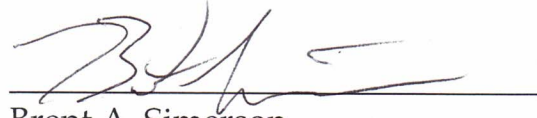
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18 day of October, 2022.

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A handwritten signature in black ink, appearing to read 'B. Simerson', is written over a solid horizontal line.

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CERTIFICATION

I hereby certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the Court and served on all opposing parties.

Dated this 18 day of October, 2022.

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