STATE OF WISCONSIN

SUPREME COURT

Case No. 22AP802

**In re the termination of parental rights to S.R.,
A Person under the age of 18:**

STATE OF WISCONSIN,
Petitioner-Respondent-Respondent,

v.

J.D.R. Sr.,
Respondent-Appellant-Petitioner.

GUARDIAN AD LITEM'S RESPONSE TO PETITION FOR REVIEW

THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

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ISSUE PRESENTED FOR REVIEW

1. Whether a trial court erroneously exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach.

Trial Court and Court of Appeals Answered: No.

Furthermore, this Court should not grant J.D.R. Sr.'s Petition for Review under Wisconsin Statute § 809.62(1r) because the question presented as to what constitutes erroneous exercise of discretion is well-settled and previously decided, and further, J.D.R. Sr. implicitly concedes that this case does not meet statutory criteria for review.

STATEMENT OF THE CASE

On September 18, 2020, the State of Wisconsin filed a Petition for Termination of Parental Rights to S.R. against J.D.R. Sr. on the asserted grounds of continuing need of protection or services pursuant to Wis. Stat. § 48.415(2), and failure to assume parental responsibility pursuant to Wis. Stat. § 48.415(6). (R. 5).[1] On December 17, 2020, J.D.R. Sr. entered a denial to the petition, and trial dates were scheduled.

After multiple delays, the jury trial proceeded on December 1–3, 2021, and December 13–14, 2021. After hearing the evidence, the jury deliberated and returned verdicts on continuing CHIPS with one dissenter, and failure to assume parental responsibility with one dissenter. (R. 130: 83–84). The trial court received those verdicts and denied a motion for judgment notwithstanding the verdict by the J.D.R. Sr. finding that the standard was

[1] This brief will refer to the Index in 22AP56802, cross ref. 20TP204, unless otherwise noted, given that the appeals are consolidated and the transcripts and paperwork as to J.D.R. Sr. are identical aside from identifying case numbers and names. Where not relevant, this brief will not cover the grounds and dispositional phases as to the other Respondent parent, L.C., nor the maternal half-sibling, S.R.

not met because a reasonable jury could have reached the conclusion that there was clear and convincing evidence of both grounds. (R. 130: 86). The court entered judgment on the verdicts and found J.D.R. Sr. unfit. (R. 130: 86). Disposition was scheduled on December 15, 2021, and December 16, 2021.

Disposition proceeded and after hearing evidence the trial court found that it was in S.R.'s best interests that J.D.R. Sr.'s rights be terminated. (R. 131: 65). The trial court signed an order reflecting the same on December 16, 2021. (R. 113).

J.D.R. Sr. filed a notice of intent to pursue post-disposition relief on December 20, 2021, and a notice of appeal was filed on May 12, 2022. (R. 150). J.D.R. Sr. filed a brief in support of his appeal on June 17, 2022. On August 19, 2022, the Court of Appeals affirmed the trial court. This petition for review follows.

STATEMENT OF FACTS

S.R. is a young child who has lived in the child welfare system for most of his life. (See. R. 5). On January 10, 2018, S.R. was removed from J.D.R. Sr. at 4 months old after an in-home safety plan was violated leaving S.R. in an unsafe environment. (*See* R. 61). L.C., S.R.'s biological mother, had an extensive alcohol and drug abuse history, and S.R. tested positive for cocaine and THC at birth. (*See* R. 62: 3–5). S.R. was placed with J.D.R. Sr. on an in-home safety plan, which was violated when J.D.R. Sr. left S.R. alone with L.C. without approval. (R. 145: 43–48). The CHIPS court found S.R. to be in need of protection or services on August 21, 2018, pursuant to Wis. Stat. § 48.13(10m). (R. 65: 16). On September 12, 2018, the trial court signed a dispositional order outlining conditions for return and services to assist J.D.R. Sr. in meeting those conditions. (R. 65: 17) (R. 63).

On September 18, 2020, the State of Wisconsin filed a Petition to Terminate Parental Rights. (R. 5). The case proceeded to a jury trial on December 1–3, 2021, and December 13–14, 2021, and the jury returned verdicts as to both pleaded grounds of continuing CHIPS and failure to

assume parental responsibility. The trial court entered judgment on the verdicts and found J.D.R. Sr. unfit on December 14, 2021. The case proceeded to disposition on December 15–16, 2021.

Jury Trial Proceedings

During trial, the jury first heard from A.H., who was the first assigned case manager from November 2017 until November 2019. (R. 145: 41–42, 52). A.H. testified that S.R. was initially placed on an in-home safety plan because he was born several weeks premature and was born drug-positive for cocaine and THC. (R. 145: 43). J.D.R. Sr. was the designated protective agent on the safety plan, and per the parameters of that plan he was to give S.R. to his sister, the child's aunt, if he was unable to care for S.R. for any reason. (R. 145: 43). The safety plan prohibited leaving S.R. with L.C. for any period of time unsupervised. (R. 145: 43). A.H. testified that there were continuous issues during the safety plan wherein the DMCPS would try to do unannounced visits to check in with the child and the paternal aunt, who was supposed to watch the child while J.D.R. Sr. was receiving scheduled weekly medical care, but the aunt was largely nonresponsive to these attempts. (R. 145: 44–45). Eventually, S.R. was removed after it became clear that J.D.R. Sr. was not following the plan but was instead leaving S.R. with L.C. without approval, despite L.C.'s admitted and ongoing drug use. (R. 145: 47–49).

The dispositional order laid out five conditions, plus the standard visitation condition, specific to J.D.R. Sr. designed to alleviate safety concerns to return S.R. to his care,[2] and enumerated two different services to assist in meeting those conditions—family therapy, and home management. (R. 63).

A.H. testified that she attempted to engage J.D.R. Sr. in services both prior to entry of the dispositional order, as well as after entry of the order. (R. 145: 54). J.D.R. Sr. was only minimally engaged in services and missed

[2] Conditions 1, 2, and 3 were ordered as to the mother, L.C., exclusively, and are not discussed in this appeal.

several appointments between November 2017 and November 2019. (R. 145: 55–56). A.H. testified that J.D.R. Sr. had not met any of his required conditions prior to the case transfer in November 2019. Specifically, A.H. noted that DMCPS remained concerned that J.D.R. Sr. was leaving the child with older children in the home as the supervisor while he would leave to run errands, thus not always supervising his child or putting his child's needs before his own[3] nor having age-appropriate expectations of his child.[4] (R. 145: 57, 62–63). Further, A.H. testified that as of November 2019, J.D.R. Sr. continued to show signs of unaddressed anger that would result in inappropriate discipline for children in the home, thus not controlling his emotions.[5] (R. 145: 63).

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[3] "Condition 4: Always Supervise Your Child and Place Your Child's Needs Before Your Own

The court requires you to do the following:

- Show that you can make and follow through on plans that will keep your child safe.
- Show that you can identify safe caretakers for your child.
- Show that you allow only safe individuals to have contact with your child.
- Show that you can and will make and use a plan for making sure the child is safe and supervised when you are unavailable, overwhelmed, or stressed.
- Do not leave your child alone or in unsafe places." (R. 63: 6).

[4] "Condition 5: Have Age Appropriate Expectations of Your Child

The court requires you to do the following:

- Show that you can anticipate your child's behaviors and needs.
- Show that you can properly meet your child's needs.
- Show that you understand what your child is physically and emotionally capable of doing.
- Show that you can supervise your child on your own without someone else helping you.
- Show that you can redirect your child from an unsafe situation or bad behaviors with age appropriate discipline that is not verbally or emotionally abusive." (R. 63: 6).

[5] "Condition 6: Control Your Emotions

The court requires you to do the following:

- Do not physically abuse your child or let anyone else physically abuse your child.
- Show that you are able to control your emotions and actions daily.

A.H. testified that J.D.R. Sr. had made some progress as to conditions 7 and 8 but had not fully met either condition as of the November 2019 case transfer. Specifically, J.D.R. Sr. was maintaining the home that he lived in, but he consistently reported that he was looking for independent housing away from other family members, specifically L.C., and so he had not fully met the condition to keep a safe, clean home.[6] (R. 145: 63–64). Further, J.D.R. Sr. had made some progress in understanding that L.C. needed AODA treatment, but he never articulated why L.C.'s drug use posed a risk to S.R.[7]

- Show that you can discipline your child in a non-violent and non-impulsive way.
- Show that you can set boundaries for your child and use age appropriate consequences for bad behaviors.
- Do not hit your child or use any objects such as belts or cords to strike your child.
- Show that you recognize when you are frustrated with your child and that you can handle these situations without using physical discipline.
- Show that you understand that physical discipline harms your child physically and emotionally.
- Help your child get therapy and services to deal with past physical abuse." (R. 63: 6).

[6] "Condition 7: Keep a Safe, Clean Home

The court requires you to do the following:

- Show that you can keep a clean and safe home daily.
- Show that you can keep your home free of excess clutter so that a person is able to walk freely throughout the home and not have to squeeze through hallways or run into items.
- Show that you can keep your home free of pests and insects.
- Should that you dress your child daily in clean clothing that fits.
- Show that you keep your food in a clean, safe space.
- Show that you keep unsafe items such as medicines, cleaners, electrical cords, electrical plugs, heaters, and lighters away from your child's reach.
- Show that you can keep and use a safe place for your child to sleep." (R. 63: 6–7).

[7] "Condition 8: Provide Safe Care for Your Child

The court requires you to do the following:

- Have a safe, suitable and stable home.
- Do not abuse your child or place your child at risk of being abused.

(R. 145: 64–65.) J.D.R. Sr. would attend L.C.'s treatment meetings and advocate for AODA treatment, but he would then talk to L.C. about leaving treatment to come assist him with the children and showed inconsistency in understanding the risks inherent to drug addiction and the process necessary to recover from it. (R. 145: 64–65.)

The case transferred in November 2019 to A.L, who was assigned until May 2020. A.L. made additional repeated referrals to services for J.D.R. Sr. for trauma informed parenting classes based on new safety concerns. (R. 146: 42). J.D.R. Sr. continued to struggle with identifying safe individuals in his home, and in February 2020 the DMCPS discovered that J.D.R. Sr. had an adjudicated sex offender living in his home. (R. 146: 44).[8] J.D.R. Sr. was not cooperative with the DMCPS in providing information about the older child in the home and denied that the child was living in the home (R. 146: 45); however, J.D.R. Sr. later admitted that the child was living there (R. 146: 46), and then recanted again (R. 146: 47). Visitation was moved back to fully supervised upon discovery of this individual, and the case took a sharp turn from thereon out. J.D.R. Sr. became defiant and uncooperative, refusing visitation initially, refusing services, and refusing to acknowledge or articulate why a registered sex offender posed a risk to S.R. (R. 146: 45–48).

J.D.R. Sr.'s inability to articulate his protective role became more apparent as time went on. In May 2020, J.D.R. Sr. refused to participate in family therapy with S.R. (R. 146: 75). He was referred to individual therapy and a psychological evaluation, but he was inconsistently engaged with

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- Show that you want to and are able to care for your child and your child's special needs on a full-time basis.
- Cooperate with others needed to help care for your child.
- Cooperate with the DMCPS by staying in touch with your ongoing case manager, letting your ongoing case manager know your address and telephone number, and allowing the ongoing case manager into your home to assess the home for safety." (R. 63: 7).

[8] This individual was J.D.R. Sr.'s son, J.D.R. Jr. Evidence concerning the identity of this individual, or the relationship between J.D.R. Sr. and J.D.R. Jr. was excluded and not presented to the jury. This information was discussed extensively and openly at disposition and before the trial court throughout the case.

therapy and he did not show up for his evaluation. (R. 146: 76–77). J.D.R. Sr. did not even respond to DMCPS about a trauma informed parenting referral. (R. 146: 75–76). J.D.R. Sr. moved into a hotel in June 2020 with L.C. and was transient until June 2021. (R. 146:79–82). The first home, in June 2021, had exposed wiring and was not approved for visitation or reunification. (*See* R. 146: 82). He moved again in August 2021, but there were several people living in the house with him, including J.D.R.'s older child who was a registered sex offender. (R. 146: 83–84). During a home visit, L.H., the case manager from May 2020 until the date of trial, visually observed marijuana and drug paraphernalia in the basement of the home. (R. 146: 90).

L.H. testified that from May 2020 until September 18, 2020, when the Petition for Termination of Parental Rights was filed, J.D.R. Sr. still had not met any of his conditions for return. Specifically, J.D.R. Sr. still lacked ability to supervise and place S.R.'s needs before his own, as he had unsafe people in the home environment. (R. 129: 21). J.D.R. Sr. continued to struggle during interactions with the child and would threaten timeouts for behavior that was age-appropriate, and further would only ask the child for updates about his life without consulting caregivers. (R. 129: 23). J.D.R. Sr. was not using physical discipline during visitation, but he continued to get frustrated with the child and would yell at professionals during visitation or not control his frustration appropriately with S.R. (R. 129: 25). Further, on the date the petition was filed J.D.R. Sr. did not have his own home to assess, and even by the date of trial J.D.R. Sr.'s home was not appropriate due to unsafe individuals living there. (R. 129: 25–27).

While J.D.R. Sr. was initially consistent in visiting S.R., (R. 145: 59–60), that consistency did not last through the whole case (*See* R. 146: 100). Even prior to November 2019, J.D.R. Sr. would generally supply food, diapers, and wipes at visitation, but J.D.R. Sr. relied on other family members to assist with necessary cares for S.R. (R. 145: 61–62). Toward the end of the case, he did not always bring supplies to visits. (R. 146: 100). By trial, J.D.R. Sr. was approved for six hours of visitation per week but declined full four hour visits on Saturdays because he did not believe he could keep the child entertained for four hours. (R. 146: 101). J.D.R. Sr. was never able to

articulate his protective role as a parent, was never able to understand or articulate safety concerns with leaving S.R. with L.C. unsupervised and remained unable to identify other unsafe individuals in his home. (R. 145: 66–67).

J.D.R. Sr. did not provide daily care, supervision, or protection for S.R. (R. 145: 68). J.D.R. Sr. did not attend any of S.R.'s medical appointments. (R. 145: 61). J.D.R. Sr. would occasionally reach out via video call to talk to S.R., but he never reached out for updates about the child, or to coordinate scheduling for medical appointments or other needs. (R. 146: 91). J.D.R. Sr. testified at trial that S.R. was doing well, had no behavioral issues, and was doing well at daycare (R 146: 35); however, S.R. was having issues at daycare including tantrums, screaming, and defiant behaviors. (R. 146: 96). Further, J.D.R. Sr. testified that he knew of no medical issues (R. 146: 35–37); however, S.R. had allergies, daily medications for an asthma diagnosis, and annual specialist appointments (R. 146: 97).

The jury deliberated and returned verdicts on each ground, finding that the State had met its burden to prove that S.R. remained in need of protection or services pursuant to Wis. Stat. § 48.415(2) and that J.D.R. Sr. failed to assume his parental responsibility pursuant to Wis. Stat. § 48.415(6). (R. 130: 83–84). The trial court denied a motion to dismiss posed by J.D.R. Sr. and entered judgment on the verdicts. (R. 130: 86).

Disposition Proceedings

Disposition proceeded on December 15–16, 2021. At disposition, L.H. testified to the dispositional factors in Wis. Stat. § 48.426. L.H. testified that S.R. had a fully-licensed, committed adoptive resource identified, whom he'd lived with for 3.5 years. (R. 135: 37–39, 46, 49–50) (*See also* R. 135: 19–20). L.H. had observed interactions between S.R. and the caregivers and testified that the bond between them was apparent. (R. 135: 37–38). L.H. testified that S.R. was a few months old at removal and had health issues related to being born premature and drug-affected, but the only lingering issue was asthma. (R. 135: 39). L.H. noted that the caregivers were

committed to adoption, and that S.R. was otherwise adoptable. (R. 135: 38) (*See also* R. 135: 21–22).

L.H. testified that S.R. had no significant contact with extended family, just with his parents and older siblings. (R. 135: 40). Specifically, as to S.R. and J.D.R. Sr., L.H. testified that she believed the relationship was more like playmates than father and son. (*See* R. 135: 42). S.R. never asked about J.D.R. Sr. outside of visitation and did not discuss him unless specifically asked about him. (R. 135: 42). L.H. believed any harm from severing the relationship between S.R. and J.D.R. Sr. would be short-term. (R. 135: 45). As to siblings, L.H. testified that S.R. has several older siblings, but only occasionally visits with them. (R. 135: 47). S.R. lived with the older siblings for approximately four months of his life prior to removal and only visited infrequently. (R. 135: 47–48). S.R. had a substantial relationship with the sibling he was living with in the foster home,[9] and L.H. did believe that separation from that sibling would cause harm. (R. 135: 48). The caregivers had frequently discussed the importance of continuing biological relationships, and so L.H. believed any harm would be mitigated by that commitment to continued contact. (R. 135: 43, 48–49).

L.H. testified that S.R. was not old enough to understand adoption, but S.R. had spent a significant amount of his life out of home. (R. 135: 46, 49–50). Evidenced showed that S.R. had been out of the parental home since he was four months old, and that the parents had not made any significant progress on diminishing safety threats since November 2019. (*See* R. 49–60). L.H. testified that the caregivers had been the primary provider for all of S.R.'s food, shelter, medical, and other basic needs. (R. 135: 51–52). Further, L.H. testified that no meaningful progress had been made by J.D.R. Sr. towards reunification, as J.D.R. Sr. was allowing J.D.R. Jr. to live in the home after he was charged and adjudicated delinquent for first degree sexual assault of a child after assaulting his younger sister in the home at least twice in 2019. (R. 135: 52–58). J.D.R. Sr. wavered on acknowledging that J.D.R. Jr. was living in his home, but consistently failed to understand why that

[9] J.D.R. Sr. was excluded by DNA testing to this child, and so that child is not discussed in this appeal.

would be a safety concern if his son was living there. (R. 135: 59–60). Ultimately, L.H. believed that S.R. would enter a more stable and permanent relationship if the court granted the TPR petition. (*See* R. 135: 46–52).

The trial court ruled that TPR was in S.R.'s best interests. (R. 131: 65). The court found that S.R. was in a committed adoptive resource, (R. 131: 65); that there was nothing about S.R.'s age or health that would prevent adoption, (R. 131: 65); that S.R. was too little to express his wishes, (R. 131: 65); and that the duration of separation from his parents was "pretty much his entire life." (R. 131: 62). As to substantial relationships, the trial court noted that it is hard for little children to create substantial relationships with somebody who is not their daily caregiver but found that S.R. did know J.D.R. Sr. and cared about him (R. 131: 65–66). As to older siblings, the trial court noted that S.R. did not have substantial contact with them, so evaluating the strength of the relationship was difficult. (R. 131: 66). Ultimately, the trial court found that there would be either no harm, or limited harm that would be mitigated, should any biological relationships be severed, because the caregivers had demonstrated dedication to continuing those relationships. (R. 131: 66–67).

The trial court noted that the most fundamental factor was stability and permanence. (R. 131: 67). The trial court found that J.D.R. Sr. did not have a safe home for S.R. to return to. (R. 131: 62). The trial court reasoned that the removal decision in this case was centered on J.D.R. Sr. failing to be protective when he violated the in-home plan, (R. 131: 58), which continued in November 2019 when J.D.R. Jr. assaulted his younger sister and was charged and adjudicated delinquent of that, (R. 131: 60–61), and was continued still when J.D.R. Sr. had the child hiding in his home with the victim when he was AWOL from his court-ordered placement. (R. 131: 61–62). Waiting for that change was no longer in S.R.'s best interests, and the trial court found that having a stable, permanent family relationship was what S.R. needed. (R. 131: 67).

The court granted the TPR petition on December 16, 2021 and entered orders terminating J.D.R. Sr.'s parental rights.

The Court of Appeals affirmed the trial court's decision. The Court of Appeals noted that, while J.D.R. Sr.'s appeal focuses heavily on J.D.R. Sr.'s own positive testimony, there was ample evidence in the record from professionals indicating that J.D.R. Sr. did not meet his conditions for return. *State v. J.D.R. Sr.*, No. 22AP802, slip op. at 10 (Wis. Ct. App. August 19, 2022). Specifically, case managers testified that J.D.R. Sr. repeatedly cancelled or rescheduled appointments with service providers; that safety concerns relative to J.D.R. Sr.'s anger remained outstanding; that J.D.R. Sr. still could not provide a safe, clean home for the child due to a convicted sex offender living with him and drug paraphernalia being found in the home; and that visitation with the child was not conducted appropriately. *Id.* at 10–11. The Court of Appeals concluded that this was sufficient evidence to support a finding that J.D.R. Sr. failed to meet conditions and further that S.R. was a child in continuing need of protection or services. *Id.* at 11.

Further, J.D.R. Sr. continued to rely on his own positive testimony to contest the failure to assume responsibility finding; however, again, the Court of Appeals noted that there was sufficient evidence in the record to support that finding when looking at the evidence as a whole. *Id.* at 14. Specifically, case managers testified that S.R. had lived outside the parental home for most of his life, and aside from visitation J.D.R. Sr. did not inquire about S.R.'s needs, involve himself in daily cares or activities, nor provide any supplies to the caregivers. *Id.* at 13.

Finally, J.D.R. Sr. argued that the trial court erroneously exercised its discretion because the trial court "placed excessive emphasis on irrelevant facts," to which the Court of Appeals disagreed. *Id.* at 15. The Court of Appeals noted that the trial court weighed each of the required factors, which J.D.R. Sr. conceded on appeal. *Id.* at 16–17. J.D.R. Sr. merely disagreed with the weight given to the considerations under those factors, and the Court of Appeals declined to overturn particularly given the reliance on only J.D.R. Sr.'s own testimony. *Id.*

On September 13, 2022, J.D.R. Sr. filed a Petition for Review with this Court.

ARGUMENT

I. THERE ARE NO REAL AND SIGNIFICANT QUESTIONS NEEDING CLARIFICATION IN THE PETITION. THIS COURT SHOULD DENY J.D.R. SR.'S PETITION FOR REVIEW BECAUSE IT DOES NOT MEET THE CRITERIA SET FORTH IN WISCONSIN STATUTE § 809.62(1r).

This Court should deny J.D.R. Sr.'s Petition for Review as the Petition does not meet the criteria set forth for discretionary review by this Court. J.D.R. Sr.'s petition fails to demonstrate a need for clarification of the law, and the questions presented are not novel, but instead ask for a review of the factual record in the case and the application of well-settled legal principles to that record.

Additionally, Wis. Stat. § 809.62(1r)(c) requires more than a showing that a decision by this Court would clarify the law, but also that one of the following is applicable: (1) "[t]he case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation;" or (2) "[t]he question presented is a novel one, the resolution of which will have statewide impact; or (3) "[t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § 809.62(1r)(c)(1)-(3). J.D.R. Sr. fails to show that a decision by this Court would clarify or develop the law, but also implicitly concedes that the criteria are not met. (Pet. for Rev. at 5).

A. The Trial Court Did Not Erroneously Exercise its Discretion When it Entered an Unfitness Finding Against J.D.R. Sr. Because There was Sufficient Evidence to Make That Finding.

A termination of parental rights action is a bifurcated proceeding. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95 ¶ 24, 255 Wis. 2d 170, 648 N.W.2d 402. The first phase, or the grounds phase, involves determining

whether there are reasons to terminate a person's parental rights to a child. *Id.* The second phase, or the dispositional phase, requires that a trial court decide whether termination of parental rights is in a child's best interests. Wis. Stat. § 48.426(2); *Steven V. v. Kelley H.*, 2004 WI 47 ¶ 25, 271 Wis. 2d 1, 678 N.W.2d 856.

The decision to terminate parental rights is within the circuit court's discretion. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). A decision by a trial court will be upheld if there is a proper exercise of discretion. *State v. Margaret H.*, 2000 WI 42 ¶ 27, 234 Wis. 2d 606, 610 N.W.2d 475; *Rock County Dept. of Social Servs v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). If a trial court examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach, then a trial court will be found to have properly exercised its discretion. *Dane County DHS v. Mable K.*, 2013 WI 28 ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198; *see also Julie A.B.*, 2002 WI 95 ¶ 30, 255 Wis. 2d 170, 648 N.W.2d 402; *Margaret H.*, 2000 WI 42 ¶ 32, 234 Wis. 2d 606, 610 N.W.2d 475.

If grounds for termination are found by the court or a jury, the court "shall find the parent unfit." Wis. Stat. § 48.424(4). A party may move for judgment notwithstanding the verdict if the verdict is "contrary to law, or to the weight of evidence." Wis. Stat. § 805.15. A motion for judgment notwithstanding the verdict due to insufficient evidence may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Wis. Stat. § 805.14(1). An appellate court may not overturn a trial court's ruling on a motion for judgment notwithstanding the verdict unless that ruling was "clearly wrong." *Correa v. Woodman's Food Market*, 2020 WI 43 ¶ 8, 391 Wis. 2d 651, 943 N.W.2d 535; *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388–89, 541 N.W.2d 753.

At the close of his case, J.D.R. Sr. motioned to dismiss the case, which was denied by the trial court. (R. 130: 86). The trial court noted that the standard as not met to set aside a verdict, because "there was plenty of evidence in the record from which a reasonable jury could have come to these

conclusions and that would not be appropriate for me to take that from them." (R. 130: 86). J.D.R. Sr. cites several instances of positive testimony coming from his own time on the stand, but there was ample evidence to sustain the verdicts on both grounds.

As to Continuing CHIPS pursuant to Wis. Stat. § 48.415(2), the State must prove that the child was adjudged to be in need of protection or services and placed out of home on orders containing the TPR warnings; that the agency assigned made reasonable efforts to provide ordered services; and that the parent failed to meet the conditions of return. Wis. Stat. § 48.415(2); *Wisconsin Jury Instruction*—Children—324.

Directed verdict was given as to the first issue—whether the child was adjudged to be in need of protection or services on an order containing TPR warnings—and so the jury had to answer two questions: whether the DMCPS provided reasonable efforts, and whether the parent failed to meet conditions. On appeal, J.D.R. Sr. does not explicitly raise any issue with the DMCPS's efforts but focuses on the positive changes that J.D.R. Sr. testified to during trial.

While J.D.R. Sr. did testify that he had made some progress in controlling his anger, in controlling S.R.'s tantrums, in learning proper nutrition for S.R., and in addressing his own needs through therapy, that was not the totality of evidence presented to the jury. (*See* Br. of App. at 12). The jury also heard evidence from A.H., A.L., E.U., and L.H. that throughout the case J.D.R. Sr. had bouts of minimal engagement in services and consistent failure to recognize, articulate, and plan around safety risks inherent to his home. Specifically, A.H. testified that J.D.R. Sr. was only minimally engaged in services and missed several appointments between November 2017 and November 2019. (R. 145: 55–56). A.H. testified that J.D.R. Sr. was not making substantial progress in identifying safe caregivers for S.R., which was demonstrated by leaving his younger children with older children while running errands, as well as his inability to articulate the risks posed by L.C. who was living with him consistently throughout the case. (R. 145: 62–65). A.L. testified that this was further exacerbated in November 2019 when J.D.R. Sr. had a registered sex offender living in his home, or at very least having access to his home. (*See* R. 145:45–46).

The jury heard that it was at this point in the case that J.D.R. Sr. became even more uncooperative and defiant with case management. A.L.

testified that J.D.R. Sr. lacked transparency about the status of the sex offender in his home, and J.D.R. Sr. began to refuse visitation and services. (R. 145: 45–48). E.U. and L.H. both testified that as time went on, J.D.R. Sr. refused family therapy with S.R., did not attend his appointments for a psychological evaluation, and did not even respond to DMCPS's suggestion that he engage in trauma-informed parenting classes. (R. 145: 75–77). J.D.R. Sr.'s housing stability became diminished for a full year, and when he did have housing again there were several people living in the home, and there were belongings in the basement suggesting that the registered sex offender was still living there and had marijuana and drug paraphernalia in open view of any observer. (R. 145: 79–90).

As to failure to assume parental responsibility pursuant to Wis. Stat. § 48.415(6), the State must prove that J.D.R. Sr. did not have a substantial parental relationship with S.R. as defined by statute. Wis. Stat. § 48.415(6). Again, on appeal, J.D.R. Sr. focuses on positive testimony about his involvement with S.R. during prenatal care and prior to S.R.'s removal and discusses some instances of visitation during the CHIPS case. This is not all the jury heard during testimony.

The jury also heard that J.D.R. Sr. had bouts of inconsistent visitation, and at times even refused visitation when he was frustrated with the DMCPS's actions. (R. 145: 59–60) (R: 146: 101). The jury heard that J.D.R. Sr. would sometimes rely on others during visitation to provide for S.R.'s cares. (R. 145: 61–62). The jury heard that J.D.R. Sr. did not provide daily care, supervision, or protection for S.R., and did not attend any of S.R.'s medical appointments. (R. 145: 61, 68). The jury heard that J.D.R. Sr. never asked for updates about S.R. or about medical appointment schedules, and while testifying J.D.R. Sr. was unable to articulate how the child was doing in daycare or medically. (R. 146: 91, 96–97). Finally, the jury heard ample evidence that J.D.R. Sr. could not articulate why L.C., who was continuing to use drugs, or J.D.R. Jr., who was a registered sex offender, posed a risk to S.R. if S.R. went home.

The standard for review is that the trial court's denial of a motion for judgment notwithstanding the verdict must be "clearly wrong." *Correa*, 2020 WI 43 ¶ 8, 391 Wis. 2d 651, 943 N.W.2d 535; *Weiss,* 197 Wis. 2d 365, 388–89, 541 N.W.2d 753. There was ample, credible evidence by which the jury could find that J.D.R. Sr. did not meet his conditions of return, nor did he assume his parental responsibility, and accordingly the trial court's ruling

denying the motion for judgment notwithstanding the verdict, and subsequent entry of an unfitness finding, were an appropriate exercise of discretion. The Court of Appeals affirmed, and there is no novel question before this Court justifying review.

B. The Trial Court Did Not Erroneously Exercise its Discretion When it Found that Termination was in S.R.'s Best Interests Because There was Sufficient Evidence to Make That Finding.

Wisconsin Statute § 48.426 governs the dispositional phase of TPR proceedings. The statute provides that the best interests of the children shall be the prevailing factor considered by a court in determining the disposition of a child. Wis. Stat. § 48.426(2); *Julie A.B.*, 2002 WI 95 ¶ 4. A trial court may consider any relevant evidence but must consider the six factors set out in Wis. Stat. § 48.426(3). *Steven V.*, 271 Wis. 2d 1 ¶ 27. The statute does not lay out the degree of weight to be assigned to each factor, and only requires that a trial court give "adequate consideration of and weight to each factor." *Margaret H.*, 2002 WI 42 ¶ 35.

The best interests of the child govern the dispositional phase, and the factors in Wis. Stat. § 48.426(3) exist to "give contour" to the best interests standard and "serve to guide courts in gauging whether termination is the appropriate disposition." *Margaret H.*, 2002 WI 42 ¶ 34. The standard for an erroneous exercise of discretion is not whether a judge gave less weight than desired to a particular factor, or whether a judge considered the same quantity of evidence for each factor, or even whether each factor weighed in favor; it is whether a judge examined the relevant facts, applied a proper standard of law, and demonstrated a rational process to reach a conclusion. *See Mable K.*, 2013 WI 28, ¶ 39.

Here, the trial court considered each factor, and ultimately found that termination was in S.R.'s best interests. On appeal, J.D.R. Sr. argues that the court gave "excessive emphasis" to some factors. (Br. of App. at 17). This is not the standard.

As to Wis. Stat. § 48.426(3)(a), the court heard evidence that S.R. was living in a fully-licensed, committed adoptive resource, a home that S.R. had lived in for over three years. The court heard that S.R. was bonded to the caregivers and sought them out for comfort and played with them and interacted with them like a family. The court heard from the caregiver and the case manager consistent information that the caregivers were fully committed to adoption without hesitation. L.H. further testified that S.R. was not only highly likely to be adopted by the current caregivers, but that he was otherwise highly adoptable. This evidence is sufficient for the court to analyze the first factor, and this factor weighs in favor of termination.

As to Wis. Stat. § 48.426(3)(b), the court heard that S.R. was born premature and drug dependent, but most of those symptoms had subsided. The court heard S.R. had lingering asthma but was otherwise doing well physically. The court heard that this medical diagnosis was not a barrier to adoption. This evidence is sufficient for the court to analyze the second factor, and this factor weighs in favor of termination.

As to Wis. Stat. § 48.426(3)(c), the court heard evidence that S.R. had never met any extended family members, and that S.R. had no substantial emotional bond with any of those individuals. The court heard that S.R. has several older siblings, but he only had a handful of informal visits with those siblings. Evidence showed that S.R. had no substantial emotional bond with those siblings. The court heard that S.R. does have a substantial emotional bond with the sibling he was living with in the foster home, and that being separated from her would cause harm. The court heard that S.R. recognized who J.D.R. Sr. was, but seemingly viewed him more as a playmate. The court also heard that the caregivers were fully committed to continuing the relationship. This evidence is sufficient for the court to analyze the third factor, and this factor on balance weighs in favor of termination.

As to Wis. Stat. § 48.426(3)(d), the court heard that S.R. is too young to understand adoption or express any specific wishes. This evidence is sufficient for the court to analyze the fourth factor, which is neutral because S.R. cannot articulate wishes at his age.

As to Wis. Stat. § 48.426(3)(e), the court heard that S.R. was removed at four months old and lived continuously out of home from that removal. The court heard that S.R. had lived with the current caregivers for over three years. The duration of separation for S.R. was over 90% of his life. This evidence was sufficient for the court to analyze the fifth factor, and this factor weighs in favor of termination.

As to Wis. Stat. § 48.426(3)(f), the court heard evidence that the caregivers were the primary provider for all of S.R.'s food, shelter, medical, and other basic needs. The court heard evidence and testimony suggesting that reunification was nowhere close on the horizon. Specifically, J.D.R. Sr. had spent the entire case failing to progress in recognizing why L.C. posed a risk to S.R., and J.D.R. Sr. essentially believed that L.C. had stopped using drugs without treatment, despite attending team meetings and knowing L.C. was not engaging consistently in treatment or drug screens. Further, the court heard evidence that J.D.R. Sr. had J.D.R. Jr. living in his home, or having regular access to the home, where J.D.R. Jr.'s victim lived, and potentially J.D.R. Sr. had helped J.D.R. Jr. go AWOL and hide while on a delinquency order for first degree sexual assault of a child—his younger sister. The court heard that J.D.R. Sr. had lacked transparency about J.D.R. Jr. for years, despite attending court hearings and knowing that J.D.R. Jr. plead guilty to the sexual assault charge and had been placed on the sex offender registry. To the date of trial, J.D.R. Sr.'s testimony and behavior were inconsistent and lacked credibility as to his long-term plans for J.D.R. Jr. This was ample evidence for the court to analyze the sixth factor, and this factor weighs in favor of termination.

At disposition, the trial court is tasked with determining what is in the best interests of the child, and it is tasked with giving "adequate consideration of and weight to each factor" in Wis. Stat. § 48.426(3), in addition to any other relevant evidence. Wis. Stat. § 48.426(3); *Steven V.*, 271 Wis. 2d 1 ¶ 27; *Margaret H.*, 2002 WI 42 ¶ 35. J.D.R. Sr. asserts that the court gave too much weight to the history of the case and did not give enough weight to J.D.R. Sr. loving S.R. and having some positive visitation with S.R. This is simply not the standard at disposition. An individual does not get to assign weight to evidence. The trial court is tasked with doing so, giving "*adequate*

consideration of and weight to each factor." The trial court did so and did not erroneously exercise its discretion in the process. The Court of Appeals agreed, affirming the trial court's decision, and there is no novel question for this Court to review.

CONCLUSION

The trial court's decision terminating parental rights of J.D.R. Sr. is consistent with the mandates of Wis. Stats. §§ 48.415(2) and (6), 48.426(3), and the case law interpreting those statutes. The Court of Appeals reviewed the case and found no error. J.D.R. Sr.'s petition is merely seeking routine review of facts as applied to settled legal principles, which does not meet the criteria for review by this Court. Accordingly, the Guardian ad Litem respectfully requests that this Court deny J.D.R. Sr.'s Petition for Review.

Dated at Milwaukee, Wisconsin, this 19th day of September, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,476 words.

Dated at Milwaukee, Wisconsin, this 19th day of September, 2022.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated at Milwaukee, Wisconsin, this 19th day of September, 2022.

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