Family Law

Termination of Parental Rights – "Best Interests of the Child" – Burden of Proof

***State v. H.C.*, 2025 WI 20 (filed June 3, 2025)**

HOLDING: The dispositional phase of a termination of parental rights (TPR) proceeding is a discretionary determination of the child's best interests; the statute does not impose a burden of proof.

SUMMARY: H.C.'s struggles with addiction and mental illness left her unable to adequately care for her young son. When other measures failed, the county filed a TPR petition against H.C., who did not contest the grounds for the TPR petition. At the dispositional phase, the circuit court ruled that it was "unquestionably" in the child's best interests that H.C.'s parental rights be terminated, regardless of whether the state bore the burden of proof and no matter whether the burden was to a preponderance of the evidence or clear and convincing evidence.

In an unpublished opinion, the Wisconsin Court of Appeals affirmed. As to the appropriate burden, it held that both parties carried the burden of proving their "desired outcome" by a preponderance of the evidence (¶ 10).

The Wisconsin Supreme Court affirmed the court of appeals' mandate, which left "the circuit court's TPR order undisturbed" (¶ 1). The majority opinion was authored by Justice R.G. Bradley. The court rejected H.C.'s contention that due process required the state to prove by clear and convincing evidence that termination was in the child's best interest (*see* ¶ 17).

"During the grounds phase, the State carries the burden to prove a parent unfit by clear and convincing evidence. Wis. Stat. § 48.31(1). Once the State meets its burden and the court finds a parent unfit, the circuit court 'shall consider' the best interests of the child with the factors enumerated in Wis. Stat. § 48.426(3) in determining whether to terminate parental rights. Wis. Stat. § 48.426(1). At that point, the proceeding no longer lies within the realm of factfinding" (¶ 21).

Put differently, the grounds phase is a "traditional adversarial proceeding" (¶ 24). The dispositional hearing "bears little resemblance to an adversarial proceeding" (¶ 25).

"That is not to say due process is disregarded at the dispositional phase merely because the circuit court's decision is discretionary. To the contrary, a discretionary standard allows the court to weigh all relevant evidence to determine a child's best interests without regard for which party bore a burden to produce it. A discretionary decision governed by the child's best interests in no way lessens the degree of confidence a court must have in its decision" (¶ 29).

"Nothing in the statutory text imposes a burden of proving the child's best interests by a preponderance of the evidence or by clear and convincing evidence at disposition" (¶ 30). In sum: "At disposition in a TPR matter, no factfinding occurs; accordingly, no party bears any burden of proof" (¶ 31).

Chief Justice Anne Walsh Bradley concurred in an opinion joined by Justice Dallet. The majority opinion, they believe, makes Wisconsin a "national outlier" on this issue. "Although I agree with the majority opinion that neither due process nor public policy requires a clear and convincing evidence burden in this situation, in my view, the general civil burden of preponderance of the evidence should apply, and such a burden should be on the petitioner" (¶ 34).

Torts

Medical Malpractice – Failure to State a Claim

***Hubbard v. Neuman*, 2025 WI 15 (filed May 23, 2025)**

HOLDING: The complaint properly stated a claim against the plaintiff's physician.

SUMMARY: The plaintiff's ovaries were removed during a surgery intended to treat another disease; allegedly the removal occurred without the plaintiff's informed consent. The defendant physician (the plaintiff's obstetrician-gynecologist) was not present during the surgery but had allegedly recommended and planned for the ovaries' removal with the surgeon. The plaintiff contended that the defendant was a "physician who treats a patient" within the meaning of Wis. Stat. section 448.30 (Wisconsin's informed consent statute). The circuit court denied the defendant physician's motion to dismiss for failure to state a claim. The court of appeals affirmed. *See* 2024 WI App 22.

The supreme court also affirmed in a majority opinion authored by Chief Justice Ann Walsh Bradley. The court applied "time-honored principles" that compelled it to accept all pleaded facts as true, to draw all reasonable inferences, and to liberally construe the complaint "and dismiss only if it is clear that under no circumstances can the claimant recover" (¶ 15). First, the defendant was the plaintiff's treating physician at all relevant times (*see* ¶ 20). Second, the defendant helped plan the surgery with the surgeon (*see* ¶ 21). The "sum" of the plaintiff's allegations was sufficient to survive a motion to dismiss (¶ 23).

The court also took the opportunity to "clarify and narrow" the reach of the court of appeals' decision in this case about the scope of Wis. Stat. section 448.30: "We conclude that it is unnecessary to interpret the statute's use of the word '[a]ny' [physician] because this case can be resolved simply by interpreting the word 'treats'" (¶ 24).

Justice Ziegler, joined by Justice R.G. Bradley, dissented because the majority failed to address what the substantive law requires the plaintiff to prove and thereby "greatly expand[s]" the scope of "physicians" within the meaning of Wis. Stat. section 448.30 (¶ 30). **WL**

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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