Jennifer L. Abbott attorney – Reply

ARGUMENT

I. THE STATE'S EFFORT TO SEEK REVIEW OF THE TRIAL COURT'S FINDING THAT THE TWINS HAVE SUBSTANTIAL RELATIONSHIPS WITH THEIR GRANDMOTHER SHOULD BE REJECTED.

The State argues that "the trial court's conclusion that [Margaret H.] had a substantial relationship with Darryl and Durrell is clearly erroneous." (State's Brief, p. 20) This is an issue which was not contested before the Court of Appeals. Furthermore, no party sought review of this issue in this Court. Finally, in the Court of Appeals, the Guardian *ad Litem*, in effect, conceded that this was an issue on which there was conflicting evidence and that the finding was not clearly erroneous. The State's argument, thus, should be rejected.

A. The State Has Waived Argument On The Issue Of Whether There Were Substantial Relationships By Not Asserting That Position In The Court of Appeals.

The State, for the first time in these appellate proceedings, asserts that the trial court erred in finding that the twins had a substantial relationship with Margaret H. By not asserting this position in the Court of Appeals, the State has waived this issue.

It is well-established that an issue raised in the trial court, but not raised on appeal, is deemed waived. *See*, A.O. Smith Corp. v. Allstate Ins. Cos., 222 Wis.2d 475, 588 N.W.2d 285, 292 (Ct. App. 1998). Similarly, numerous decisions hold that an issue raised on appeal, but not briefed or argued, is deemed abandoned. *Id.* Finally, an issue that is not raised until oral argument is deemed waived. *Id.*; City of Milwaukee v.

Christopher, 45 Wis.2d 188, 190, 172 N.W.2d 695, 696 (1969). Based upon existing case law, and the principles upon which those cases were decided, this Court should similarly hold that where a party fails to raise an issue before the Court of Appeals (or, as in this case, even participate before the Court of Appeals), the Supreme Court may deem the issue waived.

Of course, once a case comes before this Court, the Court has the discretion to review "any substantial and compelling issue" the case presents. In Interest of Jamie L., 172 Wis.2d 218, 232, 493 N.W.2d 56 (1992) (citation omitted). This general principle, however, does not support review of the issue presented in the State's Brief. This is not, for example, a constitutional issue which this Court will generally consider if "it is in the best interests of justice to do so. . . ." Laufenberg v. Cosmetology Examining Bd., 87 Wis.2d 175, 187, 274 N.W.2d 618 (1979). Nor is the issue one which would fit the criteria for review set forth in Rule 809.62. Further, the Court of Appeals had no opportunity to examine this issue and render an opinion on the question. *Cf.*, In Interest of Baby Girl K., 113 Wis.2d 429, 448, 335 N.W.2d 846 (1983). The Court should decide that the State has waived review of the issue.

B. The Trial Court's Finding That The Twins Had Substantial Relationships With Margaret H. Is Not Clearly Erroneous.

Assuming, *arguendo*, that the Court accepts the State's invitation to review the trial court's factual finding that there were substantial relationships between the twins' and

Margaret H., that finding should be sustained. The trial court's findings of facts will not be upset unless they are "clearly erroneous." State v. Van Camp, 213 Wis.2d 131, 140, 569 N.W.2d 577 (1997); Wis. Stat. § 805.17(2). As the Guardian *ad Litem* noted in his Brief to the Court of Appeals, in this case "there was some dispute over the amount of visitation the twins' relatives had during the years. . . ." (p. 28) The State, in its Brief, disingenuously presents this dispute in the light least favorable to sustaining the trial court's finding.

The State asserts that Margaret H. had only 12 visits with the twins in their first four years of foster care. What the cited portions of the record establish, however, is that the Children's Service Society's records reflect only 12 such visits. (R. 62: 55)

As Mr. Lockwood testified, Margaret H. does not drive. (R.62: 56) Thus, the twins' maternal aunt, Denise G., "was the person who was primarily doing the pick-up/drop-off and supervision of the children." (R. 62: 56)

Denise G., when asked about the frequency of visits, testified:

> Usually every other weekend, and I would pick them up from their second -- the third placement foster home, and that was Thelma, and go get them on weekends and bring them back that Sunday. . . ."

(R. 62: 97-98)

Denise G. also testified that she and her family have had substantial contact with the twins during the time they resided in foster care. (R. 62: 99)

When asked whether Rick Lockwood's testimony, that she had only visited the twins two or three times per year, was accurate, Margaret H. testified:

> First, nobody ever told me to keep records of visiting the boys so I never did, but I did visit. We did visit more than two or three times. . . . [Denise G.] would go from work and pick up the children. . . ., and we had more than two or three visits.

(R. 62: 76-77)

Margaret H. further testified that she also visited the twins preschool and, "[i]n fact, everybody knew me, and I'd see them." (R. 62: 77)

Finally, it is noteworthy that the State's own witness felt that the relationships were substantial. Near the end of Mr. Lockwood's testimony, the following exchange occurred:

THE COURT: All right. Mr. Lockwood, I have a question. Do you believe that there is a substantial relationship between the twins and their biological family?

THE WITNESS: Yes.

(R. 62: 59)

II. THE STATE'S ARGUMENTS THAT THE TRIAL COURT ERRED ARE NOT RELATED TO THE ISSUE BEFORE THIS COURT: WHETHER THE COURT OF APPEALS CORRECTLY INTERPRETED SEC. 48.426(3)(c), STATS.

At pp. 7-16 of its Brief, the State argues (a) that the circuit court failed to consider the best interests of the twins when it dismissed the termination of parental rights petition; and (b) that it failed to consider five of the six factors set forth in § 48.426(3), Stats. Neither of these arguments relate to the issue presented for review, which is whether the Court of Appeals erred when it concluded that an Order terminating

parental rights to a child would not sever the relationship between the child and his or her biological family within the meaning of Wisconsin Statutes § 48.426(3)(c), despite the fact that the petition for termination of parental rights is a predicate for adoption by a nonrelative.

With respect to the first argument, the State is incorrect. The trial court stated "it is time for these kids to be reintegrated into their family, and I feel it is in their best interest." (R. 63: 49) (emphasis added) The trial court, thus, did make a finding that termination would not be in the twins' best interests; the prevailing factor under § 48.426, Stats. Ultimately, however, it does not matter. As set forth below, the Court of Appeals' decision to remand this matter is not contested in this review. Rather, it is the Court of Appeals' interpretation of § 48.426(3)(c) that is at issue.

The State's argument that the trial court erred when it failed to address some of the factors set forth in § 48.426(3), Stats. is not at issue in this review. In fact, Margaret H. conceded this issue for purposes of this proceeding, first by not seeking review of it in her Petition for Review, and a second time in her main brief:

> In this case, the trial court's decision, frankly, did not clearly demonstrate that it had considered and weighed all of the factors required by § 48.426(3). The Court of Appeals' decision to remand the matter for further proceedings, therefore, was correct. *See,* Termination of Parental Rights to T.R.M., 100 Wis.2d 681, 688, 303 N.W.2d 581, 584 (1981).

(Brief, p. 24)

Rather, the sole issue upon which review was sought and granted is whether an Order terminating parental rights to a child would sever the relationship between the child and his or her biological family within the meaning of Wisconsin Statutes § 48.426(3)(c), where the proposed disposition contemplates adoption by a nonrelative if termination is ordered. There is no need, therefore, to address the arguments set forth at pp. 7-16 of the State's brief.

III. SECTION 48.426(3)(c), STATS., IS AMBIGUOUS.

At pp. 17-21 of his Brief, the Guardian *ad Litem* argues that the plain language of § 48.426(3)(c) renders an unambiguous meaning of "relationship": the emotional connection between family members. The Guardian *ad Litem's* own analysis, which accords different meanings to the word as it is used in the two clauses of § 48.426(3)(c) demonstrates the ambiguity of the statute.

After arguing, at pp. 18-19, that the term "relationship" as used in the first clause of § 48.426(3)(c), Stats., means an emotional connection between family members, the Guardian *ad Litem* asserts that "these relationships," as used in the second clause of § 48.426(3)(c) "carries the same meaning." (p. 19) He then analyzes the statute as follows:

> This factor calls upon the court to evaluate the strength and quality of the emotional and psychological relationships the child may have with birth family members. If the strength and quality is substantial, then the court must evaluate what harm may come to the child by <u>legally severing</u> these relationships.

SUPREME COURT OF WISCONSIN

Appeal No. 99-1441

IN RE THE TERMINATION OF PARENTAL RIGHTS TO
DARRYL T.-H. and DURRELL T.-H.
PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner,

DARRYL T.-H and DURRELL T.-H.,

Appellants

v.

MARGARET H.,

Respondent-Petitioner.

PETITIONER'S BRIEF ON BEHALF OF THE STATE OF WISCONSIN

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STATEMENT OF THE ISSUES

1. Whether the circuit court erroneously exercised its discretion when it failed to consider the best interest of the children in regard to its decision to dismiss the petition to terminate parental rights.

2. Whether the circuit court erroneously exercised its discretion when it failed to consider five of the six standards in sec. 48.426(3) Wis. Stats. which shall be considered in making a best interest determination.

3. Whether the circuit court erred in finding that the children have a substantial relationship with their maternal grandmother.

4. Whether granting a petition to terminate parental rights severs more than the legal relationship between a child and his or her biological family.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The Petitioner recommends oral argument because this case involves nuances and development of the law, voluminous facts and policy concerns that are appropriate for oral argument and that would be more thoroughly and effectively resolved through oral exchange.

Petitioner also recommends publication of this court's opinion because it will identify and clarify the best interests standard to be applied in termination of parental rights cases. This Court's decision will merit publication because it will decide a type of case that is of substantial public interest and concern.

STATEMENT OF THE CASE

Procedural Status of the Case

This review is pursuant to a Supreme Court order of September 28, 1999 granting maternal grandmother, Margaret H.'s Petition for Review.

On April 6, 1999, the circuit court entered an Order denying the State of Wisconsin's petition to terminate the parental rights to Darryl and Durrell T.-H. (R:3) The children's Guardian ad Litem appealed the trial court order and the Court of Appeals reversed and remanded the matter to the trial court for further proceedings with orders that the trial court must consider the twins' best interests as paramount. Margaret H. then filed a Petition for Review.

Statement of the Facts

Chronology of Critical Facts

February 3, 1993: Darryl and Durrell T.-H. are born.

February – March 1993: Darryl and Durrell T.-H live with their mother for approximately one month while she is in drug treatment. (R. 62:41)

March 1993 – May 3, 1993: Mother leaves children with maternal grandmother, who is presumably the primary caretaker of children. (R. 62:43)

May 3, 1993 – February 2, 1994: CHIPS Order is entered on May 3, 1993 and children are placed with their maternal aunt on June 10, 1993 and remain in that placement until February 2, 1994. (R. 62:43-44)

February 2, 1994 – July 13, 1994: Darryl and Durrell live in the first of four foster home placements. (R. 62:45)

July 13, 1994 – July 22, 1994: Darryl and Durrell live in their second foster home. (R. 62:45)

July 22, 1994 – March 1998: Darryl and Durrell spend the bulk of their life in their third foster home. (R. 62:45)

1994: Maternal grandmother visits children four times during this year. The boys are in a non-relative placement as of February 2, 1994. (R. 62:46)

1995: Maternal grandmother visits children, who are still in a non-relative placement on four occasions. (R. 62:46)

1996: Maternal grandmother visits children, who remain in a non-relative placement on three occasions. (R. 62:46)

April 22, 1996: The permanency plan is changed from placement in the home of the grandmother to termination of parental rights/adoption on July 3, 1996. Efforts to recruit an adoptive resource commence. Margaret H. is in court when the permanency plan is changed. (R. 62:50, 86)

1994 – 1998: Darryl and Durrell are not placed with Margaret H. because her home is not large enough to accommodate the boys. (R.62:49)

1997: Maternal grandmother has one visit with Darryl and Durrell. (R. 62:46)

March 12, 1998: Maternal grandmother is advised that an adoptive resource has been located for Darryl and Durrell. (R. 62:50-51)

March 1998: Maternal grandmother begins to see children on a regular basis. (R. 62:51)

November 20, 1998 and January 15, 1999: Dispositional contest before Judge Donald.

CAST OF CHARACTERS

Darryl T.-H. - Durrell T.-H.: The children were born on February 3, 1993 to a mother with longstanding drug and alcohol addictions. (R. 43:10) Darryl and Durrell may have suffered from the effects of their mother's cocaine use during pregnancy. (R.43:11) The children's natural grandmother, Margaret H., believes the children were neglected emotionally and physically while in their mother's care. (R. 43:10)

At the time of the dispositional hearing on November 20, 1998, the five-year-old twins suffered from Reactive-Attachment Disorder as a result of having lived with seven different caretakers in five years. (R. 62:45 and 63:19) Although the children had numerous behavior problems, their behavior had improved significantly since being placed with Debra G. in March of 1998. (R. 62:29) Dr. Cheryl Brosig, their treating physician/therapist strongly recommended against any further changes in their placement. (R. 62:11) Dr. Stephen Emiley, court appointed psychologist agreed that permanency is extremely important to these children. (R. 63:19)

Debra G.: Debra G., a 41-year-old female, is the foster mother and proposed adoptive parent of Darryl and Durrell. The children were placed in her home in March 1998. (R. 62:45) These are the only children living in her home. (R. 62:22) She has proven to be an excellent resource for these children. Debra G. has rearranged her work schedule and lifestyle to accommodate these children. (R. 62:20) She has sought out as much information and training as possible in order to effectively parent these children. (R. 62:24-25) She is seen as having an excellent capacity for empathy and sensitivity to the emotional needs of these children and they appear to have responded to this. (R. 43-14) Debra G. testified that if allowed to adopt the children that she would continue contact with their biological family, including their grandmother and their siblings. (R. 62:26)

Margaret H.: Margaret H., the children's maternal grandmother, was 62 years old on November 20, 1998. (R. 43:1) Margaret H. is raising seven of her grandchildren including five of Darryl and Durrell's siblings. (R. 62:77-78)

Three of Margaret H.'s eight children have suffered from chemical dependency problems. (R. 43:10) The children currently in her care also suffer from a number of serious behavior problems. Joseph is in day treatment at St. Charles, Alicia is in the detention center on charges of strong-arm robbery and battery. (R. 62:87-88) Heather was committed to corrections for aggravated battery. (R. 62:88-89)

Margaret H., who is now requesting placement of the twins, visited them only twelve times during the first four years they were in foster care. (R. 62:47)

She only began regular visitation after hearing that an adoptive home had been found for the children and that a termination of parental rights petition would soon be filed. (R. 62:50-51)

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT FAILED TO CONSIDER THE BEST INTEREST OF THE CHILDREN IN REFUSING TO GRANT THE STATE'S PETITION FOR TERMINATION OF PARENTAL RIGHTS.

The trial court erroneously exercised its discretion and made a mistake of law when, after a two day hearing, it failed to make any findings as to the best interest of the children. A determination of the best interests of the child in a termination proceeding depends on first-hand observation and experience with the persons involved, and therefore, is committed to the sound discretion of the circuit court. A circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion. Termination of Parental Rights of Kegel, 85 Wis.2d 574, 579, 271 N.W.2d 114 (1978). The exercise of discretion requires a rational thought process based on examination of the facts and application of the relevant law. Hartung v. Hartung, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981). Whether or not the trial court applied the appropriate legal standard in this case requires interpretation of the Children's Code (Ch. 48, Stats.) and Wisconsin case law and should be reviewed de novo. McEvoy v. Group Health Coop. Of Eau Claire, 213 Wis.2d 507, 517, 570 N.W.2d 397 (1997).

Section 48.01, Wis. Stats., indicates that the best interest of the child shall always be of paramount consideration when construing Ch. 48. Moreover, Sec. 48.426 (1) Wis. Stats., which specifically applies to termination of parental rights cases, mandates that the trial court consider the best interest of the child to be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

In the instant case, there is no evidence that the circuit court gave any consideration to the best interest of Darryl and Durrell when it dismissed the termination of parental rights petition. The Court of Appeals was correct in its analysis that the trial court's oral decision reveals that it considered the feelings, efforts, and desires of the grandmother as paramount. (App. 7)

II. THE CIRCUIT COURT'S FAILURE TO CONSIDER FIVE OF THE SIX FACTORS SET FORTH IN SEC. 48.426(3) CONSTITUTES AN ERRONEOUS EXERCISE OF DISCRETION.

In a proper exercise of discretion, the trial court must consider each of the factors listed in Sec. 48.426 (3) Wis. Stats. These factors are:

(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.

(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.

In this case the trial court ignored all the mandated factors, except for a cursory consideration of §48.426 (3) (c).

If the trial court had properly considered each of the five remaining factors, it would have come to the inescapable conclusion that it was in Darryl and Durrell's best interest to grant the petition for termination of parental rights.

The first factor the court should have considered is: The likelihood of the children's adoption after termination.

The evidence showed:

- Debra G. stated that she wished to adopt Darryl and Durrell. (R. 62:21)
- Debra G. testified that she completed four separate sets of parenting classes in an effort to know as much as she could prior to placement of the children. The Department requires foster parents to complete only one set of parenting classes. (R. 62:22, 27)
- Debra G. indicated that she was aware of the fact that the boys had behavioral problems and had special needs, but that she was fully committed to raising them to adulthood. (R. 62:28)

- Case manager Rick Lockwood, the social worker assigned to the case, testified that the children are adoptable. (R. 62:53)
- Rick Lockwood recommended the plan of adoption by Debra G. (R. 62:52)
- Gail Albergotti, social worker with the Milwaukee County Adoptions Unit, testified that adoption by Debra G. was the appropriate plan for the boys. (R. 62:67)

The evidence shows that Debra G. has gone to great lengths to prepare for having the children placed with her and to properly parent them. She is well aware of their special needs and the fact that it may not be easy to rear them. She is fully committed to raising them to adulthood. The social workers assigned to the case are confident that this is an appropriate adoptive placement.

The second factor to be considered is: The age and health of the children, both at the time of disposition and, if applicable, at the time the children were removed from the home.

The evidence as to this factor showed:

- Darryl and Durrell were two months old when originally removed from their mother's care. (R. 11)
- Darryl and Durrell were five years old at the time of disposition.
- Dr. Cheryl Brosig, the children's therapist, indicated that the children suffer from Reactive-Attachment Disorder. (R. 63:19, App. 9-11)

- Dr. Brosig further testified that while in an earlier placement, the children had a history of drinking out of the toilet and wandering through the house at night. (R. 62:10)
- Dr. Brosig stated that the children's condition has improved since their placement with Debra G. The children appear to be more organized, more focused and more settled. (R. 62:9-10)
- Debra G. stated that when the children first came to live with her in March, 1998, that they displayed a number of behavior problems including hitting, kicking, biting, spitting, crying and screaming. (R. 62:29) She further testified that by November, 1998, the children's behavior had become more manageable. (R. 62:29)

The evidence shows that these children have been living outside their parents' home since infancy. They have absolutely no attachment to either of their parents. The evidence also shows that the children have an Attachment Disorder and serious behavior problems, which have improved since placement with Debra G. Debra G. obviously has an understanding of the boys' special needs and has the ability to meet those needs.

The next factor, which the court failed to consider, in total, is the wishes of the children. Although the guardian ad litem refused to directly inform the court of the wishes of the children, there was evidence in the record to indicate what the wishes of the children were: (R. 63:38)

- Dr. Stephen Emiley, court appointed psychologist, testified that Darryl consistently refers to Debra G. as "mom" and sees her as his source of nurturing, security and support. (R. 44:2)
- Dr. Emiley states Darryl did not like having visits with his grandmother. (R. 44:2)
- Dr. Emiley reports that Durrell views Debra G. as being caring and attentive to his needs and offers feelings of love toward her, which he feels are reciprocated. (R. 44:2)
- According to Dr. Emiley, both children see the foster mother as nurturing and caring. (R. 44:4)
- Per Dr. Emiley, neither Darryl nor Durrell view the grandmother as being nurturing or interactive. (R. 44:4)

While the children are too young to fully understand the concept of adoption and their wishes should not be binding, it is clear that they have bonded to Debra G. She is a source of security and love for Darryl and Durrell. Darryl considers her to be his mother. The children have flourished in her home.

The next factor, which should have been considered is: The duration of the separation of the parent from the child.

- Darryl and Durrell lived with their mother as newborns. They lived with her for about one month while she was in drug treatment. (R. 62:41)

- There is no evidence that the biological father of the boys has ever had any contact with them.

These five-year-old twins have been separated from their mother since infancy. Their mother is a stranger to them. Their biological father, whose identity is uncertain, has never had any contact with them. They have no ties, whatsoever, to their parents.

The next factor which the court overlooked is: Whether the children will be able to enter into a more stable and permanent family relationship as a result of the termination, taking account the conditions of the children's current placement, the likelihood of further placements and the results of prior placements.

Stable and permanent family relationship taking into account children's current placement:

- Debra G. wishes to adopt the children. (R. 62:21)
- Debra G. understands the children's need for stability as evidenced by the fact that she initiated visits with the children's former foster family, fostered visits between the twins and their biological family and maintained continuity in their schooling. (R. 62:20-21, 31)
- Darryl and Durrell have been accepted into Debra G.'s family. (R. 62:28)
- Debra G. testified that the children's behavior has improved since placement in her home. (R. 62:29)

- Dr. Brosig stressed the importance of maintaining stability and consistency in the children's lives, and stated that the only way that they're ever going to get better is if they can count on someone being there; that they have a routine; that they have consistency in their lives. (R. 62:11)
- Dr. Cheryl Brosig testified that the condition of the children has improved since placement with Debra G. in that they are more organized, focused and settled. (R. 62:9-10)
- Dr. Stephen Emiley observed that Debra G. has an excellent capacity for empathy and sensitivity to the emotional needs of these children and they appear to have responded to this. (R. 43:14)
- The children, according to Dr. Emiley, obviously have much more individualized attention under the care of Debra G. and she has a willingness to put the boys' needs before hers. (R. 43:14)

Stable and Permanent Family Relationship taking into account the likelihood of future placements:

- Margaret H. is 62 years old and was employed at the time of the termination hearing. (R. 62:72, 91)
- Dr. Brosig testified that another big change would be disruptive to the children. (R. 62:11)

- Visitation between the grandmother and the children has been sporadic up to the time of the filing of the Petition for Termination of Parental Rights. (R. 62:47)
- Dr. Emiley concluded that Margaret H. has a tendency to underestimate the special needs of these children. (R. 43:14)
- Margaret H. had other children in her home at the time this matter was heard and several of those children were having serious problems. (R. 62:90) Joseph, age 12, is in day treatment at St. Charles. (R. 62:87) Alicia is in the detention center being held on charges of strong-arm robbery and battery. (R. 62:88) Heather spent time in corrections for aggravated battery. (R. 62:88-89)

Stable and Permanent Family taking into account the result of prior placements:

- For the first month of their lives the children lived with their mother. (R. 62:41)
- The children then lived with Margaret H. for a period of no longer than three months. (R. 62:43)
- On June 10, 1993, the children were placed with their maternal aunt where they remained for eight months. (R. 62:44)
- The children were placed in the first of four foster homes on February 2, 1994, and remained there for five months. (R. 62:45)

- The children were moved to the second foster home on July 13, 1994, and stayed in that placement for nine days. (R. 62:45)
- The third and longest foster care placement was made on July 22, 1994, and lasted for a period of close to four years. (R. 62:45)
- The children were placed in the pre-adoptive home of Debra G. in March, 1998. (R. 62:45)
- As a result of the numerous placements, these children now suffer from Reactive-Attachment Disorder. (R. 63:19)
- Dr. Stephen Emiley testified that the children's problems are directly related to the massive instability they suffered while growing up. (R. 63:19)

Any reasoned analysis of the past, present and possible future placements of these children leads to the conclusion that placement with Debra G. would provide the children with a stable and permanent family relationship. On the other hand, placement with Margaret H. would result in additional instability, inconsistency and chaos. These children, already diagnosed with Reactive-Attachment Disorder, can not be expected to withstand another change in their placement. It is cruel and inhumane to remove them from Debra G. to whom they are strongly attached and view as their mother.

III. THERE IS NO RATIONAL OR REASONED BASIS FOR THE CIRCUIT COURT'S FINDING THAT THE CHILDREN HAD A SUBSTANTIAL RELATIONSHIP WITH THEIR GRANDMOTHER.

The only factor under §48.426 (3), which the trial court even attempted to address, is § 48.426 (3)(c), which requires an analysis of whether the children have substantial relationships with the parent or other family members, and whether it would be harmful to the children to sever these relationships.

The language of § 48.426 (3)(c) limits the court's inquiry to only those relationships which are substantial. Therefore, we must determine whether the relationship between Darryl, Durrell and their biological family was substantial. In order to do so, we must first define the word "substantial." Unfortunately, substantial is not defined in either Ch. 48 or in case law. Absent any statutory definition, the meaning of non-technical words may be ascertained from a recognized dictionary. State v. Wittrock, 119 Wis.2d 664, 670, 350 N.W.2d 647, 651 (1984).

The New Webster's Dictionary and Thesaurus of the English Language (1993) defines substantial as:

1. having real existence, not imaginary
2. firmly based
3. relatively great in size, value or importance
4. (of meals) large and filling
5. (of food or drink) very nutritive
6. strong, made to last
7. well-off, financially sound

The first definition does not provide any guidance because every relationship does, in fact, exist. Therefore, the use of the second definition seems more appropriate. Using the second definition, the court is required to determine whether or not the relationship between the children and other family members is firmly based. Darryl and Durrell did not have a firmly based, i.e., substantial relationship with their biological family. The record indicates that shortly after their birth, the twins lived with Margaret H. for approximately three months. (R. 62:44) The children then lived with their maternal aunt for approximately eight months. (R. 62:44) The children were placed in foster care the day before their first birthday. (R. 62:45)

The court in Barstad v. Frazier, 118 Wis.2d 549, 563, 348 N.W.2d 479 (1984) held that a parent who has a constitutionally protected interest in his or her relationship with the child, is not entitled to full constitutional protections if they have never borne any significant responsibility for the child and have not functioned as a member of the child's family unit. In the Interest of Baby Girl K., 113 Wis.2d 429, 447-448, 335 N.W.2d 846 (1983). Clearly, if a parent's constitutional protections can be eroded by an abdication of responsibility, a grandparent who has no constitutionally protected interest, can lose whatever claims they may have when they have failed to establish a substantial relationship with a child. The record in this case indicates that the grandmother did not have a substantial relationship with Darryl and Durrell.

Margaret H., maternal grandmother, visited the infants four times in 1994. (R. 62:46) Her contact with the children decreased to three visits in 1996. (R. 62:46) In 1997, she chose to have only one visit with the boys. (R. 62:46). In 1998, the year Margaret H. was informed that an adoptive resource had been found and a Termination of Parental Rights Petition had been filed, she suddenly and unexpectedly began visiting the children every other week. (R. 62:46) Prior to 1998, Margaret H. had a total of twelve visits in four years.

The twins could not have formed a substantial, i.e., firmly based relationship with Margaret H. after having seen her only twelve times in four years. This is especially true in light of the fact that her visits became more and more infrequent as the years passed.

The absence of a firmly based relationship between Margaret H. and the twins is also found in her lack of interest in and concern for Darryl and Durrell. This disregard is shown by the fact that she allowed the children to remain adrift in foster care for four years prior to making any attempt to regain their placement. This disregard is even more blatant when one considers that initially the social service agency was fully prepared to place the children with her when she obtained a large residence. (R. 62:49) The degree to which the agency expected Margaret H. would be the ultimate resource for the boys is shown in the fact that even though the children were not placed with her, Margaret H. was named legal guardian of the twins on February 14, 1995. (R. 62:47). On April 22, 1996, after Darryl and Durrell had been in foster care for two years, Margaret H. was

informed that the permanency plan had been changed to termination of parental rights and adoption. (R62:50) In spite of being aware of this change and of the fact that the twins were going from stranger to stranger, Margaret H. took no action on their behalf other than to reduce the limited amount of contact she had with the boys.

There is no dispute that the only obstacle to placement of the boys with Margaret H. was that she needed a larger residence. Margaret H. testifed that she could have rented a larger place. (R. 62:85) However, she felt that the proposed rent was excessive and constituted a waste of money. (R. 62:85) At that point, she chose to put her financial self-interests above the urgent needs of Darryl and Durrell. These actions clearly are not the actions of a grandmother, who in her own words believes "families take care of families." (R. 62:83) Based on Margaret H.'s actions and inactions, the trial court's conclusion that she had a substantial relationship with Darryl and Durrell is clearly erroneous.

IV. ASSUMING, ARGUENDO, THAT THESE CHILDREN HAVE A SUBSTANTIAL RELATIONSHIP WITH THEIR BIOLOGICAL FAMILY, THERE IS NO EVIDENCE THAT THOSE TIES WILL BE BROKEN BY THE GRANTING OF THE PETITION TO TERMINATE PARENTAL RIGHTS.

The case law is clear that a termination of parental rights severs the legal relationship between a child and their biological family Estate of Topel, 32 Wis.2d 223, 145 N.W.2d 162 (1966) and In re: Soergel, 154 Wis.2d 564, 573-574, 435 N.W.2d 624 (1990). None of the parties in this appeal dispute this. However,

Margaret H. argues that when the trial court considers the relationship between the children and the biological family, that it is duty bound to consider only the legal relationship. The Court of Appeals was correct in rejecting this argument.

There are two separate relationships between family members; there are the actual relationships and the legal relationships. Only the actual relationship holds any meaning to children. Thus, a trial court analysis of whether an actual relationship exists and whether it will continue to exist is a proper avenue to explore. Limiting the trial court's examination to only the legal relationship would frustrate the intent of §48.426, which is that all relevant evidence is to be considered.

If the legislature had intended the word "relationship" to mean only the "legal relationship," it would have used the phrase "legal relationship in §48.426(3)(c) instead of "substantial relationship." In addition, the language of §48.426(3) directs that the circuit court's inquiry should not be limited to the six listed criteria. The court in In re: Brandon S.S., 179 Wis.2d 114, 147, 507 N.W.2d 94 (1993) held that the grandparents who had been excluded from the proceeding had important, relevant evidence to present about their relationship with the child. Obviously the language in Brandon S.S. is demonstrative of the fact that the trial court is to consider all evidence effecting the best interest of the child.

In this case, Debra G. testified that she expected the actual relationship between the children and biological family to continue. (R. 62:26) Looking at

Debra G.'s past conduct, there is every reason to believe that Debra G.'s testimony is true. Debra G., from the very beginning, has put the best interest of the children ahead of all other considerations. For example, despite the strained relationship between Debra G. and Margaret H., Debra G. cooperated fully with the biweekly visitation schedule. (R. 62:38) She has been involved in their therapy and provides an individualized, nurturing and loving environment for the children. Debra G. told Dr. Emiley that if she were allowed to adopt, that she would encourage continued contact with their biological family. (R. 43:7) Dr. Emiley concludes that Debra G. reveals a willingness to put the boys' needs before hers. (R. 43:14)

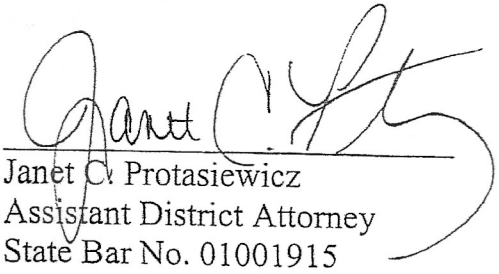
The trial court must be free to consider, weigh and analyze all relevant evidence relating to the best interest of the children. If this court were to accept Margaret H.'s argument regarding §48.426 (3) (c), the trial court would have to ignore much relevant evidence. This cannot be in the best interests of the children.

CONCLUSION

Despite the abundance of available evidence, the circuit court erroneously exercised its discretion when it failed to consider the standards and factors in §48.426. For this reason, this court should remand this matter to the circuit court with orders to consider the best interest of the children as paramount. Or in the alternative, the urgent need for these children to have permanence and stability, as mandated in Ch. 48 requires that this court, as a matter of law, reverse the decision of the trial court and free these children for immediate adoption.

Dated at Milwaukee, Wisconsin this 7th day of December, 1999.

Respectfully submitted,



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