

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

October 23, 1997

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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No. 97-1170

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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IN RE THE PLACEMENT OF NAKITA M., A PERSON  
UNDER THE AGE OF 18:

WISCONSIN DEPARTMENT OF HEALTH & FAMILY  
SERVICES,

PETITIONER-RESPONDENT,

v.

PATRICIA J. G.,

RESPONDENT-APPELLANT.

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APPEAL from an order of the circuit court for Dane County:  
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

DYKMAN, P.J.<sup>1</sup> Patricia J.G. appeals from a circuit court order removing Nakita M. from her home. Patricia had been Nakita's foster parent.

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

(continued)

Patricia argues that her due process rights were violated because the circuit court did not require the Department of Health and Social Services to prove by clear and convincing evidence that removal was in Nakita's best interests. We conclude that Patricia received any process to which she was due. Patricia also argues that several of the trial court's findings were clearly erroneous. We conclude that each of the contested findings was supported by evidence. We therefore affirm.

### **BACKGROUND**

Nakita was born on September 9, 1989, and has lived with Patricia since October 14, 1989. In January 1992, Nakita's biological mother, Debra M., consented to the termination of her parental rights so that Patricia could adopt Nakita. The Wisconsin Department of Health and Social Services (DHSS)<sup>2</sup> was granted guardianship of Nakita. In December 1992, after completing an adoption study, DHSS gave Patricia notice that it intended to remove Nakita from her home. Patricia petitioned the circuit court to review DHSS's decision under § 48.64(4)(c), STATS.

After a five-day trial, the circuit court approved the decision to remove Nakita from Patricia's home. The trial court found that Patricia's household had been plagued with domestic violence between adults that had a damaging influence on the children. In addition to Nakita, Patricia has five children of her own—Nicole, Charles, Mariah, Shane and Antoine. Patricia's companion at the time, Melvin J., is the father of Patricia's three youngest children—Mariah, Shane and Antoine. Melvin's daughter by a different mother,

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<sup>2</sup> The Department of Health and Social Services was renamed the Department of Health and Family Services effective July 1, 1996. *See* 1995 Wis. Act 27, §§ 9126(19) and 9426(16).

Latrice, also lived in Patricia's home on a temporary foster care basis several times. The court found that Melvin was physically and verbally abusive, abused alcohol and used and delivered cocaine, and had been convicted of possession of cocaine, possession of a weapon and violence toward Patricia and others. Melvin and Patricia used physical force to discipline the children, and Patricia was inconsistent with her use of discipline.

The court also found that there had been incidents of physical violence among the children in Patricia's home and that two of Patricia's children had used physical violence against children outside the home. Both of Patricia's children who had reached their teens had been charged with offenses involving violence and were regular drug users by the age of thirteen. Nakita had shown some signs of a tendency toward aggressive speech and behavior.

Most of Patricia's children had experienced significant problems in school and in the community. Although her five children are of average intelligence, four of them were seriously underachieving at school and lacked motivation. The lack of emphasis on school work within Patricia's home contributed to their poor attitudes toward education and the low priority it had for them.

The court found that the serious emotional, medical and educational problems of many of the children would drain Patricia's ability to meet Nakita's needs as Nakita grew older. Patricia greatly minimized the seriousness of her problems and those of Melvin and the children and lacked a commitment to change.

The trial court recognized that Nakita was thriving, well cared for and loved, and that removal would cause her short-term distress and create a risk

of long-term harm. Against these risks, the court looked at Patricia's track record with the other children as an indicator of how Nakita might fare. It observed that the other children had displayed serious problems and attributed them in large part to the home in which the children were raised. It concluded that if Nakita remained in the home, she was likely to develop the same types of problems and faced a risk of physical harm. The court determined that the family's problems were not likely to be seriously improved in the future and that removing Nakita would promote her long-term best interests.

The trial court stayed its order until March 1, 1994 or the entry of an appellate decision. On November 16, 1993, we affirmed the trial court's order. *See Patricia G. v. DHSS*, No. 93-2013, unpublished slip op. (Wis. Ct. App. Nov. 16, 1993).

On November 24, 1993, Patricia filed a motion for relief from the trial court order granting removal of Nakita. In a sworn affidavit, Patricia stated that she had been separated from Melvin since June 1993. Patricia also noted that since June 1993, she had been working closely with many professionals and treatment providers. There was also new professional testimony. A doctor who had been providing therapy to Nakita since just before the first removal hearing testified that the psychological harm from the removal would be greater than the potential harm that would come from staying in Patricia's home. Although the trial court still believed that Nakita was at risk in Patricia's home, it concluded that these additional factors tipped the scales in favor of leaving Nakita stay in the household. In January 1994, the court vacated its earlier order.

On April 27, 1995, Patricia, DHSS and Nakita's guardian ad litem signed a statement that affirmed the mutual commitment on the part of DHSS and

Patricia to accomplish the legal adoption of Nakita by Patricia. The statement provided that DHSS and Patricia would collaboratively work toward Nakita's adoption by Patricia, assuming that both DHSS and Patricia meet certain obligations.

In November 1995, after Patricia's relationship with Melvin had ended, Roosevelt W. moved into Patricia's home with his three children—April, Andre and Tierra. April, Andre and Tierra were Nakita's half-siblings. Roosevelt, who had previously had a long-term relationship with Nakita's mother, became legal guardian of these children in 1986.

On March 22, 1996, DHSS again recommended removal of Nakita from Patricia's home. On April 11, 1996, DHSS removed Nakita from Patricia's home on an emergency basis and placed Nakita in a different foster home. On April 12, 1996, the circuit court sustained the emergency removal after hearing testimony that Nakita had been physically and sexually abused in Patricia's home. In July 1996, DHSS filed an amended permanency plan report which contained the allegations of abuse and again recommended that the court order removal of Nakita and approve a permanent plan of adoption with an alternative family. Patricia again petitioned the circuit court to review DHSS's recommendation under § 48.64(4)(c), STATS.

Because of the previous hearings that had occurred in 1993 and January 1994, the circuit court confined the scope of the hearing to events occurring after January 1994. After a two-day trial, the circuit court affirmed DHSS's decision. The circuit court incorporated its findings from July 1993 and January 1994 into its decision. The court also found that Melvin had remained an active participant in family activities and that Patricia had encouraged the

relationship between Melvin and Nakita to continue, despite Patricia's prior representation that Melvin would no longer be an integral part of her household. The court also found that Patricia had failed to implement a comprehensive family and individual counseling program for herself and her children, despite her contention in January 1994 that she would do so.

Although each of Patricia's children had achieved some success since January 1994, the court found that the dominant feature of their development was a continuation of significant problems at school, with the law and in the community. Despite the problems of her own children, Patricia allowed several other children to reside in her home for varying periods of time. The court also found that Nakita was physically abused by a number of the children and was sexually abused by two of Patricia's children and by her own half brother. Patricia denied that Nakita was abused and continued to minimize the seriousness of her children's problems.

The court recognized that Nakita was closely bonded to Patricia, that Patricia genuinely loves Nakita and that Patricia had provided for Nakita's material needs exceptionally well. The court found that were Nakita to be permanently removed from Patricia's home, she would experience a great sense of loss and grief and may suffer long-term negative consequences. However, the court found that Nakita would be at greater risk if left in Patricia's home than if she were removed.

On January 30, 1997, Patricia filed a motion for reconsideration with the trial court. The court denied the motion. Patricia appeals.

## **DISCUSSION**

Patricia first argues that the circuit court erred in requiring only that DHSS prove by a preponderance of the evidence that removal was in Nakita's best interests. Patricia argues that she had a liberty interest in "maintaining her family" and that the Due Process Clause required DHSS to show the basis for removal by clear and convincing evidence, not merely a preponderance of the evidence. Whether the proceedings complied with constitutional standards for due process is a question of law that we decide *de novo*. *State v. Tammy F.*, 196 Wis.2d 981, 987, 539 N.W.2d 475, 477 (Ct. App. 1995).

In *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Supreme Court concluded that in termination of parental rights proceedings, the Due Process Clause requires that the petitioner show by clear and convincing evidence that termination is appropriate. In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), the Supreme Court faced the question of whether the relation of foster parent to foster child is sufficiently akin to the concept of "family" to merit substantive and procedural due process protections. *See id.* at 842. The Court left the question unanswered, concluding that even if foster parents have a protected liberty interest, that interest was sufficiently protected by the removal statutes at issue. *Id.* at 847.

Several jurisdictions have examined whether foster parents have a protected liberty interest in the continued custody of their foster children. Some courts have found that a protected liberty interest exists. *See Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982); *Brown v. County of San Joaquin* 601 F. Supp. 653 (E.D. Cal. 1985); *Berhow v. Crow*, 423 So.2d 371 (Fla. Dist. Ct. App. 1982). A larger number of courts have found that foster parents do not have a protected liberty interest. *See Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985); *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 697-99 (7th Cir.

1979); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977); *Snell v. Tunnell*, 698 F. Supp. 1542, 1560 (W.D. Okla. 1988), *aff'd and remanded*, 920 F.2d 673 (10th Cir. 1990); *Sherrard v. Owens*, 484 F. Supp. 728, 741 (W.D. Mich. 1980), *aff'd*, 644 F.2d 542 (6th Cir. 1981); *In re A.C.*, 415 N.W.2d 609 (Iowa 1987). But Patricia does not cite any case, and we do not find any case, that has extended the “clear and convincing evidence” requirement of *Santosky* to the removal of a foster child from his or her foster parent.

In *In re Petition of D.I.S.*, 494 A.2d 1316 (D.C. 1985), the court specifically rejected the same argument that Patricia is making. The court reasoned:

[I]t is axiomatic that the evidence in a case could establish the existence of a fact by a preponderance of the evidence, yet fail to do so by clear and convincing evidence.

In light of the goal of adoption proceedings to determine the best interests of the child, use of the preponderance of the evidence standard is most appropriate. Under appellant's argument, when a preponderance of the evidence establishes that adoption by a non-custodial non-parent is in the best interests of the child, the child would remain in the custody of the custodial non-parent when the evidence is less than clear and convincing. Given our focus on the child's best interests, such a result is peculiar.

*Id.* at 1326.

In Wisconsin, the focus in removal proceedings is also on the child's best interests. See § 48.64(4)(c), STATS. We agree that it would be peculiar to require a child to remain in a foster home when it has been proven by a preponderance of the evidence that removal is in the child's best interests. Moreover, we believe that we would step outside the bounds of our error-correcting function were we to accept Patricia's argument when no other



jurisdiction has recognized such a due process right. Because no court has held that the State must prove by clear and convincing evidence that removal is in the child's best interests, we reject Patricia's argument.

Patricia also challenges several of the circuit court's factual findings and argues that removal was not in Nakita's best interests. The best interests standard involves a mixed question of fact and law. *See Adoption of Randolph*, 68 Wis.2d 64, 69, 227 N.W.2d 634, 637 (1975). We review the trial court's findings of fact under the clearly erroneous standard. *Id.* We search the record for evidence to support the trial court's findings, not for evidence to support findings the court could have made, but did not. *In re Estate of Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

The ultimate conclusion as to the determination of the child's best interests is a question of law. *Randolph*, 68 Wis.2d at 69, 227 N.W.2d at 637. We ordinarily review questions of law *de novo*. *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983). However, because a conclusion regarding the best interests of the child is so intertwined with the historical facts, we will afford some deference to the trial court's determination, although the trial court's decision is not controlling. *See id.*

Patricia first contests the trial court's finding that she failed to implement a comprehensive family and individual counseling plan as promised in January 1994. In her November 1993 affidavit supporting her motion for reconsideration, Patricia stated:

Since June, 1993, I have been working closely with many professionals and treatment providers. I have been and continue to be in counseling with Dr. Jonathon Lewis. The purpose of my counseling is to work on issues involving my decision to terminate my relationship with Melvin, improving my self-esteem, ensuring that my home

remains free of domestic violence and dealing with the problems of being a single parent.

Patricia further provided: “It is my intention to continue to work with the counselors, day care provider and schools. I am willing to do whatever it takes to meet my children’s needs.” In January 1994, the trial court vacated its earlier order in part because Patricia had shown a commitment to the involvement of service providers to assist her and her family.

At trial, Patricia testified that she only saw Dr. Jonathon Lewis, the doctor mentioned in her affidavit, about six times. In her reply brief, she admits that she “did not continue therapy with the provider mentioned in her affidavit.” Patricia did complete a forty-hour course and received some therapy through Dane County Advocates for Battered Women. However, this is not the counseling she mentioned in her affidavit that she was receiving and would continue to receive. The trial court’s first contested finding is not clearly erroneous.

Patricia next disputes the trial court’s finding that Nakita was physically and sexually abused while in Patricia’s home. At trial, Dr. Lorraine Broll testified that she had evaluated Nakita to determine whether she had been physically or sexually abused. Nakita told Dr. Broll that Shane, Andre and Antoine had squeezed her neck hard and made her faint. Nakita also said that she was kicked, punched, and picked on by the other children. In addition, Nakita told Dr. Broll that Mariah had pulled her hand and made her touch the stove, burning her finger. Based on this evidence, the trial court’s finding that Nakita had been physically abused by members of the household is not clearly erroneous.

Regarding sexual abuse, Nakita told Dr. Broll that Mariah had Nakita touch Mariah’s breast over the top of her pajamas. When asked her opinion on whether Nakita had been sexually abused, Dr. Broll testified:

My opinion was that there was some sexual abuse that happened.... [Nakita] talked about Antonio touching her on the butt, on the outside of the butt. She talked about Andre touching her private place and she also made a reference to some contact between her genitals and Andre's genitals.

Based on this evidence, the trial court's finding that Nakita had been sexually abused in the home is not clearly erroneous.

The trial court may have erred in finding that Nakita had been sexually abused by two of Patricia's children and her own half brother. Mariah was Patricia's daughter, and Andre was Nakita's half brother, but Antonio was Latrece's brother, not Patricia's child. This error, however, is harmless. Of relevance is the trial court's finding that Nakita had been sexually abused by three children while under Patricia's care, not which three children were the perpetrators of the abuse. At issue in this proceeding was whether Nakita should be removed from Patricia's home. Any abuse that took place while Nakita was under Patricia's care is relevant to this determination, regardless of whether the abuser was Patricia's daughter, Nakita's half sibling, or an unrelated child.

Patricia next contends that her children have improved overall since 1994. In its findings, the trial court stated: "Since January, 1994, each of [Patricia's] children has achieved some success which cannot be and is not ignored. However, during the same period the overwhelming dominant feature of their development is a continuation of significant problems at school, with the law and in the community." We assume that, by arguing that her children have improved since 1994, Patricia is contesting this finding as clearly erroneous.

At the time of the 1996 hearing, Patricia's oldest daughter, Nicole, was serving a three-year sentence for felony forgery and had felony drug charges pending. In fall 1994, Shane and Antoine were involved in a rock-throwing

incident on State Street, and in 1995, they vandalized two Madison businesses and were involved in an incident at Vilas Park in which they approached two boys, strong-armed them and took some money. Shane was also involved in a pushing and shoving incident at Vilas Park and had attempted to break up a fight while wielding a knife.

Kathy Van Gordon, an adoption supervisor for DHSS, testified that Antoine has had difficulties in school. In March 1996, Antoine's teacher told Van Gordon that Antoine was making progress, but continued to struggle in school and was not completing his homework. An assistant principal at Shane's school told Van Gordon that Shane had had a difficult time transitioning to middle school. The school experienced oppositional behavior from Shane and had a difficult time getting him to turn in homework. Shane also harassed and intimidated other students, but his behavior was settling down. A guidance counselor or teacher at Mariah's school told Van Gordon that Mariah was quite distractible, acted very impulsively, and seemed sullen and angry at times. Mariah was "mouthier" than most of her peers and had been suspended from school. Patricia testified, however, that Mariah had been "honorable mention," one step behind the honor roll, in three of the last four quarters.

The record supports the trial court's finding that Patricia's children continued to have significant problems at school, with the law and in the community. Therefore, its finding is not clearly erroneous.

Next, Patricia contends that the trial court erred in finding that she had minimized the seriousness of her children's problems. In making this finding, the court focused on a letter from Patricia to Dr. Broll, Patricia's testimony and other testimony received. In her brief, Patricia argues: "The fact that Patricia

stressed her children's successes in the course of this five year adversarial proceeding is not surprising and should be expected considering that a negative determination means that she loses the little girl she has raised for six and one-half years."

The trial court recognized Patricia's genuine love for Nakita, and we do not dispute the sincerity of Patricia's attempt to keep Nakita in her home. But the fact is that the trial court found that Nakita had been physically and sexually abused and that Patricia's children continued to encounter significant problems at school, with the law and in the community. If Patricia minimized the role of her children in the abuse or minimized her children's problems at school, with the law or in the community, then the trial court could appropriately find that she was minimizing her children's problems, regardless of whether she did so at trial, in a letter to Dr. Broll, or elsewhere.

We conclude that this finding is also supported by the evidence, and therefore is not clearly erroneous. In the letter to Dr. Broll, Patricia emphasized the successes of her children in school. She also stated that the allegations of sexual abuse had not been substantiated and set forth evidence that, in the absence of Nakita's statement to the contrary, would tend to prove that Andre, Shane and Antoine had not squeezed Nakita's neck and made her faint. Patricia did not believe that the boys had squeezed Nakita's neck to make her faint until Nakita told her so at Dr. Broll's office, even though Nakita had previously reported the incident to Sue Ayres, a Dane County social worker. And at trial, Patricia testified that "Antoine was barely involved" in the strong-armed theft and mentioned that the boys were less out of line during the theft than during the vandalism incident. She also testified that she did not believe that Mariah intentionally touched Nakita's finger to the stove.

Patricia next argues that she “will validate Nakita if returned to the home.” At trial, Patricia testified that she now believes that some bad things happened to Nakita while in her care. The trial court believed that this admission was too late and lacked credibility. It is for the trial court, not us, to determine the credibility of the witnesses. *Leciejewski v. Sedlak*, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984). Considering Patricia’s prior failure to acknowledge that Nakita had been physically or sexually abused, the trial court’s determination that Patricia’s acknowledgment of abuse lacks credibility is not clearly erroneous.

Finally, Patricia contends that it is in Nakita’s best interests to remain in her household. The trial court found to the contrary. In reviewing the trial court’s determination, we first note that the judge who heard two days of testimony in December 1996 and concluded that removal was in Nakita’s best interests was the same judge who heard five days of testimony in June 1993, the same judge who granted Patricia’s motion for reconsideration in January 1994, and the same judge who denied Patricia’s motion for reconsideration in February 1997. This judge had the opportunity to listen to the various people who have played a role in Nakita’s life and the professionals who have made determinations relevant to Nakita’s best interests. This judge had the opportunity to determine the credibility of the various players in these proceedings. Because the trial court is better situated to evaluate credibility, we defer to its findings.

In determining that removal was in Nakita’s best interests, the trial court noted that its predictions about the future that it made in January 1994 had proven to be wrong. Although Patricia had ended her relationship with Melvin, she encouraged Nakita to continue a relationship with him. The court also believed that the counseling Patricia procured for her children was not enough to address the severity of their behavioral problems. The court believed that Patricia

was either unwilling or incapable of providing the guidance, direction, or time-commitment necessary to assure that her children were law abiding, successful in school, and productive members of the community. Patricia has a generous nature, but she takes other children into her home when her own children require that she gives them a full-time commitment.

The court also believed that, if left in Patricia's home, Nakita was at risk of experiencing the same problems that Patricia's older children had already encountered. And because Patricia had not accepted the fact that Nakita had been abused, the court believed that Nakita was at risk of being abused in the future.

The court also turned to the testimony of Dr. Anna Salter, one of Patricia's witnesses, to support its decision. According to the court, Dr. Salter persuasively expressed the opinion that a child like Nakita should not be separated from her psychological parent unless absolutely necessary. The court then stated:

[Dr. Salter] described abuse of a child, sexual and/or physical, as one of the occasions when removal might be justified, but not if two key things were accomplished. First, the psychological parent must believe the child and show her she is there to protect her. As my previous remarks indicate, I am not convinced this is true of [Patricia]. Second, the primary perpetrator in this case, Andre, must be removed from the home because he is a danger to Nakita. That was Dr. Salter's opinion and I accept it. I am likewise not convinced that Andre is permanently out of [Patricia's] home. He is a relative of Nakita's. He lives less than a mile away with his mother, Debra M[.], who [Patricia] has encouraged to have an ongoing relationship with Nakita and who is, of course, Nakita's birth mother. [Patricia] has not had a very good track record in controlling who comes in and out of her home and in and out of Nakita's life. Even if Andre were somehow to be kept away from Nakita, [Patricia's] willingness to take troubled children into her home exposes Nakita to further abuse. When will Nakita be exposed to the next Andre?

The court recognized that a permanent separation of Nakita from Patricia may cause long-term negative consequences for Nakita. It also realized that Nakita's positive relationship with her counselor would not eliminate the sense of loss and sadness that Nakita would experience from being separated from Patricia. However, the court concluded that the risks of returning Nakita to Patricia's home outweighed the risks of removal. Based on the record, we cannot conclude that the trial court erred in its decision.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.



