COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 03-1654
03-1655

Cir. Ct. Nos. 02TP000281
02TP000282

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 03-1654
CIR. CT. NO. 02TP000281

IN RE THE TERMINATION OF PARENTAL RIGHTS TO LAMONT C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NEONA C.,

RESPONDENT-APPELLANT,

LAMONT C.,

RESPONDENT.

NO. 03-1655
CIR. CT. NO. 02TP000282

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DAMIAN C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NEONA C.,

RESPONDENT-APPELLANT,

DAMIAN C.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Neona C. appeals from the order terminating her parental rights to her children, Lamont C. and Damian C. She contends that the default judgment entered against her was unreasonable and unjust. She further contends that there was insufficient evidence to establish, as grounds for the termination of her parental rights, that: (1) she failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6) (2001-02);[2] and (2) the children remain in continuing need of protection or services of the court, pursuant to WIS. STAT. § 48.415(2). Finally, Neona C. contends that the trial court failed to exercise discretion on the record, and thus erroneously exercised its discretion, when it terminated her parental rights. Because the default judgment was proper, there was sufficient evidence, and the trial court properly exercised its discretion, this court affirms.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

I. BACKGROUND.

¶2 Lamont C. and Damian C. were born on January 3, 1997 and December 4, 1997, respectively. The children were taken into protective custody on August 11, 1999, as a result of allegations of medical neglect and malnutrition. On April 24, 2000, they were found to be in need of protection or services and the court accordingly entered a dispositional order placing Lamont and Damian outside of the home of their mother, Neona C. The dispositional order was extended in April 2001. The dispositional and extension orders contained written warnings regarding the possibility of the termination of parental rights, were reduced to writing, and were given to Neona C. In August 2001, Neona C. moved to Kentucky while her children were still in foster care in Milwaukee.

¶3 On April 29, 2002, a petition was filed seeking the termination of Neona C. and Lamont C.'s parental rights to their sons. As grounds for termination, the petition alleged that Neona C. failed to assume parental responsibility within the meaning of WIS. STAT. § 48.415(6) and that she was substantially unlikely to meet the conditions of return within twelve months, pursuant to WIS. STAT. § 48.415(2).[3]

¶4 Neona C. appeared by phone for the initial appearance on the petition on May 24, 2002, but she subsequently failed to appear, not once, but twice, for scheduled depositions. On August 1, 2002, the State filed a motion for

[3] In addition, the petition alleged two grounds for the termination of the father's parental rights. An amended petition, filed on June 24, 2002, alleged a third ground for the termination of the father's parental rights. The father, however, voluntarily consented to the termination of his parental rights on July 22, 2002. This appeal concerns only the termination of Neona C.'s parental rights.

default judgment. Neona C. appeared late for the jury trial scheduled for August 19, 2002; as of 9:10am, Neona C. had not appeared for the trial scheduled to begin at 8:30am. As a result of both her failure to participate in discovery and her failure to arrive on time for trial, the trial court found Neona C. to be in default and heard testimony from the ongoing case manager. The case was recalled at around 9:30am, when Neona C. appeared at the courthouse. Her counsel moved to vacate the default judgment on both grounds. The trial court let the default judgment stand, remarking that sufficient notice of the depositions had been given to Neona C. and that she was informed of the possible consequences of her failure to appear and to participate. A written order terminating the parental rights of Neona C. and Lamont C. was filed on September 16, 2002. We consolidated the cases for appeal on July 2, 2003.

II. ANALYSIS.

A. The default judgment was reasonable.

¶5 A trial court has both statutory and inherent authority "to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). WISCONSIN STAT. § 805.03 provides in relevant part:

> **Failure to prosecute or comply with procedure statutes.** For failure of any … party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

Further, WIS. STAT. § 804.12(4) provides, in relevant part:

> FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION…. If a party … fails … to appear before the officer who is to take the party's deposition, after being served with a proper notice, … the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2) (a) 1., 2. and 3.

¶6 WISCONSIN STAT. § 804.12(2)(a) provides that for failure to comply with an order to provide or permit discovery the court may make such orders as are just including, but not limited to, the following: (1) an order that designated facts be taken as established; (2) an order refusing the disobedient party the right to support or oppose designated defenses or claims; and/or (3) an order striking out pleadings, or portions thereof, or rendering a judgment by default against the offending party. Further, WIS. STAT. § 802.10(7) provides that "[v]iolations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03." "The authority to impose sanctions is essential to the trial court's ability to enforce its orders and ensure prompt disposition of lawsuits." ***Johnson***, 162 Wis. 2d at 274. Yet, "[t]o enter a default judgment, the trial court must determine that the 'noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse.'" ***Smith v. Golde***, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999) (quoting ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995)).

¶7 However, in a termination of parental rights case,

> the constitution and statutory code require a showing of proof before the [trial] court can enter a particular judgment or order, [and] the [trial] court cannot enter the judgment or order without the appropriate showing. To be sure, the [trial] court may … determine that a party's action or inaction provides adequate cause for sanctions against that party. But such cause does not allow the court to dispense

> with any independent constitutional or statutory burden of proof that must be satisfied prior to entering a judgment or order.

Evelyn C.R. v. Tykila S., 2001 WI 110, ¶25, 246 Wis. 2d 1, 629 N.W.2d 768. Thus, in finding a party in default in a termination case, the trial court is "striking" the defendant's contest posture, but must still determine that sufficient evidence exists to establish grounds for termination. The trial court's entry of default, however, is an exercise of discretion that this court reviews under the erroneous exercise of discretion standard. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. "[This court] will sustain the court's default judgment sanction if there is a reasonable basis for its determination." ***Smith***, 224 Wis. 2d at 526.

¶8 Neona C. contends that the default judgment entered against her was unreasonable and unjust. She argues that the State's argument—that Neona C.'s failure to appear for her depositions precluded the State from adequately preparing for trial—in support of its request for a default judgment is unpersuasive. She insists that the State's inability to depose her "did not mean its ability to present its case was 'totally frustrated.'" And finally, Neona C. contends that "[t]here is no reasonable basis for concluding that such a result is just in this case[,]" and that "[t]he [trial] court did not and could not find that Neona's failure to appear at scheduled depositions was egregious or in bad faith."

¶9 However, it is the trial court's exercise of discretion with which this court is concerned. The trial court is not required to determine that the State's ability to present its case was "totally frustrated" in order to impose sanctions. Indeed, "[t]he court's discretion to impose sanctions is not dependent on a

showing that the opposing has been actually prejudiced by the delay." ***Sentry Ins.***, 247 Wis. 2d 501, ¶19.

¶10 Neona C.'s contention that there is no reasonable basis for concluding that a default judgment was just in this case is unpersuasive for the reasons that follow. On May 24, 2002, Neona C. appeared by phone for the initial appearance. During those proceedings, the trial court stated:

> I would advise … you … Miss [C.] … you must appear on the next date in a timely fashion. Miss [C.] needs to maintain contact with Mr. Hartley so you can respond to discovery to prepare your defense, et cetera.
>
> If you would fail to do any of it, there is a substantial likelihood that you would lose your right to fight this petition by way of a trial.

Later, during the same proceedings, the following exchange occurred:

> THE COURT: Miss [C.], Mr. Hartley will be in touch. I am not requiring you to appear on the adjourned initial appearance date; however, on the trial date, which is August 19 at 8:30, you do need to appear. You need to appear in person and be prepared to participate in the trial, okay?
>
> MS. [C.]: Okay.

¶11 As is evident from the transcripts, Neona C. was warned that her failure to participate or appear could result in the loss of her right to fight the petition. She was ordered to participate in discovery and appear in a timely fashion for trial. She was also given sufficient notice of each of the depositions and the date and time of the trial. Yet, she failed to appear for the depositions, and arrived around an hour late for the trial.

¶12 The record indicates that Neona C. made no phone calls to the court or her attorney indicating that she would not be able to attend the depositions or

arrive on time for trial. On the morning of the trial date, the State moved for entry of default:

> MS. SOWINSKI: Your Honor, we're here for a jury trial scheduled for this morning. On a prior court date, the mother had been ordered to appear, and she was warned that if she did not do so, she would be defaulted in these proceedings. The Court may notice that the State has filed a motion to default the mother, as she has not participated in discovery. Two different dates have been scheduled for her deposition, and the mother has failed to appear on both dates. It was on May 24th of this year that the Honorable Christopher Foley did tell the mother that if she failed to appear at subsequent court appearances, she would be defaulted, and at this time I would ask that the mother's default be entered by the Court.
>
> THE COURT: Counsel for the mother, anything?
>
> MR. HARTLEY: No.
>
> THE COURT: All right. On two bases a default as to the mother will be granted. One is her failure to appear today. This matter was set for 8:30. It's now 9:10, and the second is her failure to participate in discovery. So ordered.

And later, after Neona C. had arrived, the case was recalled and her attorney moved to vacate the order of default:

> MR. HARTLEY: Judge, after we were exiting the courtroom – it's about 9:28 – I was getting on the elevator. My client was stepping off the elevator. … I'm going to ask the Court to reverse and vacate its prior order defaulting my client as previously stated on the record.
>
> ….
>
> THE COURT: There were two grounds for which the default was granted. One was her failure to appear, and the second was her failure to participate in the discovery process. Counsel for the mother, are you asking the Court to vacate the default on both grounds?
>
> MR. HARTLEY: Absolutely.

THE COURT: Do you have some explanation to offer for her failure to appear – participate, rather, in discovery?

MR. HARTLEY: Well, I can tell the Court that at the time that the first – I don't have the date, but on the date of the first deposition, my client was residing in Kentucky, and I had attempted to notify her by phone and also notified her in writing of that date. Apparently she could not make it up to Milwaukee on that date.

THE COURT: You said, "apparently," meaning you're speculating, engaging in conjecture, or you talked to her, and she said, I couldn't make it, or what?

MR. HARTLEY: Well, she told me after the fact that that's why she couldn't make it. The second –

THE COURT: She told you what?

MR. HARTLEY: She told me that she couldn't get back to Milwaukee from Kentucky, and she told me after she missed the deposition date.

THE COURT: Okay.

MR. HARTLEY: The second deposition date was scheduled for July 29th of 2002. Ms. [C.] was back in Milwaukee. I think she had been back since about the 26th of July, and my office notified her in writing as well as had communication with her by phone, at least through a message at her mother's house, a day or two prior to the deposition date as well as Ms. [C] called our office the morning of the deposition date at, I believe, about 10:00 in the morning. The deposition was scheduled for, I believe, 4:00. We couldn't get ahold [sic] of her by phone that day. I don't have a reasonable explanation for her nonappearance. Maybe she can shed some light on that. I haven't had much communication with her since then.

THE COURT: But there was notice provided to her for the deposition of July 29; is that right?

MR. HARTLEY: Yes.

THE COURT: And you have received no explanation for her failure to appear; is that right?

MR. HARTLEY: Not a reasonable one.

THE COURT: Have you received any?

MR. HARTLEY: No.

….

THE COURT: You received no explanation for her failure to appear at the deposition of July 29; is that correct?

MR. HARTLEY: That's correct. She may have indicated she had transportation problems.

THE COURT: She may have indicated to someone other than you?

MR. HARTLEY: My recollection is that she indicated that to me maybe a week after that, that she has transportation problems, although she was living in the City of Milwaukee.

….

THE COURT: Was the mother informed of the possible consequence of her failure to participate in discovery?

MS. SOWINSKI: My notes reflect, your Honor, that on May 24th of 2002, Judge Foley – and it is my experience with Judge Foley that he does this as a matter of practice – did order the parents to appear and participate in discovery and to appear at all court appearances or be defaulted, and the docket sheet, I believe, will reflect, and my notes reflect, that the mother did make that court appearance by phone, and her attorney was here in the courtroom. …

….

THE COURT: … I am going to let stand the default judgment. There was sufficient notice of three depositions given to the mother. One was adjourned by stipulation. Two were missed without explanation or excuse. On the notices of deposition, the mother was informed of the possible consequence of her failure to appear. The first one scheduled for June 13 says, failure to appear may result in punishment for contempt or petitioner's motion for default judgment. Children are entitled to some finality and stability. It shall stand. So ordered.

¶13 As is evident from the transcripts, there was a reasonable basis for the trial court's decision to find Neona C. in default. The court considered her

actions and her lack of justifiable excuse. "Under § 804.12(2)(a)3., a [trial] court may enter a default judgment as a sanction for bad-faith discovery violations when the offending party has not proved it had a clear and justifiable excuse for its conduct." ***Brandon Apparel Group, Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544 (citing ***Johnson***, 162 Wis. 2d at 275). Bad faith has been defined as "intentionally or deliberately delay[ing], obstruct[ing] or refus[ing] the requesting party's discovery demand." ***Hudson Diesel***, 194 Wis. 2d at 543. Further, "[a] circuit court may find that a party acted in bad faith as long as it is clear from the record that the court was convinced of the party's bad faith, even though the court did not use the words 'bad faith.'" ***Brandon Apparel***, 247 Wis.2d 521, ¶11. Here, although the trial court did not use the terms "bad faith" or "egregious," it did note that: (1) Neona C. was made aware of the potential repercussions for her failure to participate in discovery; (2) she was given sufficient notice of the depositions; and (3) she still failed to appear for two depositions without so much as a phone call indicating that she would not be able to attend. It also noted that Neona C. offered no reasonable or justifiable excuse for her absence, except that she "may have indicated that she had transportation problems[,]" well after the scheduled deposition dates. Indeed, the record fails to explain or indicate whether Neona C. even had an excuse for her failure to timely appear at trial. Accordingly, the trial court's exercise of discretion was reasonable.

B. There was sufficient evidence to establish that Neona C. failed to assume parental responsibility.

¶14 When reviewing the sufficiency of the evidence, "[a]ppellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d

659. Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." ***Id.***, ¶39 (quoting ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.*** Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶15 WISCONSIN STAT. § 48.415(6) sets forth the failure to assume parental responsibility as a ground for termination, and essentially outlines the means by which a parent can avoid an allegation of failure to assume:

> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well- being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶16 Stated otherwise, a "substantial parental relationship" means "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." ***Id.*** Further, as indicated above, in

determining whether Neona C. has had a substantial parental relationship with her children, the court may consider "whether [Neona C.] has ever expressed concern for or interest in the support, care or well-being of the child[ren], [and] whether [she] has neglected or refused to provide care or support for the child[ren.]" *See **id**.*

¶17 Neona C. contends that a finding that she never exercised significant responsibility for the daily supervision, protection, and care of her children is clearly erroneous. In support of that contention, Neona C. argues that Lamont and Damian lived with her for over two and a half and one and a half years, respectively, and "[w]ithout care, an infant does not become a toddler." However, Neona C. makes no reference to the record or the evidence presented to further and develop her argument. As such, she fails to consider the evidence presented by the State, in the form of the testimony of the case manager, indicating that: (1) both children appeared to be "seriously neglected" and "alarmingly small for their ages" when they were taken into protective custody; (2) both children were treated at Children's Hospital for malnourishment; (3) Damian was anemic and behind on his immunizations; (4) Damian had a severe eye condition that Neona C. had failed to treat; (5) Lamont had an asthmatic condition that Neona C. had failed to treat; (6) since the children were taken into protective custody, Neona C. has done nothing to provide daily supervision, education, and care for the children; and (7) Neona C. has provided no financial support for the children since they were removed from her home.

¶18 As indicated by the State, it does appear to make a mockery of the "substantial parental relationship" requirement to say that the requirement is satisfied merely because the children survived. Although Neona C. contends, in her reply brief, that her argument is not that they merely survived, but rather that

"for an infant to become a toddler, someone must provide that child with water, food, clothing and shelter[,]" and that that is exactly what Neona did for her children, that clarification is insufficient to shed the feeling that she is urging this court to minimize the expectations of parents and substantial parental relationships. That clarification still ignores the qualities, quantities, and nature of the care and concern required of parents to exercise significant responsibility for the protection and care of their children. It was reasonable for the trial court to conclude that Neona C. never exercised *significant* responsibility for the protection and care of her children in light of the evidence indicating the state of the children's malnourishment and their neglected medical conditions.

¶19 As the second ground for the termination of Neona C.'s parental rights, the State alleged, under Wis. Stat. § 48.415(2), that Neona C.'s children were in continuing need for protection or services, and, under § 48.415(2)(a)3:

> [t]hat the [children had] been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the [children] to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

¶20 Neona C. argues that to establish this as a ground for termination, the State must prove that the county department made a reasonable effort to provide the services ordered by the court, and "[b]ecause the record contains no testimony indicating what particular steps were taken to provide services to Neona, the [trial] court could not properly find that the county department made a reasonable effort to provide services previously ordered." However, as this court has already concluded that there was sufficient evidence to support the failure to assume parental responsibility ground for termination, we need not address this

contention. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) ("Because we have determined that there is at least one sufficient ground to support the order, we need not discuss the others.").

C. The trial court properly exercised its discretion.

¶21 Provided the statutory grounds for termination are satisfied, the decision to terminate parental rights is within the province of the trial court's discretion. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). "[T]he trial court must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child." ***Mrs. R. v. Mr. and Mrs. B***, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981) (citation omitted).

> 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.

David S. v. Laura S., 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993).

¶22 Further:

> The court should explain the basis for its disposition, on the record, by alluding specifically to the factors in Wis. Stat. § 48.426(3) and any other factors that it relies upon in reaching its decision. In every case the factors considered must by calibrated to the prevailing standard. The best interests of the child is the polestar of all determinations under ch. 48. The court *shall* decide what disposition is in the best interest of the child[ren].

Sheboygan County DHHS v. Julie A.B., 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402 (citations omitted).

¶23 The brevity of the trial court's "explanation" on the record for the basis of its disposition is disconcerting, but not fatal. In ***Julie A.B.***, the supreme court stated that the trial court *should* explain the basis for its disposition *on the record*, referring to the WIS. STAT. § 48.426(3) factors.[4] ***Id.*** It did not say that it *shall* do so or else result in an erroneous exercise of discretion *per se*.

¶24 After hearing testimony from the ongoing case manager, the State made the following request:

> I would ask the Court to adopt as findings of fact the following paragraphs in the petition: paragraph 1, paragraph 2 as amended by Mr. Hartley's statement as to the mother's address, paragraph 3 … paragraph 4, paragraph 5, paragraph 6, and paragraph 8 as well as paragraph 9 and to order that the mother be found unfit and

[4] WISCONSIN STAT. § 48.426(3) sets forth the factors to be evaluated in considering the best interests of the children:

> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (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.

> that the parental rights of both parents are terminated forever and that the Bureau is to be given guardianship at this time for purposes of arranging adoption.

The trial court ruled as follows: "The Court grants relief sought from the petition and requested by counsel for the State, makes said findings, and grants the petition in all respects, and so ordered." The petition addresses the likelihood of adoption, the ages and health of the children, the duration of the separation of the children from their mother, the lack of substantial relationships between the children and their mother or other family members, the efforts that have been made to reunify the family, the likelihood of future placements, and the fact that the children would be able to enter into a more stable and permanent family relationship once the parents' rights have been terminated. The petition alleged that, after considering those factors, it would be in the best interest of the children to terminate the parental rights of Neona C. Accordingly, the trial court accepted these contentions and made such findings on the record, and in so doing, implicitly exercised its discretion in ordering the termination as it was in the best interest of the children.

¶25 Based upon the foregoing, this court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.