COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1983 **Cir. Ct. No. 2015TP20**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO L. D. G.,
A PERSON UNDER THE AGE OF 18:

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

C. C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] C.C. appeals from an order of the circuit court terminating her parental rights to L.G. C.C. challenges the circuit court's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

determination on summary judgment that grounds existed to terminate C.C.'s parental rights. C.C. contends: (1) the circuit court's summary judgment procedure at the grounds phase violated the mandatory notice provision under WIS. STAT. § 802.08(2); (2) a genuine issue of material fact exists on the issue of grounds; and (3) summary judgment was not carefully administered. I conclude that summary judgment was appropriate and, therefore, affirm.

BACKGROUND

¶2 C.C. is the biological mother of L.G., who was born in October 2011. In January 2012, a dispositional order was entered determining L.G. to be a child in need of protection and services (CHIPS), and placing L.G. outside C.C.'s home. In September 2015, Jefferson County Department of Human Services petitioned the circuit court for the termination of C.C.'s parental rights to L.G. on the following grounds: continuing CHIPS, *see* WIS. STAT. § 48.415(2)(a), and a continuing denial of periods of physical placement or visitation, s*ee* § 48.415(4). C.C. contested the termination.

¶3 Prior to a fact-finding hearing on the issue of grounds, which was set to begin on January 11, 2016, the Department sought discovery from C.C. in the form of interrogatories, requests for admission, and requests for production of documents, which were due within thirty days. C.C. failed to respond to the discovery requests, despite an extension of the response time. The Department moved to compel discovery and a hearing was held on the matter on Wednesday, January 6, 2016. At the hearing, the circuit court granted the Department's motion to compel, and deemed the unanswered discovery to be admitted for fact-finding purposes.

¶4 After the circuit court ruled on the Department's motion to compel, the Department informed the court that in light of the court's discovery ruling, the Department might file a motion for summary judgment on the issue of grounds. The court stated that if the Department wanted to file a motion for summary judgment, the court would give the Department until the close of the next business day, January 7, 2016, to file its summary judgment motion, and that the court would "push the jury commencement back" one day, and use January 11, the day originally slated as the first day of the fact-finding hearing, to hold a hearing on the Department's motion. C.C.'s trial counsel stated that she had no objection to the summary judgment timeline.

¶5 On January 7, 2016, the Department filed a motion for summary judgment along with supporting affidavits. C.C. did not file a response. At the January 11 hearing, CC conceded that the first three elements of the allegation of continuing CHIPS had been established. *See* WIS. STAT. § 48.415(2)(a) (setting forth the element). C.C. argued, however, that a factual dispute exists as to the fourth element—that "there is a substantial likelihood that [C.C.] will not meet [the conditions established for the safe return of L.G. to C.C.'s care] within the 9-month period following the fact-finding hearing." WIS. STAT. § 48.415(2)(a)3.

¶6 The circuit court found that the Department "ha[d] made a prima facie showing on element number 4. That there is not a substantial likelihood that [C.C.] will meet the conditions for return home as it relates to [L.G.] within the next nine months." The court stated, however, that C.C. "has a right to try to demonstrate in the context of the summary judgment motion that she is likely substantially to meet those conditions within the next nine months" and that to grant the Department's motion then would effectively deny C.C. that opportunity. C.C.'s attorney stated that one week would be sufficient time to submit an

affidavit in opposition of the Department's motion for summary judgment and the court ordered that C.C. would have one week to submit her affidavit along with any supporting evidence. C.C. submitted an affidavit on January 18, 2016.

¶7 A second hearing on the Department's motion for summary judgment was held on January 20, 2016, after which the circuit court granted the Department's motion for summary judgment. Thereafter the court held a dispositional hearing and, exercising its discretion, found that termination of C.C.'s parental rights to L.G. was in L.G.'s best interest. C.C. appeals.

DISCUSSION

¶8 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the first, or "grounds" phase of the proceeding, the petitioner must prove that there is a factual basis establishing parental unfitness under one or more of the grounds described in WIS. STAT. § 48.415. ***Id.***, and ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-25, 255 Wis. 2d 170, 648 N.W.2d 402. At the grounds fact-finding stage, the rights of the parent are paramount and the petitioner bears the burden of proving by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist. ***Steven V.***, 271 Wis. 2d 1, ¶24; and ***Julie A.B.***, 255 Wis. 2d 170, ¶24. If the fact-finder finds a WIS. STAT. § 48.415 ground has been established, the circuit court must find the parent unfit and then, during the second stage, determine whether termination of parental rights is in the child's best interest. ***Tammy W–G. v. Jacob T.***, 2011 WI 30, ¶¶18-19, 333 Wis. 2d 273, 797 N.W.2d 854.

¶9 On appeal, C.C. challenges only the first step of the procedure. C.C. contends the circuit court erred in granting the Department's motion for summary judgment because: (1) the timeline implemented by the court for summary judgment violated WIS. STAT. § 802.08(2); (2) a genuine issue of material fact exists as to the fourth element of continuing CHIPS; and (3) summary judgment was not carefully administered in this case. I address each of C.C.'s contentions in turn below.

A. Summary Judgment Timeline

¶10 C.C. contends that the time frame for the Department's submission of its motion for summary judgment and the date of the hearing on the Department's motion did not comply with WIS. STAT. § 802.08(2). Section 802.08(2) provides: "Unless earlier times are specified in the scheduling order, the motion [for summary judgment] shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing."

¶11 The Department filed its motion for summary judgment on January 7, 2016, and the hearing on the motion took place thirteen days later on January 20th. C.C. argues that the circuit court had not entered a scheduling order, and that she was therefore entitled to twenty days notice of the Department's motion before the hearing date. C.C. argues in the alternative that if the court's verbal orders setting the deadlines for filing the motion for summary judgment and C.C.'s responsive affidavit, and setting the date for the hearing constitute a scheduling order, such an order was an erroneous exercise of the court's discretion because it did not afford trial counsel adequate time to sufficiently prepare for the hearing on the Department's motion.

¶12 C.C. did not object to summary judgment timeframe established by the circuit court, but rather agreed to the timeframe. At the January 6, 2016 hearing, where the circuit court set the deadline for the filing of the Department's motion for summary judgment and established the initial date for the hearing on the motion, C.C.'s counsel informed the court that she had "no objection" to the motion deadline and that the date set for the hearing was "fine." At the January 11 hearing, C.C.'s counsel again did not raise an objection to the timeframe, and in fact was asked by the court how much time she needed to file a responsive affidavit. C.C. counsel's stated that one week would be sufficient time, and the court granted C.C. one week to file her responsive affidavit.

¶13 C.C. agreed to the circuit court's summary judgment timeline. A party who acquiesces in a circuit court's course of action cannot later allege error because of that action. *See* ***Wells v. State***, 40 Wis. 2d 724, 734-35, 162 N.W.2d 634 (1968). Furthermore, a party must object to an error before the circuit court to preserve the issue for appellate review. ***Door Cty. DHFS v. Scott S.***, 230 Wis. 2d 460, 466, 602 N.W.2d 167 (Ct. App. 1999). Our supreme court has explained:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21. ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

¶14 C.C. does not dispute on a reply brief that her trial counsel failed to object to the summary judgment timeline. An argument asserted by a respondent

on appeal and not disputed by the appellant's reply is taken as admitted. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App.1994). Accordingly, I conclude that C.C. has forfeited any objection to the circuit court's failure to hold a hearing on the Department's motion at least twenty days after the Department filed its motion.

B. Whether a Genuine Issue of Material Fact Precludes Summary Judgment?

¶15 To prevail on the continuing CHIPS ground, the Department was required to prove four elements: (1) L.G. was adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the TPR rights notice required by law; (2) the Department made a reasonable effort to provide the services ordered by the court; (3) C.C. failed to meet the conditions established for the safe return of Christopher to her home; and (4) there is a substantial likelihood that C.C. would not meet those conditions within the nine-month period following the conclusion of the grounds hearing. See WIS JI—CHILDRENS 324A.

¶16 C.C. does not dispute that the first three elements have been established. She contends, however, that there remains a material factual dispute as to the fourth element and, therefore, summary judgment on the issue of grounds was not appropriate.

¶17 This court reviews de novo whether summary judgment was appropriate. ***Steven V.***, 271 Wis. 2d 1, ¶¶20, 44. Summary judgment is appropriate during the grounds phase of a termination of parental rights case where there is no genuine issue of material fact in dispute and the movant is entitled to partial summary judgment on that issue as a matter of law. ***Id.***, ¶34

(citing WIS. STAT. § 802.08.[2] In reviewing summary judgment, we examine whether the moving party has made a *prima facie* case for summary judgment and, if so, whether the affidavits submitted by the opposing party create material factual disputes or allow reasonable conflicting inferences from the undisputed facts. ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis. 2d 389, 394, 388 N.W.2d 645 (Ct. App. 1986).

¶18 Turning first to the Department's submissions, I conclude that the Department has made a prima facie showing for summary judgment. L.G. was removed from C.C.'s care and custody in October 2011. Heidi Gerth, the Department's case manager for L.G., averred in January 2016 that a revised dispositional order was entered in August 2013, which set seventeen separate conditions of return for C.C. Attached to Gerth's January 2016 affidavit was a September 2015 affidavit by Gerth in support of the Department's petition to terminate C.C.'s parental rights. In the September 2015 affidavit, Gerth averred that C.C. had failed to meet "many of [the] conditions" of return. Specifically, Gerth averred that C.C. had:

> (1) failed to obtain a supplemental AODA assessment with a provider selected by the Department and provide copies of the assessment to the Department;
>
> (2) failed to provide the Department with evidence of pain management program and to sign necessary releases allowing the

[2] C.C. argues that in analyzing whether the Department had established whether there was no genuine issue of material fact that L.G. was a child in continuing need of protection and services, the circuit court misstated the legal question before it and in doing so, improperly shifted the burden of proof to C.C. This court reviews de novo whether summary judgment was appropriate. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶20, 44, 271 Wis. 2d 1, 678 N.W.2d 856. Accordingly, whether the court misstated the proper inquiry and improperly shifted the burden of proof to C.C. is not relevant to our analysis.

Department to communicate with C.C.'s pain management providers;

(3) not had contact with L.G. since August 2014, when C.C.'s visits with L.G. were suspended;

(4) not been able to control her emotions during her visits with C.C. prior to the suspension of those visits;

(5) not completed a parenting course administered or approved by the Department or undergone a parenting skills assessment;

(6) not cooperated with the Department's request that C.C. undergo a psychological evaluation and failed to contact River City Psychological Center by September 22, 2013, as ordered, to schedule an assessment;

(7) not maintained sobriety from non-prescription or illegal drugs;

(8) not complied with requests for urinalysis testing;

(9) failed to keep the Department advised of her current address or temporary living quarters;

(10) not refrained from all illegal activity, having admitted to buying prescription medication off the street;

(11) not maintained regular phone contact with L.G.;

(12) failed to provide a plan for the safe return of L.G. to her home.

¶19 In Gerth's January 2016 affidavit, Gerth averred that C.C. had continued to fail to meet the conditions of return. In particular, Gerth averred that:

(1) C.C. had failed to provide the Department with information on any pain management program C.C. was using and had refused to sign releases for the providers that she had been treating with;

(2) C.C. has continued to refuse to sign releases allowing the Department to communicate with C.C.'s treating physicians to confirm medications C.C. may have been prescribed, and other releases covering areas including C.C.'s employment records, pharmacy records, medical records, mental health records, and pain management records;

> (3) C.C. has failed to appear at or has cancelled 63% of her urinary analysis and/or oral drug swab appointments, and of the twenty-five tests C.C. completed, twenty-three were positive for drugs that the Department was unable to verify were validly prescribed to C.C.;
>
> (4) C.C. has not contacted the facility the Department directed her to contact to schedule a psychological evaluation, nor has she completed the examination as directed;
>
> (5) C.C. was referred to parenting classes—Incredible Years Parenting Class, and Love and Logic. C.C. did not complete the Incredible Years Parenting Class, but did complete the Love and Logic course;
>
> (6) C.C. has failed to follow through with meetings with the Department's housing specialist to address C.C.'s housing and financial instability. C.C. did obtain transitional housing, but has not kept the Department informed as to whether she is employed or how she is supporting herself financially.

Gerth averred that to comply with the conditions of return in the next nine months, C.C. would have to: obtain an AODA assessment and follow through with any recommended treatment; provide releases of information so the individual conducting the assessment can have an accurate picture of C.C.'s prior prescription drug use and ongoing issues, comply with drug screenings; and complete psychological and parenting skills assessments; and comply with any recommendations for following through with treatment.

¶20 The summary judgment submissions establish that between August 2013 and September 2015, when the Department's petition to terminate C.C.'s parental right, C.C. failed to comply with a substantial number of the conditions of return. As of January 2016, C.C. had continued to refuse to comply with the conditions of return. I conclude that the Department made a prima facie showing that, based upon her prior failure or refusal to comply, there is not a substantial probability that C.C. will meet the conditions of return in the next nine months.

¶21 Having concluded that the Department made a prima facie showing for summary judgment, I turn to C.C.'s responsive affidavit to determine whether she has rebutted the Department's prima facie showing by demonstrating that there are disputed material facts or that there are undisputed material facts that are sufficient to allow for reasonable alternative inferences.

¶22 C.C. averred that she has "addressed [her] mental health needs, by [her] own initiative." She avers that she completed an AODA assessment in November 2011, that she has never tested positive for illegal drugs, that she has been in counseling since July 2014, been in "treatment" since June 2014, and went to counseling in 2014. C.C. avers that she completed the parenting skills course, Love and Logic. C.C. avers that she "did sign releases," which "allowed for records to be shared with the Department." She further avers however, that the releases "limited the information to be shared to records only" because she "developed concerns about the communications between the Department and [her] providers." C.C. also avers that she "worked well" with a prior case manager, but "was not able to establish the same relationship with subsequent case management." C.C. avers that "[b]ecause of the progress [she has] made, and continue[s] to make on [her] own, if [her] concerns about communications from the department are addressed, and a new case manager is assigned, [she] can meet the conditions of return …."

¶23 C.C.'s submissions fall far short of refuting the prima facie case for summary judgment. C.C. avers that she has previously completed an AODA assessment in 2011, but not that she completed a more recent one as required as part of the August 2013 conditions of return. C.C. avers that she "sign[ed] releases," however, those releases do not comply with the dispositional order and they expired in either 2013 or 2014. C.C. avers that she had "never tested positive

for illegal drugs," but does not refute the Department's evidence that she has failed to comply with the Department's drug screening requests or that part of the issue involved her use of prescription drugs, rather than per se illegal drugs. C.C. avers that she "can meet the conditions of return," but she conditions this on the Department assigning her a new case manager and addressing her unspecified concerns about communication.

¶24 The conditions of return require C.C. to complete certain tasks in the manners and methods requested by the Department, and to demonstrate certain behaviors as requested by the Department. C.C.'s averments establish that she has taken steps to complete some of the conditions on her own and in her own manner, but C.C.'s submissions do not rebut the Department's evidence that C.C. has been unwilling to abide by the conditions or to comply with the Department's request, and that in order to meet all of the conditions of return in the next nine months, the Department would need to make modifications to suit C.C.'s preferences. C.C.'s affidavit does not rebut the State's prima facie showing that there is not a substantial likelihood that she will be able to complete the conditions of return within the next nine months. Accordingly, I conclude that summary judgment on the issue of grounds was appropriate.

C. Whether the Proceeding was "Carefully Administered"?

¶25 C.C. argues that the court's summary judgment was not appropriate in this case because the summary judgment process was not "carefully administered." *See* ***Steven V.***, 271 Wis. 2d 1, ¶35 (stating summary judgment is appropriate in the unfitness phase of a TPR case if it is "carefully administered with due regard for the importance of the rights at stake and the applicable legal standards"). C.C. argues that the proceeding was not "carefully administered"

because C.C. had less than twenty days to respond to the Department's summary judgment motion, and the circuit court misstated the fourth continuing CHIPS element.

¶26 As I explained above, C.C.'s trial counsel agreed to the summary judgment time frame and cannot now complain that the time frame constitutes reversible error. Furthermore, this court reviews summary judgment de novo and, applying the proper legal standard, I conclude that the summary judgment submissions do not create a genuine issue of material fact. Accordingly, I reject this argument.

CONCLUSION

¶27 For the reasons discussed above, I affirm.

By the Court.—Order affirmed.

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