COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 No. 2016AP2039 **Cir. Ct. No. 2015TP15**

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

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

R.E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] R.E. appeals from the circuit court's grant of partial summary judgment to Racine County Human Services Department ("County"), which grant concluded there were grounds for termination of R.E.'s parental rights to her daughter, S.E., on the basis of abandonment. She also contends the circuit court erred in denying her motion to continue the dispositional hearing so as to afford another opportunity for a witness to testify. For the following reasons, we affirm.

Background

¶2 According to the petition to terminate R.E.'s parental rights, R.E. gave birth to S.E. on June 12, 2011. On November 1, 2011, S.E. was taken into temporary physical custody, and R.E. was subsequently charged with two counts of child neglect. On January 13, 2012, S.E. was found by the Racine County Circuit Court to be a child in need of protection or services, and she was placed into foster care. The placement in foster care was later extended by the court. In 2015, the County filed the current petition to terminate R.E.'s parental rights to S.E. on the basis of failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6), and abandonment, pursuant to § 48.415(1)(a)2. In support of these grounds for termination, the petition alleges:

> (A) There is no parental relationship between [S.E.] and any parent. Neither parent has provided for the daily care, supervision, or support of [S.E] since her placement out of her parents' care on November 1, 2011;
>
> (B) [S.E.] has been placed in an out-of-home placement since November 1, 2011; a period of time in excess

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> of two and one half years and essentially the child's entire life. Fit parents do not leave their child in out-of-home placement, rather, they provide nurturing, care, clothing, food and shelter for their child;
>
> (C) The parents have clearly demonstrated that they have no interest in the child by their failure to visit their child on a regular and consistent basis, their failure to keep the Racine County Human Services Department notified of their whereabouts, their failure to comply with Court-ordered services, and their failure to establish and/or maintain a parental relationship with their child;
>
> (D) The parent(s) have essentially abandoned [S.E.] to the Child Welfare System and have failed to establish and maintain a meaningful parental relationship with her;
>
> ….
>
> (b) [R.E.] has failed to visit or communicate with the child for a period of three months or longer as follows:
>
> 1. [R.E.] has failed to visit and/or communicate with [S.E.] from November 15, 2013, through April 7, 2014, a period of time in excess of four (4) months.

¶3 The County moved for summary judgment on the ground of abandonment. R.E. responded by contending she did have contact with S.E. as required by the abandonment statute. The circuit court granted the County's summary judgment motion, stating that the contacts R.E. cited were insufficient to create a genuine issue of material fact on the issue of abandonment so as to preclude summary judgment. Subsequently, the court held the dispositional hearing and, on March 16, 2016, entered an order terminating R.E.'s parental rights. R.E. appeals. Additional facts will be presented below as necessary.

Discussion

Summary Judgment

¶4 Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶5 There are two steps for proceedings to terminate parental rights. "The first step is the fact-finding hearing 'to determine whether grounds exist for the termination of parental rights.' 'During this step, the parent's rights are paramount.' During this step, the burden is on the government, and the parent enjoys a full complement of procedural rights." ***Sheboygan Cty. D.H.H.S. v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402 (citations omitted). At a fact-finding hearing on a petition to terminate a person's parental rights, the party seeking to terminate those rights must prove the allegations in the petition by clear and convincing evidence. WIS. STAT. § 48.31(1).

¶6 One of the statutory grounds for terminating parental rights is abandonment. WIS. STAT. § 48.415(1). One of the ways in which abandonment is established is by showing "the child has been placed, or continued in a placement, outside the parent's home by a court order … and the parent has failed to visit or communicate with the child for a period of 3 months or longer." Sec. 48.415(1)(a)2. "Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child." Sec. 48.415(1)(b). However, abandonment is not established

under § 48.415(1)(a)2. "if the parent proves all of the following by a preponderance of the evidence":

> 1. That the parent had good cause for having failed to visit with the child throughout the [applicable] time period ….
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the [applicable] time period ….
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> a. The parent communicated about the child with the person or persons who had physical custody of the child during the [applicable] time period … or … with the agency responsible for the care of the child during the [applicable] time period ….

Sec. 48.415(1)(c).

¶7 Kristen Kaskin, a case worker for the County, averred in an affidavit that R.E. failed to visit or communicate with S.E. from November 15, 2013, through April 7, 2014. As the circuit court properly noted, to establish abandonment under WIS. STAT. § 48.415(1)(a)2., the County need only demonstrate a period of three months during which R.E. "failed to visit or communicate with" S.E. The circuit court considered the period from November 26, 2013, through February 26, 2014. We do the same.

¶8 R.E. averred in an affidavit that on January 2, 2014, she gave a county direct service provider and a county case worker a Christmas present for S.E. and asked the provider "to schedule an appointment to set up visitation" with S.E. From this, R.E. argues on appeal that the circuit court erred in granting the County summary judgment because she "represented, through her affidavit, that,

during the alleged 90-day period of abandonment, she communicated *about* S.E. with the employees of the Human Services Department, both *about* her Christmas present for [S].E., and *about* scheduling an appointment to discuss visitation." R.E. claims "[t]his in itself raises an issue of material fact with respect to [the] County's allegations." R.E. is mistaken.

¶9 The plain language of WIS. STAT. § 48.415(1) provides that abandonment has occurred if the child "has been placed, or continued in a placement, outside the parent's home by a court order … and the parent has failed to visit or communicate *with* the child for a period of 3 months or longer." Sec. 48.415(1)(a)2. (emphasis added). Kaskin's affidavit established that this was the situation between R.E. and S.E. R.E.'s contention she communicated with County employees during the relevant time period "about" S.E., "both about [R.E.'s] Christmas present for [S].E., and about scheduling an appointment to discuss visitation" does not save her from the circuit court's finding of abandonment.

¶10 Communicating with others "about" S.E. is not communicating "with" S.E., which is what WIS. STAT. § 48.415(1)(a)2. requires to stave off a finding of abandonment. Under the statutory scheme of § 48.415(1), communicating "about" a child only comes into play "[*i*]*f* the parent proves good cause" for failing to communicate "with" the child during the relevant time period. *See* § 48.415(c)2., 3. (emphasis added); *see also* WIS—JI CHILDREN 313. Because R.E. has not even attempted to argue she had good cause for failing to

communicate *with* S.E. during the relevant time period, the fact that she may have communicated *about* S.E. does nothing to undermine summary judgment.[2]

Denial of Continuance

¶11 After the circuit court found R.E. had abandoned S.E., it held a dispositional hearing to determine if R.E.'s parental rights to S.E. should be terminated. R.E. argues the court erred in denying a motion she made to continue the hearing to a different date so as to afford another opportunity for a witness to testify by phone.

[2] R.E. does not contend on appeal that giving the Christmas present to the County employees itself constituted communication "with" S.E. Even if she had made that argument, we do not believe the giving of the present would undermine summary judgment. The circuit court concluded that the giving of the present was nothing more than "incidental contact," and it did "not consider that in the nature of the communication or type of conduct and contact that would be envisioned under the abandonment statute in terms of either a visitation or a communication." Under the facts of this case, we completely agree.

According to case notes in the summary judgment record, R.E. provided the County employees the present for S.E. during an "unannounced" visit the employees made to R.E.'s home. At the time the employees made the visit, more than a week after Christmas, S.E. was two and one-half years old. Even if the present found its way to S.E., there is no guarantee S.E. would even have been told it came from R.E., much less that being told this would have had any meaning for two and one-half year old S.E.

Furthermore, as the circuit court noted, the giving of the present could not be considered any more than "incidental contact" under WIS. STAT. § 48.415(1)(b), and such contact would not preclude summary judgment. *See* ***id.*** ("Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child…."). We have interpreted § 48.415(1)(b) to mean that "a parent may not rely upon insignificant meetings between parent and child as a defense to an abandonment claim." ***Rock Cty. DSS v. K.K.***, 162 Wis. 2d 431, 444, 469 N.W.2d 881 (Ct. App. 1991). In this case, there was not a "meeting" at all between R.E. and S.E. during this three month time period. Additionally, the jury instructions describe "incidental contact" in this statute as "insignificant contact or contact which occurred merely by chance." R.E.'s giving of the present is consistent with both of these meanings, in that if considered to be "contact" at all, it most certainly was insignificant; and due to the fact it occurred during an "unannounced" visit by the County employees to R.E.'s home, we also consider the giving-of-the-present-"contact" to be merely by chance.

¶12 "The decision whether to grant or deny [a continuance] request is left to the [circuit] court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion." ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. In deciding whether to grant a continuance, the circuit court is to balance the following factors:

> (1) the length of the delay requested; (2) whether the "lead" counsel has associates prepared to try the case in his [or her] absence; (3) whether other continuances had been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; [and] (6) other relevant factors.

Id., ¶28.

¶13 R.E. claims the circuit court erred in denying her continuance request because she was requesting a "short adjournment, which would not have prejudiced or significantly burdened any of the parties or the court," "the reason for the adjournment was legitimate and had not been requested for any dilatory purpose," and the witness' testimony was significant to her case. Significantly, R.E. does not address the circuit court's reasoning for denying her continuance motion or explain how the court erroneously exercised its discretion; she simply argues that the court got it wrong, essentially asking us to decide the motion as if we were the circuit court making the decision at the time and for the first time. This, however, is not our role; we are to determine whether the circuit court erroneously exercised its discretion in denying her motion for a continuance. We conclude the court did not err.

¶14 At the March 7, 2016 dispositional hearing, R.E., through counsel, indicated her intent to have two witnesses from Georgia testify by phone. Because

the hour was nearing 5 p.m., the parties and the circuit court agreed that a continuance would be appropriate to have those two witnesses testify on a different date. The parties and court agreed to continue the hearing on March 16, 2016, at 8:30 a.m.

¶15 At the start of the March 16, 2016 hearing, counsel for R.E. informed the circuit court that one of the witnesses, O.E., R.E's cousin, was not available to testify by phone that morning. Counsel apologized, stating, "I understand the whole morning was blocked off for this hearing." The court told counsel to call the one Georgia witness who was available to testify by phone.

¶16 This witness testified she worked for "Pathways Transition Program," a private agency that provides services to children, adolescents and adults. Part of her job includes going into homes to ensure the environment is safe and "would be able to meet the need[s]" of a child. The witness had done a home evaluation of O.E., for consideration of whether the home would be an appropriate placement for a young child like S.E. The witness had no concerns about O.E.'s ability to care for S.E. or the appropriateness of O.E.'s household for S.E.; she found O.E. to be "an appropriate caregiver."

¶17 After this witness testified, R.E.'s counsel asked for "an adjournment," indicating R.E.'s other Georgia witness, O.E., was not available to testify by phone at that time because "there was some confusion about time zone. They are an hour ahead of us. She thought she would be able to testify before she

did go into work…. But when we discussed it she realized … they are an hour ahead. She did have to go into work."[3]

¶18 The circuit court denied the adjournment/continuance request, stating in relevant part:

> The matter was scheduled today for 8:30. We were last here on March 7, 2016, for the phase two hearing. We actually came to the end of the State's case at 4:35. At that time Ms. Fritz [R.E.'s counsel] you had indicated that you had the two witnesses that you wished to call. That you preferred to call the two witnesses together rather than starting a witness and then having to interrupt that witness's testimony perhaps or finish one witness but not complete your case.

The court explained that the case was old and it had "made much accommodation to get all the testimony here. Much accommodation to allow [R.E.] to get her material together, witnesses together and make her presentation here."[4] The court added: "I don't find that it was a[n] emergency situation or a situation where [O.E.] could not have made herself available to testify today." "I think in terms of the best interests of the child, it is necessary and critical and in the best interests that we proceed to get a decision on the case." The court added that "it would be difficult to arrange for a time period … in a relative short period of time without

[3] R.E.'s counsel also commented to the circuit court that an adjournment would not "hold[] up any sort of finalization that would happen" because adoption studies had not yet been completed with regard to S.E. The circuit court stated, and counsel agreed, that what counsel was saying on this point was "not evidence."

[4] Prior to the dispositional hearing, the circuit court twice adjourned the hearing, at R.E.'s request, so that R.E. could have an expert submit a report and provide testimony at the hearing. Even with these adjournments, R.E. never submitted a report from the expert and thus the expert never ended up testifying at the dispositional hearing.

bumping another case." "We had set aside this morning. I am going to deny the request to adjourn this any further."

¶19 The date of March 16 was chosen with R.E.'s input. By the time of the March 16 hearing, S.E. had been out of R.E.'s home for over four years and the petition to terminate R.E.'s parental rights had been pending for more than a year. The circuit court's comment that O.E.'s unavailability was not due to an "emergency situation" and she could have made herself available to testify seems to us an indication the court was not willing to delay finalization of the termination of parental rights decision in the hope that O.E. would at a future date view testifying at the hearing as a significant enough priority to ensure she would be available to provide her testimony.

¶20 The circuit court determined that finalizing the case was in the best interest of S.E., whose consideration was paramount in the disposition phase. *See* ***Dane Cty. DHS v. Mable K.***, 2013 WI 28, ¶59, 346 Wis. 2d 396, 828 N.W.2d 198 ("the best interests of the child" is the "domina[nt]" and "paramount consideration" in the disposition phase of a termination proceeding). R.E. indicates her counsel was "requesting a short adjournment"; however, it is speculation whether the adjournment would have been short. Indeed, the court indicated "it would be difficult to arrange for a time period … in a relative short period of time without bumping another case." Furthermore, if providing testimony at the hearing was not a significant enough priority for O.E. on March 16, there would be no reason for the court to have confidence O.E. would make it a priority if the hearing was continued to a new date. Furthermore, R.E. conclusorily asserts, without argument or explanation, that neither the court nor

any of the parties would have been "prejudiced or significantly burdened" by an adjournment.[5]

¶21 As the circuit court indicated, and the County repeats on appeal, S.E.'s fate had been hanging in the balance for more than a year with regard to the termination of R.E.'s parental rights, and for more than four years S.E. had not known R.E. as a source of any significant parental support or care. R.E. has failed to meet her burden on appeal of convincing us the circuit court erroneously exercised its discretion in denying her request for a continuance.

By the Court.—Order affirmed.

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

[5] R.E. asserts, and no one disputes, that the requested adjournment was not for a dilatory purpose.