COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP1390 **Cir. Ct. No. 2016TP30**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO J.R.W., A PERSON UNDER THE AGE OF 18:

J.M.W.,

PETITIONER-RESPONDENT,

V.

J.R.P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Robert[2] appeals from an order terminating his parental rights to his daughter, Jessica. He argues that the circuit court erroneously granted Melissa's motion for partial summary judgment on the ground of abandonment under WIS. STAT. § 48.415(1). As we conclude there are no genuine issues of material fact that entitle Robert to a trial, we affirm.

Background

¶2 Jessica was born on July 11, 2011, and is the biological child of Melissa and Robert. It is undisputed that Robert has not seen Jessica since October 2013, despite a court order providing him with visitation.[3] We note that Robert resides in an adjacent county to Melissa and Jessica, and neither distance, transportation, nor employment status served as an impediment to Robert's relationship with Jessica. On September 27, 2016, Melissa filed a petition seeking termination of Robert's parental rights on grounds of "abandonment" and "failure to assume a substantial parental relationship" under WIS. STAT. § 48.415(1) and (6). According to the petition, Robert "has not communicated with [Jessica] in the form of letters, cards or telephone since October 2013" despite being aware of Jessica's location or being able to locate her. Melissa alleged that Robert "has

[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.

[2] In order to protect the anonymity of the participants in this case, the parties referred to the child, J.R.W., as Jessica, J.M.W., the biological mother, as Melissa, and J.R.P., the biological father, as Robert. We shall do the same.

[3] After Robert's paternity was legally established in 2012, the court ordered a visitation schedule providing Robert a one-hour supervised visit with Jessica once a week. Over time, Robert had unsupervised overnight visits with Jessica as a result of an oral agreement with Melissa. Robert asserts these overnight visits went on for two years and abruptly ended in October 2013 when Melissa informed Robert that, due to behavioral issues after Jessica's visits with Robert, the parties would be returning to the court-ordered supervised visitation schedule.

never had a substantial parental relationship with" Jessica, and Robert had not "communicated with [Melissa] to demonstrate interest in or concern for [Jessica]." The impetus for the petition was Melissa's desire to have her husband "legally assume responsibility for the support, education and medical care of [Jessica] and become the father for all legal intents and purposes."

¶3 Melissa moved the court for partial summary judgment on the abandonment ground. In support of her motion, Melissa submitted an affidavit asserting that she has "received no communication from [Robert] since October, 2013," despite maintaining the same phone number, email, and address known to Robert prior to that time. Melissa also claimed that she did not deny Robert visits, only asking "to return to the visitation schedule set by the court due to concerns over behavioral issues with my daughter following extended visits."

¶4 Robert submitted an affidavit in opposition to summary judgment alleging that he and his mother "would get together on my daughter's birthday and at other times to look at photos and remember times with [Jessica]" and would "pool our funds and send cards and presents at times for [Jessica]. Some were returned unopened. Others were not returned." Robert claimed that after October 2013, he "sought advice from three different attorneys [to gain more visitation] but could not afford to hire them" and he "was concerned about attempting contact contrary to [Melissa's] stated wishes as she had frequently threatened to call the police on me or seek a restraining order."

¶5 The summary judgment hearing was held on February 2, 2017. The circuit court heard no arguments or testimony, relying on the motion, affidavits, and supporting documentation to determine that there was no genuine issues of material fact regarding the statutory elements of abandonment. The court also

found that Robert had failed to establish "good cause" for his failure to contact Jessica and granted the motion. The dispositional hearing took place on March 27, 2017. After hearing testimony in favor of and against terminating Robert's parental rights, the court found that termination was in Jessica's best interests. Robert appeals.

Discussion

¶6 "Parental rights termination adjudications are among the most consequential of judicial acts, involving as they do 'the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.'" ***Steven V. v. Kelley H.***, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856 (citation omitted). The United States Supreme Court has historically recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982). Therefore, due process requires that when a party moves to "destroy weakened familial bonds, [the state] must provide the parents with fundamentally fair procedures." ***Id.*** at 753-54. These procedures include a hearing and "proof of parental unfitness by clear and convincing evidence." ***Steven V.***, 271 Wis. 2d 1, ¶23.

¶7 Wisconsin has a two-part procedure for involuntary termination of parental rights (TPR). The focus in the "grounds" phase is on the parent, and the moving party must prove by clear and convincing evidence that the parent is "unfit." WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶3. During the grounds phase of the TPR proceedings, "the parent's rights are paramount," and it is crucial that parents are provided "heightened legal safeguards to prevent erroneous decisions." ***Walworth Cty. DHHS v. Roberta J.W.***, 2013 WI App 102, ¶1, 349

Wis. 2d 691, 836 N.W.2d 860 (citation omitted). The focus in the "dispositional" phase is on the child, and the court must decide if it is in the child's best interests that the rights of his or her parent be terminated. WIS. STAT. § 48.426(2).

¶8 This appeals involves only the grounds phase of the TPR proceeding, specifically the ground of abandonment under WIS. STAT. § 48.415(1)(a)3. Robert argues that the circuit court erred in granting partial summary judgment as there were genuine issues of material fact regarding whether Robert abandoned Jessica under the statute.

¶9 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Regarding summary judgment in TPR proceedings, our supreme court has explained that summary judgment during the grounds phase is permitted, although not always suitable in all cases. ***Bobby G.***, 301 Wis. 2d 531, ¶39; *see also* ***Steven V.***, 271 Wis. 2d 1, ¶5. In many TPR cases, "the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing." ***Bobby G.***, 301 Wis. 2d 531, ¶40. Ordinarily, summary judgment will be inappropriate in "cases premised on … fact-intensive grounds for parental unfitness." ***Id.***

¶10 In this case, whether summary judgment is appropriate rests on the analysis of WIS. STAT. § 48.415(1). Although § 48.415(1)(a) provides five different ways to establish abandonment, only subd. (1)(a)3. is relevant to this appeal. Section 48.415(1)(a)3. provides that parental rights may be terminated if the parent "abandons" his or her child, which is established by proving that "the

child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer." If the party seeking termination proves these elements, the parent subject to termination may still defeat the petition by proving by a preponderance of the evidence that he or she had good cause for failing to visit or communicate with the child. *See* § 48.415(1)(c).[4] Robert challenges the circuit court's findings as to whether he in fact failed to communicate with Jessica for the full six months and whether Robert established good cause for that failure. *See* § 48.415(1)(a)3. & (1)(c).

[4] WISCONSIN STAT. § 48.415(1)(c) provides:

> Abandonment is not established under par. (a)2. or 3. 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 time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 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 time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

¶11 We conclude that partial summary judgment was properly granted in this case. Robert does not contest that he has not visited or communicated directly with Jessica since October 2013—a timespan of three years from the date the petition was filed. Jessica was two years old the last time she had contact with Robert. Robert argues, however, that he "specified that he *attempted to* communicate with Jessica on her birthday and on holidays." Since Jessica's birthday is mid-July and holidays are scattered throughout the year, Robert claims "he did not go a full six months without communicating with her." Robert's argument is a nonstarter. WISCONSIN STAT. § 48.415(1)(a)3. requires more than an *attempt* to communicate with the child. The statute necessitates actual communication, meaning that the child would share in the act.

¶12 Robert claimed in his deposition and affidavit that he and his mother sent text messages, cards, and presents to Melissa and others to give to Jessica, thereby "communicat[ing] about [Jessica] with the person … who had physical custody." *See* WIS. STAT. § 48.415(1)(c)3.a. Robert admits that he never sent text messages to Melissa, but claims that his mother sent text messages intended to be from both of them asking for an updated picture of Jessica as he felt his mom "would have a better angle in regards to … getting pictures of [Jessica] … because of the fact that [Melissa] and my mom had never had any problems."[5] Robert also admits that he never sent any cards or packages to Jessica directly from him, with his return address, as he and his mother would always send them together. Robert claims that some of the packages he and his mother sent were not returned, "suggesting that they may have made it to Jessica."

[5] Robert's mother did not submit her own affidavit at the "grounds" phase.

¶13 Robert's assertions at his deposition and in his affidavit to the court are insufficient to preclude summary judgment. The party opposing summary judgment must set forth specific evidentiary facts showing that a genuine issue exists for trial. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Id.*** It is important, therefore, for this court to recognize the distinction between a conclusory affidavit and one that sets forth specific evidentiary facts about an event.

¶14 The only evidence of any communication that Robert presented was a 2014 Valentine's Day gift with an outfit for Jessica that was sent to Jessica's maternal grandparents and returned to sender. Even if we were to accept the 2014 gift as evidence of communication about Jessica, it was neither sent within the six months immediately preceding the petition nor sent to the person who had physical custody of Jessica. *See* WIS. STAT. § 48.415(1)(a)3. & (1)(c)3.a. Robert's suggestion that some of the other packages that were allegedly not returned to sender "may have made it to Jessica" is clear speculation.[6] Robert presents no other evidence that he, specifically, sent any communications to Melissa or of when or where the alleged text messages, cards, or packages from Robert and his mother were sent. If Robert had this information, it should have

[6] The only legal support Robert provides is a reference to ***State v. Lamont D.***, 2005 WI App 264, ¶15, 288 Wis. 2d 485, 709 N.W.2d 879, and he suggests that "[t]hird-party contacts, if successfully delivered, allow a fact-finder to determine that a parent did not abandon his or her child." ***Lamont D.*** does not aid Robert as this court determined that there was "no dispute that [the parent] attempted to communicate with his daughter by writing her and her mother many letters," suggesting there was direct evidence of the letters. ***Id.***

been provided in submissions in opposition to summary judgment.[7] Instead, Robert's affidavit and deposition testimony contain mere conclusory statements insufficient to foreclose summary judgment.

¶15 Robert also argues that he is entitled to a fact-finding hearing on the issue of whether he had good cause for failing to communicate with Jessica or about Jessica with Melissa. Robert asserted during his deposition and in his affidavit that he was afraid of Melissa and that "[g]iven the context of the relationship between Robert and Melissa, a jury could have concluded that Robert rightfully feared for his safety and thus had good cause for failing to visit or communicate with his daughter." Robert explained that he was "concerned" about contacting Melissa "as she had frequently threatened to call the police on me or seek a restraining order." Robert further noted that Melissa could be "unpredictable" and "violent" and that she had "physically and verbally attacked me while we were together."

¶16 We agree with the circuit court's conclusion that Robert's unsupported assertions did not create a genuine issue of material fact as to the question of good cause. Robert claims he was "concerned" about contacting Melissa against her "stated wishes." Robert admits that Melissa has never called the police on him and never obtained a restraining order against him. Robert asserts no facts supporting an inference that his "concern" prevented him from using a telephone, the mail, or some other means of communication from afar, and

[7] Robert indicated at his deposition on December 16, 2016, that he was in the process of collecting additional evidence about text messages, cards, and packages that were sent for Jessica. Almost two months later, on February 9, 2016, he filed his affidavit in opposition to Melissa's motion for partial summary judgment, which failed to include any additional information or submissions.

there is nothing in the record, such as a court order, that would indicate that calling, texting, or writing would somehow have led to his apprehension by police. Robert also had the benefit of a court order allowing him to visit with Jessica—a benefit he has not utilized since October 2013.

¶17 Robert also provides no evidence of Melissa's "stated wishes." Although we agree that a person's conduct in keeping a child from a parent is relevant in determining whether the parent has good cause for not visiting or communicating with the child, *see* WIS JI—CHILDREN 314, we see no evidence in the record that this was Melissa's intent. Instead, our review of the record indicates that in November 2013 Melissa wrote to Robert: "I hope you can understand that I only want what's best for [Jessica] and I've been trying to make this work for as long as possible. If you still want to see [Jessica] an hour twice a week, you are entitled to your time with her." Despite writing back that "[i]f you really feel in your heart that you know best and I should only see my daughter, the absolute love of my life, an hour a week, then so be it," Robert never accepted Melissa's offer. Thus, we agree with the circuit court that Robert failed to meet his burden as his submissions do not create a material factual dispute as to whether there was good cause for the failure to communicate.

Conclusion

¶18 We heed our supreme court's caution that while partial summary judgment is available at the grounds phase of a TPR proceeding, a grant of summary judgment must be "carefully administered with due regard for the importance of the rights at stake and the applicable legal standards." ***Steven V.***, 271 Wis. 2d 1, ¶35. Accordingly, we strongly caution against the use of summary judgment at a TPR proceeding where the parent is present and objecting. Based

on the facts presented in this case, however, we affirm the partial summary judgment entered under WIS. STAT. § 48.415(1) on the ground that there are no material issues of fact that entitle Robert to a trial. As a result, the order terminating Robert's parental rights of Jessica is affirmed.

By the Court.—Order affirmed.

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