COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2371 **Cir. Ct. No. 2017TP5**

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

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

MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

J. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] J.K. appeals from an order terminating her parental rights to her son, M.B. She argues that the circuit court erroneously granted partial summary judgment during the grounds phase of the termination of parental rights (TPR) proceeding. As there are no genuine issues of material fact that entitled J.K. to a trial, we affirm.

BACKGROUND

¶2 M.B. was born on April 3, 2015. Four days later, M.B. was removed from his home and placed in foster care. On December 10, 2015, a dispositional order on a child in need of protection or services (CHIPS) petition was entered. The order included conditions for return of M.B. to J.K., including that J.K. have a safe, suitable, and stable home; that J.K. cooperate with visitation and demonstrate parenting ability during visitation; that J.K. complete AODA and mental health assessments; that J.K. cooperate with M.B.'s therapists; that J.K. refrain from committing any new crimes and cooperate with her probation officer; and that J.K. demonstrate that she could understand and meet M.B.'s needs.[2]

¶3 The Manitowoc County Human Services Department (the department) indicates that J.K. was offered eighty-two visits with M.B., but she only attended forty-seven. J.K.'s last visit with M.B. was on December 12, 2015. In December 2015, J.K. returned to Minnesota, where she was originally from, and was thereafter arrested in January 2016 for not cooperating with the terms of

[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] M.B.'s father was also a party to the dispositional order and was provided conditions of return. He voluntarily terminated his parental rights to M.B. and is not a party to this case.

her Minnesota probation. J.K. was incarcerated in Minnesota from January 2016 until May 2016, when she was released to a work release program, where she resided until September 2016. J.K. remained in Minnesota living with her mother after that time. J.K. scheduled a visitation with M.B. in November 2016 and in February 2017, but cancelled both appointments. J.K. does not dispute that she has not seen M.B. since December 2015.

¶4 In March 2017, the department filed a TPR petition on three grounds: (1) abandonment, pursuant to WIS. STAT. § 48.415(1); (2) continuing need of protection or services, pursuant to § 48.415(2); and (3) failure to assume parental responsibility, pursuant to § 48.415(6). Section 48.415 requires a finding on only one ground to meet the definition of an unfit parent. *See also* ***State v. Jipson***, 2003 WI App 222, ¶17 n.5, 267 Wis. 2d 467, 671 N.W.2d 18. J.K filed a motion to dismiss the failure to assume parental responsibility allegation, claiming § 48.415(6) is unconstitutional as applied to J.K as she was unable to exercise daily supervision of her child. The department filed a motion for partial summary judgment as to the grounds phase. The court denied J.K.'s motion to dismiss and denied the department's motion for summary judgment on the grounds of abandonment, but granted summary judgment on the grounds of continuing need of protection or services and failure to assume parental responsibility. At the dispositional hearing, the court found that it was in M.B.'s best interests to terminate J.K.'s parental rights. J.K. appeals.

DISCUSSION

¶5 As has often been recited, Wisconsin has a two-part procedure for an involuntary TPR. The focus in the "grounds" phase is on the parent, and the county must prove by clear and convincing evidence that the parent is "unfit."

WIS. STAT. § 48.31(1); ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶3-4, 271 Wis. 2d 1, 678 N.W.2d 856. 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); ***Steven V.***, 271 Wis. 2d 1, ¶27. This appeal involves only the grounds phase of the TPR proceeding. Summary judgment is available during the grounds phase of a TPR action if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.[3] ***Steven V.***, 271 Wis. 2d 1, ¶6; *see also* ***State v. Bobby G.***, 2007 WI 77, ¶39, 301 Wis. 2d 531, 734 N.W.2d 81.

¶6 J.K. argues on appeal that the circuit court erred in granting partial summary judgment as there were genuine issues of material fact remaining as to whether the grounds of continuing need for protection and services and failure to assume parental responsibility were established. This court independently reviews a decision to grant or deny summary judgment. ***Oneida Cty. DSS v. Nicole W.***, 2007 WI 30, ¶8, 299 Wis. 2d 637, 728 N.W.2d 652.

[3] We recognize J.K.'s argument that the department's burden is higher than "clear and convincing" based on our supreme court's discussion in ***Grams v. Boss***, 97 Wis. 2d 332, 294 N.W.2d 473 (1980). There, the court stated: "A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt." ***Id.*** at 338. We distinguish the court's discussion as ***Grams*** was not a TPR case. Further, since ***Grams*** was decided, this court has decided ***Steven V. v. Kelley H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856. In ***Steven V.***, this court clearly pronounced that "[b]y statute and as a matter of procedural due process, parental unfitness must be proved by clear and convincing evidence" and that "[a]n order granting partial summary judgment on the issue of parental unfitness where there are no facts in dispute and the applicable legal standards have been satisfied does not violate the parent's statutory right to a jury trial." ***Id.***, ¶¶4-5. There was no discussion of a "higher" burden of proof at summary judgment in ***Steven V.***, and further it would be antithetical to have a higher standard of proof at the summary judgment phase than at a jury trial. We are bound by the legal standard pronounced in ***Steven V.*** *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

Continuing Need for Protection and Services: WIS. STAT. § 48.415(2)

¶7 To find a parent unfit due to continuing need of protection or services under WIS. STAT. § 48.415(2), a court must first find by clear and convincing evidence that: (1) the child has been adjudged in need of protection or services and placed outside the home by a court order containing the required warnings and notice; (2) the agency responsible for care and custody of the child has made a reasonable effort to provide services ordered by the court; and (3) the child has been outside the home for a cumulative total of six months or more, the parent has failed to meet the conditions of safe return, and there is a substantial likelihood that the parent will not do so within nine months of the hearing date. Sec. 48.415(2)(a)1.-3. On appeal, J.K. challenges only service of the conditions of return (notice) and whether the department "made a reasonable effort to provide services ordered by the court." She does not dispute that she did not meet the conditions of safe return of M.B. to her care.

¶8 J.K. first alleges that "there is no proof in the record that the Court provided written notice of the conditions of return to J.K." J.K. is wrong as the record provides that the court did review the record to verify that the written notice to terminate parental rights was given to J.K. at the CHIPS proceeding, notably on December 10, 2015, when J.K. signed the notice of termination of parental rights. J.K. argues it was error for the court to take judicial notice of the CHIPS file to determine an issue relevant to the TPR summary judgment motion, citing to ***Perkins v. State***, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973), in support of her position. In ***Perkins***, our supreme court held that it could not take judicial notice of a prior conviction for the same conduct that was not within the record before the supreme court. ***Id.*** at 346-47; *see also* ***State ex rel. Mengel v. Steber***, 158 Wis. 309, 149 N.W. 32 (1914). ***Perkins***, however, was concerned with the

authority of an appellate court to take judicial notice of documents not in the appellate record; thus, it does not help J.K. in establishing the scope of the lower court's authority to take notice of proceedings in its own court.

¶9 Our supreme court has explained that "[g]enerally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970). In this appeal, we were not provided with information contained in the CHIPS case file, including the December 10, 2015 disposition order nor the signed notice referenced by the circuit court, despite the indication in the TPR petition that the court order was attached.[4] Where the record is incomplete, we must assume that the omitted material supports the circuit court's decision. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). J.K. cannot legitimately claim surprise and prejudice that the court took judicial notice of the CHIPS paper records in this case as this was clearly an "interrelated proceeding involving substantially the same parties and pending before the same court."[5] ***Mielke***, 49 Wis. 2d at 75. Further, the record before this court does include letters sent by the department to J.K. where she was incarcerated in Minnesota on January 6 and 28, 2016, which state: "Attached you will find the

[4] The appellant, J.K., bears the burden to ensure that the record is complete and that it includes all documents pertinent to the issues raised on appeal. *See* ***Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.***, 209 Wis. 2d 457, 469, 563 N.W.2d 554 (Ct. App. 1997).

[5] We note that there is no evidence in the record whether Judge Fox was the judge presiding over the CHIPS case, although it appears from the transcripts to be implied. As J.K. does not argue that Judge Fox was not, we assume for the purposes of this decision that Judge Fox also presided over the CHIPS case.

Conditions of Return and Services that are currently court ordered."[6] Accordingly, we conclude that it is undisputed that J.K. was provided written notice of the conditions of return.

¶10 J.K. next argues that the department failed to make reasonable efforts to provide services to help her reunify with M.B. We disagree. The record is replete with evidence of the department's efforts. The department provided volunteer drivers and gas cards to J.K. while she was living in the Manitowoc area as well as in Minnesota, including multiple gas cards in 2015 and $150 in gas cards[7] in February 2017 to allow J.K. to travel from Minnesota to Wisconsin. The record contains no fewer than eight letters that were sent to J.K. between January 2016 and December 2016, each one reminding J.K. of the conditions of return; providing contact information for M.B.'s foster parents, daycare, and doctor; and explaining that J.K. was expected to resume visitation with M.B. as soon as she was released from incarceration. The department provided proof that they contacted Todd County in Minnesota regarding possible placement of M.B. with J.K.'s mother, but Todd County indicated significant child protective services history and denial of a foster parent certification to J.K.'s mother.[8] The department worked with J.K.'s probation agent to make sure she was allowed to

[6] We recognize J.K. argues that pursuant to WIS. STAT. §§ 48.415(2)(a)1., 48.356(2), and 48.355, *the court* must provide written notice of the conditions of return to the parent. As we have already addressed, the court properly reviewed the CHIPS file to confirm that the court provided notice to J.K., and we mention the department's communications with J.K. only to demonstrate that her argument is disingenuous as she was well aware of the conditions for return of M.B. to her care.

[7] J.K. claims these were stolen.

[8] J.K. also suggested another relative would have taken M.B., but the department indicates that she never came forward to offer to take M.B. and placement with her would have been inappropriate as Minnesota had denied her foster parent certification previously.

leave Minnesota for visits with M.B. The department also provided information to assist J.K. with completing her mental health and AODA assessments. J.K. failed to show that she addressed her mental health and AODA issues.

¶11 The evidence presented by the department and by J.K. demonstrates that the department took reasonable actions to help unify J.K. with M.B. and to help J.K. satisfy the conditions of return. J.K. does not show any material fact suggesting that the department's actions were not reasonable nor that she met any condition for return, rather she merely offered excuses for why *she* could not satisfy the conditions of return. We conclude that J.K. failed to demonstrate a material issue of fact to preclude summary judgment.

Failure to Assume Parental Responsibility: WIS. STAT. § 48.415(6)

¶12 J.K. next argues that it was error to grant summary judgment based on her failure to assume parental responsibility as the statute is unconstitutional as applied to her. J.K. claims WIS. STAT. § 48.415(6) is unconstitutional as applied because it was an "impossible hurdle" to exercise daily care of M.B. when he was placed outside of her home and she was not permitted daily visitation.

¶13 We review the question of whether a statute is unconstitutional as applied independently.[9] ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845. If a statute infringes on a parent's fundamental liberty interest in parenting his or her child, the statute is subject to strict scrutiny review. ***Id.***, ¶41. Under strict scrutiny review, we determine whether the statute is

[9] For a review of "facial" versus "as-applied" constitutional challenges, see ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶¶46-51, 333 Wis. 2d 273, 797 N.W.2d 854.

narrowly tailored to advance a compelling state interest that justifies interference with the parent's fundamental liberty interest. *See* ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. Our supreme court has already established that the state has a compelling interest in WIS. STAT. § 48.415 to protect children from unfit parents. ***Kelli B.***, 271 Wis. 2d 51, ¶25. Thus, the issue is whether § 48.415(6) is narrowly tailored to meet the state's compelling interest to protect M.B.

¶14 WISCONSIN STAT. § 48.415(6)(a) provides that failure to assume parental responsibility is established by proving that the parent has not had "a substantial parental relationship with the child." A "substantial parental relationship" is defined in the statute as

> 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 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 ….

Sec. 48.415(6)(b). "The language of WIS. STAT. § 48.415(6) … indicates that under § 48.415(6), a fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility. With regard to the relevant time period, the fact-finder should consider the circumstances that have occurred over the entirety of the child's life." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶22, 333 Wis. 2d 273, 797 N.W.2d 854. "This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment." ***Id.***, ¶3.

¶15 J.K. argues that "[t]his is not a case where the parent has had no contact with the child." J.K. asserts that she arranged for a midwife, had safe housing, clothing, diapers, wipes and toys for M.B. before he was born and that she developed a substantial parental relationship with M.B. during the visits that were provided before her incarceration.[10] J.K. claims in her affidavit that she "currently tr[ies] to call" M.B.'s daycare provider "one [sic] a month or more" and that "during each telephone call with the foster parent [and social worker] I discussed [M.B.] and how he was doing or what he was doing."

¶16 The crux of J.K.'s as-applied constitutional challenge is that the CHIPS order, the conditions of return, and J.K.'s incarceration prevented her from providing M.B.'s daily care; therefore, her substantive due process rights were violated because she did not have an opportunity to assume parental responsibility within the meaning of the statute. J.K. cites two cases for support: ***Kelli B.***, 271 Wis. 2d 51, ¶¶16-27, and ***Jodie W.***, 293 Wis. 2d 530, ¶56. ***Kelli B.*** has no bearing on this case. It involved children who were the product of incest perpetrated by the mother's father under WIS. STAT. § 48.415(7), rather than failure to assume parental responsibility under § 48.415(6). ***Kelli B.***, 271 Wis. 2d 51, ¶2. Our supreme court determined that § 48.415(7), as applied to Kelli B. based solely on her status as an incest victim, was not narrowly tailored to advance a compelling state interest. ***Kelli B.***, 271 Wis. 2d 51, ¶43. ***Kelli B.*** did not involve grounds under § 48.415(6), and the reasoning of the court is not analogous to this case.

[10] J.K. does not dispute that she has not seen M.B. since December 2015, and the record indicates she became "inconsistent with visitation" beginning in July 2015.

¶17 In ***Jodie W.***, the court terminated a mother's parental rights to her son after a finding that she was unfit solely because she was incarcerated and "without regard for her actual parenting activities." ***Jodie W.***, 293 Wis. 2d 530, ¶¶49-52. The court determined that the circuit court's finding of parental unfitness was based on an impossible condition of return, and found that the mother in ***Jodie W.*** demonstrated a substantial relationship with her son despite her incarceration by caring for her child for the first two years of his life, making "significant progress toward meeting many of the other conditions of return," taking "advantage of counseling opportunities while incarcerated," and engaging "in concerted efforts to maintain contact with [her son] and clearly demonstrated that she wanted to retain her parental rights over [her son]." ***Id.***, ¶¶53-54, 56. J.K. was not found unfit based solely on her incarceration like in ***Jodie W.***, and J.K. has not demonstrated a similar effort to retain parental rights over her son.

¶18 We conclude that the CHIPS conditions for return ordered by the circuit court were narrowly tailored to meet the interest of protecting M.B. from an unfit parent. M.B. was initially removed from J.K.'s home due to concerns with his health and care. The conditions of return took into account J.K.'s situation, while allowing her to demonstrate that she was willing to take an active role in her son's life. J.K. was not required to show that she was physically involved in M.B.'s daily care in order to establish a substantial parental relationship, nor is the finding that she lacked a substantial parental relationship the result of her failure to care for M.B. twenty-four hours a day. Instead, the court, in accordance with the statute, considered "whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child" in determining acceptance of parental responsibility. WIS. STAT. § 48.415(6)(b).

¶19 Looking at the totality of the circumstances over the entirety of M.B.'s life, the material facts in this case are undisputed. The record indicates that M.B. was initially removed from J.K.'s care after a home visit where M.B. was found at four days old to have "inappropriate formula (either spoiled or mixed improperly), filthy fingernails … and a diaper that obviously had not been changed for a lengthy period of time." At the time of the summary judgment hearing, M.B. had not seen or spoken to his mother in eighteen months. We recognize the difficulty in continuing to cultivate a relationship with M.B. once she was incarcerated in January 2016, but we share the circuit court's opinion that it was not impossible. As the circuit court explained:

> Here I get no sense birthday cards, Christmas cards, gifts sent, ever, ever, ever. So we now have a little guy who's gone for 18 months, and mom hasn't done at least as near as I can tell from this record anything to establish herself as a parent. And it isn't even necessary that she should have traveled to Wisconsin. She could have done this by writing letters to the child, attempting to have phone contact with the child. There are a myriad of ways this could have been done and should have been done but that just plain hasn't happened.

J.K. merely makes self-serving excuses, i.e., not having unlimited phone time in prison, not having unlimited access to stamps to send letters, and not having access to a car to come to Wisconsin once she was released from prison.

¶20 Even after J.K. was released from custody she failed to show proof of any substantial effort on her part to form a parental relationship with M.B., most notably that she did not have a single visit with M.B. since she was released from custody. M.B. is a special needs child who requires therapy. J.K. never attended any of M.B.'s therapy appointments before or after her incarceration, and J.K. never contacted M.B.'s therapists to determine M.B.'s special needs. J.K.'s affidavit discussing her phone calls with the foster parents merely claims that she

tried to call once a month, not that she was actually doing so or the dates on which these alleged calls were placed. J.K.'s conclusory allegations do not create a material issue of fact under WIS. STAT. § 48.415(6).

¶21 It is clear from the record that J.K.'s failure to develop a substantial relationship with M.B. resulted from J.K.'s own actions. The record indicates that while pregnant with M.B., J.K. tested positive for opiates, alcohol, and marijuana, and that J.K. declined her OBGYN's suggestion of AODA treatment. J.K. has numerous mental health diagnoses, which she has failed to seek help for, and an assorted criminal history, including drug charges, disorderly conduct, and writing bad checks. J.K. was on probation for ten years in a drug case when M.B. was born, and J.K. failed to comply with the terms of her probation, which led to her incarceration. The fact that M.B. was taken into protective custody and was under a CHIPS order did not prevent J.K. from taking part in M.B.'s daily care—J.K.'s own behavior and choices did that. Thus, J.K.'s substantive due process rights were not violated and WIS. STAT. § 48.415(6) was not unconstitutional as applied to her.

CONCLUSION

¶22 Based on the facts presented in this case, we affirm the court's grant of partial summary judgment under WIS. STAT. § 48.415(2) and (6). The order terminating J.K.'s parental rights of M.B. is affirmed.

By the Court.—Order affirmed.

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