COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP249 **Cir. Ct. No. 2017TP2**

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

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

ADAMS COUNTY HEALTH & HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

M. J. A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded for further proceedings*.

¶1 LUNDSTEN, P.J.[1] M.J.A. appeals the circuit court's order that terminated M.J.A.'s parental rights to J.S. based on the ground that J.S. was in continuing need of protection or services, commonly called the "continuing CHIPS" ground. M.J.A. argues that the circuit court erred by granting summary judgment on this ground because the parties' summary judgment submissions demonstrate that there exists a genuine issue of material fact. I agree with M.J.A. and, therefore, reverse and remand for further proceedings.

A. The Statutory Elements for Continuing CHIPS

¶2 The continuing CHIPS ground alleged here required the Department to prove each of the following elements:

(1) that J.S. was adjudged to be in need of protection or services and was placed or continued in placement outside M.J.A.'s home for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights warnings required by law;

(2) that the Department has made a reasonable effort to provide services ordered by the court;

(3) that M.J.A. has failed to meet the conditions established for the safe return of J.S. to her home; and

(4) that there is a substantial likelihood that M.J.A. will not meet the conditions for the safe return of J.S. within the nine-month period immediately following the conclusion of the fact-finding hearing.

See WIS. STAT. § 48.415(2)(a); *see also* WIS JI—Children 324A.

[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.

¶3 As we shall see, the focus here is on the fourth element, that is, the element requiring the Department to prove that there is a substantial likelihood that M.J.A. will not meet the return conditions going forward.

B. Summary Judgment Procedure in the Context of TPR Proceedings

¶4 In ***Steven V. v. Kelley H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856, our supreme court held that "partial summary judgment may be granted in the unfitness phase [i.e., the grounds phase] of a TPR case where the moving party establishes that there is no genuine issue as to any material fact regarding the asserted grounds for unfitness under Wis. Stat. § 48.415, and, taking into consideration the heightened burden of proof specified in Wis. Stat. § 48.31(1)." ***Id.***, ¶6.

¶5 The court in ***Steven V.*** also cautioned, however, that summary judgment will "ordinarily be inappropriate" when it comes to grounds such as the continuing CHIPS ground that "involve the adjudication of parental conduct vis-à-vis the child":

> 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, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child. *See* Wis. Stat. § 48.415(1) (abandonment); Wis. Stat. § 48.415(2) (child in continuing need of protection or services); Wis. Stat. § 48.415(3) (continuing parental disability); Wis. Stat. § 48.415(5) (child abuse); Wis. Stat. § 48.415(6) (failure to assume parental responsibility); Wis. Stat. § 48.415(7) (incestuous parenthood). Summary judgment will ordinarily be inappropriate in TPR cases premised on these fact-intensive grounds for parental unfitness.

Id., ¶36; *see also* ***State v. Bobby G.***, 2007 WI 77, ¶40, 301 Wis. 2d 531, 734 N.W.2d 81.

¶6 Although the court in ***Steven V.*** distinguished between such "fact-intensive" grounds and other "so-called 'paper grounds,'" *see* ***Steven V.***, 271 Wis. 2d 1, ¶¶36-37, the court made clear that, regardless of the ground, courts must decide whether summary judgment is proper on a case-by-case basis:

> We do not mean to imply that the general categorization of statutory grounds … represent a definitive statement about the propriety of summary judgment in any particular case. The propriety of summary judgment is determined case-by-case.

Id., ¶37 n.4; *see also* ***Bobby G.***, 301 Wis. 2d 531, ¶40.

¶7 I note that the statutory language governing the continuing CHIPS ground alleged here expressly refers to a "fact-finding hearing." Specifically, as noted above, the fourth element requires proof of "a substantial likelihood that the parent will not meet the[] conditions within the 9-month period following *the fact-finding hearing*." *See* WIS. STAT. § 48.415(2)(a) (emphasis added). However, M.J.A. does not dispute that, under ***Steven V.***, the continuing CHIPS ground is amenable to summary judgment. And, best I can tell, the parties assume that the pertinent date for purposes of measuring the nine-month period here was the date of the non-evidentiary hearing at which the circuit court granted the Department's summary judgment motion. I follow the parties' lead and make the same assumption.

C. Application of Summary Judgment Standards

¶8 I turn now to apply summary judgment standards to the parties' arguments and submissions. This court reviews summary judgment de novo. ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007).

¶9 As noted, the Department is entitled to summary judgment if the Department can show that "there is no genuine issue as to any material fact regarding the asserted ground[] for unfitness … and … taking into consideration the heightened burden of proof specified in Wis. Stat. § 48.31(1)." *See* ***Steven V.***, 271 Wis. 2d 1, ¶6; *see also* ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶21, 308 Wis. 2d 258, 746 N.W.2d 447 ("[T]he 'burden is on the moving party to prove that there are no genuine issues of material fact.'" (quoted source omitted)).

¶10 The court "draw[s] all reasonable inferences from the evidence in favor of the nonmoving party." ***H&R Block***, 307 Wis. 2d 390, ¶11. Further, "[w]hether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law." ***Id.***

¶11 As noted, M.J.A. argues that there is a genuine issue of material fact as to the continuing CHIPS element requiring the Department to show that there is a substantial likelihood that M.J.A. will not meet the return conditions within the pertinent nine-month period. For the reasons that follow, I agree. I need not address other elements; a factual issue as to even one element prevents summary judgment in the Department's favor.

¶12 The fourth element requires a prediction of the likelihood of future events. Often the evidence of whether a parent is substantially likely to meet return conditions going forward is evidence of the parent's past performance. That is, a parent's repeated failure to meet return conditions over time can be strong evidence that the parent will not meet those conditions going forward; conversely, if a parent has made meaningful progress in satisfying a significant number of return conditions, that progress may be persuasive evidence that the parent is likely to meet the conditions going forward. Thus, my analysis of this

element naturally looks to the evidence each party submitted as to M.J.A.'s past performance in meeting return conditions, as well as any other evidence suggestive of M.J.A.'s likely performance in the future. *See* ***La Crosse County Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶18, 252 Wis. 2d 179, 643 N.W.2d 194 ("In determining whether 'there is a substantial likelihood' that a parent will not meet conditions for the return of his or her children, a fact finder must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have been or can be modified in order to assure the safety of the children.").

¶13 M.J.A. was required to meet the following conditions of return:

> 1. Stay in touch with and cooperate with your worker ….
>
> 2. Have a safe, suitable and stable home ….
>
> 3. Have regular and successful visits with your child(ren) ….
>
> 4. Show that you are interested in your child(ren) ….
>
> 5. You must not hurt your child(ren) or let anyone else hurt your child(ren) ….
>
> 6. Complete any recommended alcohol, or other drug abuse (AODA) programs, if requested by the worker or therapist ….
>
> 7. Resolve all criminal charges and cooperate with your probation and parole officer.
>
> 8. Show that you can care for and control your child(ren) properly and that you understand their special needs ….
>
> 9. Parent shall maintain a record of contacts and efforts the parent has made to obtain employment and said record(s) shall be made available to the [Department] worker upon request ….

(Capitalization of text modified.)[2]

¶14 In support of its summary judgment motion, the Department submitted the affidavit of a social worker assigned to M.J.A.'s case. The social worker averred that M.J.A. had failed to meet a number of the return conditions. As to some conditions, the affidavit included considerable supporting detail as to M.J.A.'s past patterns of behavior in failing to meet conditions. Based on these failures, the social worker opined in her averments as follows:

- that "[t]he best predictor of future behavior is past behavior";
- that M.J.A.'s "past behavior not only demonstrates an overt pattern of non-compliance, but also a lack of recognition of the changes necessary … and an effort to subvert the Assigned Social Worker's efforts"; and
- that "[t]here is no reason to believe that [M.J.A.] will suddenly recognize the need for specified services or participation in said services in the next nine months."

¶15 Viewed in isolation, there can be no doubt that the social worker's affidavit provided powerful evidence of a substantial likelihood that M.J.A. would not meet the return conditions in the pertinent nine-month period. However, M.J.A. submitted an affidavit of her own supplying evidence that M.J.A. had met, or made progress in meeting, several conditions. M.J.A. gave examples of what she alleged was her hard work to meet return conditions and why a fact finder could find that she could meet the conditions in the next nine months. M.J.A. averred:

> 2. I currently work at [employer's name] … and have worked there since October 2016. Although, I am

[2] All but one of these conditions included additional sub-conditions. For purposes of my analysis, I need not discuss the sub-conditions.

> currently on maternity leave[,] [w]hen I am not on leave I work 40 hours a week and am paid $12/hr.
>
> 3. In October of 2016 I moved to my current address …. I live with [names omitted]…. I live there with my youngest daughter born July 14th, 2017.
>
> 4. After my youngest daughter … was born, Adams County Department of Human Services [assessed] my home for dangers. My home was deemed to be safe and fit for my youngest daughter.
>
> ….
>
> 6. I continue to have visitation with [J.S.] as often as I can….
>
> 7. I would like more visitations with [J.S.] but the social worker is refusing to set up visitations ….
>
> 8. … [J.S.] spent the night at my home over Christmas of 2016.
>
> 9. I am currently participating in AODA counseling twice monthly ….
>
> 10. I receive random urinalysis drug screens …. I last received a UA on August 21, 2017 [a few days prior to the affidavit's date]. I started to receive UA … in April of 2017.
>
> ….
>
> 16. I have not illegally used drugs since 2015.
>
> 17. I am not currently incarcerated and have no pending criminal matters.

¶16 Thus, the social worker and M.J.A. presented competing versions of M.J.A.'s prior efforts and behavior. And, the Department is the moving party seeking summary judgment. Thus, I must assume that M.J.A.'s affidavit is credible and that a fact finder might reject the social worker's allegations to the extent that those allegations conflict with M.J.A.'s affidavit or reasonable inferences from M.J.A.'s affidavit. *See* ***Pum v. Wisconsin Physicians Serv. Ins.***

Corp., 2007 WI App 10, ¶16, 298 Wis. 2d 497, 727 N.W.2d 346 (2006) ("Credibility of witnesses is not a determination to be made at the summary judgment stage.").

¶17 Drawing all reasonable inferences in favor of M.J.A., and taking into account the Department's heightened burden of proof, *see* ***Steven V.***, 271 Wis. 2d 1, ¶6, I conclude that M.J.A.'s affidavit raises a genuine issue of material fact as to whether there was a substantial likelihood that M.J.A. would not meet the return conditions in the pertinent nine-month period. As noted, M.J.A.'s affidavit provided evidence that M.J.A. had met, or had made progress in meeting, several conditions. This included the condition requiring M.J.A. to have a safe, suitable, and stable home; the condition requiring M.J.A. to have visits with J.S.; the condition that M.J.A. resolve any criminal charges; and the condition relating to employment. Notably, M.J.A.'s affidavit also provided support for the view that M.J.A. met or made progress in meeting several return conditions that could put M.J.A. in a better position to meet other conditions going forward.

¶18 The Department argues that M.J.A. is wrong when she asserts that there are several underlying factual disputes as to M.J.A.'s past performance on particular conditions. I agree that M.J.A. does not dispute several specific factual allegations in the social worker's affidavit. But that argument loses sight of M.J.A.'s broader overarching issue: M.J.A.'s affidavit creates a factual dispute regarding the extent of her past failings and efforts. This means there are competing views of some aspects of the past behavior and efforts and, thus, competing reasonable inferences remain as to the ultimate fact of whether there is a substantial likelihood that M.J.A. would not meet the return conditions going forward.

¶19 M.J.A.'s intent to comply with her AODA condition in the future serves as an example. The Department argues—and the circuit court agreed—that M.J.A. had no intention of ever complying with the AODA condition, and in particular no intention of complying with the part of the condition that required M.J.A. to attend AODA programming recommended by the Department. I agree that, if there were *undisputed evidence* that M.J.A. had no intention of ever complying with this condition, it is hard to see why summary judgment would not be appropriate. The problem for the Department is that the Department does not point to such evidence.

¶20 The pertinent portions of the Department's brief make scant reference to the factual portions of the summary judgment submissions. Best I can tell, the Department relies on parts of the social worker's affidavit in which the social worker averred that in the past M.J.A. had been uncooperative and dishonest in regard to attendance at AODA programming, and that M.J.A. had failed to provide documentation showing that M.J.A. attended AODA programming, let alone *Department-recommended* AODA programming as required by the AODA condition. The social worker averred: "Without documentation and follow-up with the service provider, the assigned social worker is unable to determine if the [AODA] service [M.J.A.] is involved with is compliant with the Dispositional Order's directive for [M.J.A.] to participate in a recommended AODA service …."

¶21 However, M.J.A.'s responsive affidavit supplied evidence, including supporting documentation dated July 31, 2017, and signed by an AODA treatment provider, that M.J.A. began attending AODA treatment in a Madison-based program in May 2017, and that M.J.A. had been attending AODA counseling twice monthly. It is true that M.J.A.'s affidavit does not demonstrate that the

Madison-based program was a Department-recommended program. Nonetheless, I disagree with the Department that the summary judgment evidence discussed above compels the conclusion as a matter of law that M.J.A.'s intention was never to comply with the AODA condition.

¶22 The Department argues that I should consider testimony from the dispositional hearing in deciding whether to affirm summary judgment against M.J.A. But the Department cites no authority that would allow me to consider this post-unfitness-phase testimony in deciding whether the circuit court properly granted partial summary judgment with respect to unfitness. The Department relies on ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, a case involving a default judgment and harmless error. *See* ***id.***, ¶36. It is not apparent why ***Evelyn C.R.*** might apply in the summary judgment context, and the Department's limited argument does not explain. To the contrary, the Department relies on a single paragraph from the ***Evelyn C.R.*** concurrence that is plainly off topic. *See* ***id.***, ¶46 (Crooks, J., concurring) (discussing usage of the terms "reasonable possibility" and "reasonable probability" in the context of harmless error analysis). The Department's reliance on ***Evelyn C.R.*** is not persuasive.

Conclusion

¶23 For the reasons stated, I reverse the order terminating M.J.A.'s parental rights to J.S. and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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