

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 8, 2011**

A. John Voelker  
Acting 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. 2011AP2221**

**Cir. Ct. No. 2010TP45**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO DAVID L. R., JR., A PERSON  
UNDER THE AGE OF 18:**

**WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**DAVID L. R., SR.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County:  
KAREN L. SEIFERT, Judge. *Reversed.*

¶1 REILLY, J.<sup>1</sup> David L.R., Sr. appeals from an order terminating his parental rights (TPR). The circuit court granted summary judgment at the first stage of the TPR proceedings after determining that David Sr. exhibited a pattern of physically abusive behavior that posed a threat to his son, David Jr. David Sr.’s parental rights were subsequently terminated at the second step of the proceedings. We conclude that summary judgment was improperly granted as sufficient facts were not submitted on the motion for summary judgment to prove a “pattern” of abuse.

### BACKGROUND

¶2 On May 18, 2009, David Sr. shook his girlfriend’s ten-week-old child, Logan B., to death. The autopsy report indicated that Logan had been abused numerous times before David Sr. shook him to death. The autopsy report did not, however, identify who had abused Logan prior to May 18, 2009. David Sr. was convicted on June 2, 2010, for recklessly causing great bodily harm to a child and second-degree reckless homicide.

¶3 David Jr., the child subject to this appeal, was born on August 23, 2006, to David Sr. and Heather L.R. David Jr. was removed from his parents’ home five weeks after his birth and placed in foster care.<sup>2</sup> On October 1, 2007, David Jr. was found to be in need of protection or services and the court transferred custody of David Jr. to the Winnebago County Department of Human Services (DHS.) In transferring custody to DHS, the court found that David Sr.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>2</sup> The record does not indicate why David Jr. was placed in foster care.

and Heather had made little to no progress in meeting the conditions for David Jr.'s return in the year since the child was taken away from them.

¶4 On September 30, 2010, DHS filed a petition seeking the termination of David Sr.'s parental rights. TPR proceedings are a two-step process. *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854. After the reasons for termination are pled, a fact finder first determines whether grounds exist to terminate parental rights. *Id.* If the fact finder determines that the facts alleged in the petition have not been proven, the petition is dismissed. *Id.* If however, a court or jury finds that the grounds for termination were met, the court shall find the parent unfit. *Id.* Only if this first step is met do the proceedings move to the second stage. *Id.*, ¶19. The second step—known as the “dispositional hearing”—is where the court determines whether termination of parental rights is in the child's best interest. *Id.*

¶5 DHS gave four grounds for seeking termination: (1) David Sr. abandoned David Jr.; (2) David Jr. is in continuing need of protection or services; (3) David Sr. exhibited a pattern of physically abusive behavior that posed a threat to David Jr.; and (4) David Sr. failed to assume parental responsibility. DHS moved for summary judgment on the third reason: whether David Sr. exhibited a pattern of physically abusive behavior that posed a threat to David Jr. To support the motion, DHS submitted David Sr.'s convictions flowing from his shaking of Logan on May 18, 2009. DHS also submitted Logan's autopsy report, which indicated that Logan was abused numerous times before David Sr. shook him to death, but the report did not identify who had abused Logan.

¶6 Summary judgment may be granted at the first stage of TPR proceedings—the “unfitness” stage—when the moving party establishes that there

are no factual disputes and the applicable legal standards have been met. *Steven V. v. Kelley H.*, 2004 WI 47, ¶5, 271 Wis. 2d 1, 678 N.W.2d 856. Parental rights may be terminated on the grounds of child abuse provided that the petitioner can demonstrate: (1) “that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the [TPR] petition” and (2) that the parent has a felony conviction for causing death or injury to a child. WIS. STAT. § 48.415(5).

¶7 At the summary judgment hearing there was no dispute that David Sr. was convicted of a felony for causing the death of a child. Therefore, the question before the circuit court on summary judgment was whether David Sr. “exhibited a pattern of physically or sexually abusive behavior which is a substantial threat” to David Jr. The court granted summary judgment as to David Sr.’s unfitness, concluding that David Sr. posed a substantial threat to David Jr. based upon David Sr.’s convictions resulting from the May 18, 2009 shaking of Logan, as well as the autopsy report of Logan which indicated prior abuse. At the second stage of the TPR process, the court terminated David Sr.’s parental rights after determining that termination was in the best interests of David Jr.

¶8 David Sr. appeals, arguing that his convictions and the autopsy report do not prove a pattern of physically abusive behavior. We agree.

### STANDARD OF REVIEW

¶9 Our review of a circuit court’s decision to grant summary judgment in a TPR case is a question of law that we review de novo. *See State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Our interpretation and

application of a statute is also a question of law that we review de novo. *State v. Richard*, 2011 WI App 66, ¶10, 333 Wis. 2d 708, 799 N.W.2d 509.

## DISCUSSION

¶10 The issue presented is whether David Sr.’s convictions for shaking Logan to death combined with the autopsy report from that incident satisfy the requirement of establishing “a pattern of physically or sexually abusive behavior which is a substantial threat” to David Jr. We hold that they do not.

¶11 A felony conviction for causing the death or injury to a child is not enough to terminate parental rights pursuant to WIS. STAT. § 48.415(5), as a single instance of abusive behavior does not establish a pattern. *Monroe Cnty. v. Jennifer V.*, 200 Wis. 2d 678, 684, 548 N.W.2d 837 (Ct. App. 1996); *see also* WIS JI—CHILDREN 340. While David Sr. was convicted of recklessly causing great bodily harm to a child and second-degree reckless homicide, both of those convictions stemmed from the single incident of shaking Logan on May 18, 2009. The only other evidence submitted by DHS on summary judgment was Logan’s autopsy report, which indicated that Logan had been physically abused prior to David Sr. shaking him on May 18, 2009. While it was uncontradicted that Logan had been subjected to repeated abuse prior to May 18, 2009, there is nothing in the report to attribute that abuse to David Sr. The autopsy report, standing alone, does not prove that David Sr. exhibited a pattern of abuse. DHS will need to show the pattern of abuse at trial or submit sufficient evidence at summary judgment to establish a pattern.

## CONCLUSION

¶12 We reverse the circuit court's decision as summary judgment was not appropriate.

*By the Court.*—Order reversed.

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

