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**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2020

Sheila T. Reiff
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. 2020AP1257

Cir. Ct. No. 2019TP2

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

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

BARRON COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

M. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Barron County:
J. MICHAEL BITNEY, Judge. *Affirmed.*

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¶1 SEIDL, J.¹ Mark appeals an order involuntarily terminating his parental rights to his daughter, Laura.² At the grounds phase of Mark's termination of parental rights (TPR) proceedings, the Barron County Department of Health and Human Services (the Department) moved for partial summary judgment on the ground of abandonment. In addition to opposing the motion on its merits, Mark moved to dismiss the Department's partial summary judgment motion on the basis that it was untimely under WIS. STAT. § 802.08(1), which provides the summary judgment procedure in civil cases. Following a hearing, the circuit court rejected Mark's motion and granted the Department's motion.

¶2 Mark argues on appeal that the circuit court lacked authority to consider the Department's motion because it was filed well after the eight-month time period prescribed by WIS. STAT. § 802.08(1). In the alternative, Mark argues that genuine issues of material fact precluded the court from granting the Department partial summary judgment. We reject Mark's arguments and affirm.

BACKGROUND

¶3 On July 28, 2017, when Laura was six years old, she was removed from her mother's home by the Department and eventually placed in a foster home. Laura was adjudicated a child in need of protection or services (CHIPS) on November 21, 2017.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² Following M.S.'s lead, and pursuant to the policy underlying WIS. STAT. RULE 809.86, we refer to him using the pseudonym "Mark." We also use a pseudonym when referring to his daughter.

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¶4 On January 24, 2019, the Department filed a TPR petition alleging, as relevant to the issues on appeal, that Mark had abandoned Laura.³ See WIS. STAT. § 48.415(1)(a)2. The matter proceeded to a jury trial at the grounds phase, which began on November 4, 2019. For reasons unrelated to the issues on appeal, the circuit court declared a mistrial.

¶5 During a telephone conference with the parties on November 19, 2019, the circuit court ordered that any pretrial motions or motions in limine were to be filed by December 27, 2019. That deadline for pretrial motions was included in a hearing notice sent to the parties after the telephone conference.

¶6 On December 23, 2019, the Department moved for partial summary judgment on the abandonment ground. Mark opposed the motion, asserting that there were genuine issues of material fact in dispute. Additionally, he later moved to dismiss the Department's motion, arguing it was untimely under WIS. STAT. § 802.08(1). Section 802.08(1) provides that a party may file a summary judgment motion "within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10." Because approximately eleven months had elapsed from the time the Department petitioned for a TPR, Mark asserted § 802.08(1) precluded the circuit court from considering the Department's partial summary judgment motion.

¶7 On April 1, 2020, the circuit court held a hearing on both parties' motions. It first addressed Mark's motion to dismiss. The court agreed with the Department that the court's "earlier directives," as stated on November 19, 2019,

³ The Department also petitioned to terminate the parental rights of Laura's mother. Her parental rights are not at issue in this appeal.

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would have included summary judgment motions and constituted a formal pretrial scheduling order under WIS. STAT. § 802.10. Because the Department made its motion prior to the deadline that the court established on November 19, the court concluded the Department's motion was timely.

¶8 Additionally, the circuit court determined that even if its earlier directives could not be considered a formal pretrial scheduling order, the court had discretion to enlarge the WIS. STAT. § 802.08(1) eight-month time period within which a party can move for summary judgment. The court agreed with Mark that a party can move for summary judgment outside of the eight-month time period if the court finds that the moving party's failure to act was the result of excusable neglect. *See* WIS. STAT. § 801.15(2)(a). The court then concluded there were reasonable grounds for the Department's noncompliance with § 802.08(1)'s eight-month time period:

In this case, ... in review of its entire file and the pleadings that are before the Court, there's nothing that's been done to prejudice [Mark's] rights in terms of contesting the involuntary TPR petition and the grounds ... simply on the basis of the timing of the motion filed by the Department for partial summary judgment.

¶9 The circuit court next addressed the merits of the Department's partial summary judgment motion, concluding the undisputed material facts demonstrated that Mark had abandoned Laura. The court determined that Mark's affidavit opposing the motion contained only "bold, vague, nonspecific, unsupported allegation[s]" regarding his failure to communicate with Laura and that Mark's allegations were insufficient to defeat the Department's motion. Accordingly, the court granted the Department partial summary judgment as to grounds for terminating Mark's parental rights, and it determined him to be an unfit parent.

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¶10 At the dispositional hearing, the circuit court determined that terminating Mark's parental rights was in Laura's best interests. Mark now appeals. Additional facts are discussed below as necessary.

DISCUSSION

¶11 Mark's appellate arguments concern only the circuit court's grant of partial summary judgment at the grounds phase of the TPR proceedings. He argues the court erred in two ways. First, he asserts it erred by denying his motion to dismiss the Department's partial summary judgment motion as untimely. Second, Mark argues the court erred by granting the Department partial summary judgment. He contends his opposing affidavit created genuine issues of material fact as to whether he failed to communicate with Laura or, in the alternative, as to whether he had good cause for abandoning her. We address, and reject, each argument in turn.

I. Mark's Motion to Dismiss

¶12 Mark argues the Department's partial summary judgment motion was untimely under WIS. STAT. § 802.08(1) and, therefore, the circuit court erred by not granting his motion to dismiss the Department's belated motion. The Department responds that the court has discretionary authority outside of § 802.08(1) that permitted the court to entertain the Department's partial summary judgment motion, even assuming it was untimely. Accordingly, this issue involves questions of statutory interpretation and, potentially, of a circuit court's discretionary decision. The interpretation and application of a statute present questions of law that we review de novo while benefiting from the circuit court's analysis. *Brown Cnty. Hum. Servs. v. B.P.*, 2019 WI App 18, ¶10, 386 Wis. 2d 557, 927 N.W.2d 560. We will not upset a circuit court's discretionary decision,

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however, unless such discretion was erroneously exercised. *Hess v. Fernandez*, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper legal standard, and uses a demonstrated rational process to reach a reasonable conclusion. *Id.*

¶13 The rules of civil procedure govern TPR proceedings under WIS. STAT. ch. 48 unless that chapter prescribes a different procedure. *See* WIS. STAT. § 801.01(2); *Steven V. v. Kelley H.*, 2004 WI 47, ¶32, 271 Wis. 2d 1, 678 N.W.2d 856. Both parties agree that the TPR statutes do not prescribe a procedure for the filing of summary judgment motions different than provided in WIS. STAT. § 802.08. *See Steven V.*, 271 Wis. 2d 1, ¶33.⁴

⁴ We question the validity of the parties' apparent agreement that the TPR statutes do not prescribe a procedure different from WIS. STAT. § 802.08 for TPR cases. For that proposition, they rely on *Steven V. v. Kelley H.*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856. One of the main holdings in *Steven V.* is that the summary judgment procedure is permitted at the grounds phase of TPR proceedings. *Id.*, ¶39. In so holding, our supreme court observed: "There is nothing in the TPR statutes that explicitly or implicitly prohibits the use of summary judgment procedure under ... § 802.08 in the unfitness phase of a TPR case. Nor do the TPR statutes prescribe a procedure different from ... § 802.08 for TPR cases" *Steven V.*, 271 Wis. 2d 1, ¶33. Both parties cite to that part of *Steven V.* in stating that there are no relevant statutes in WIS. STAT. ch. 48 that could provide the circuit court with authority to hear a partial summary judgment motion outside of the eight-month time period prescribed by § 802.08(1).

This court's independent research, however, revealed two statutory provisions in WIS. STAT. ch. 48 that might relate to the time period in which a summary judgment motion can be brought, and, thus, could be construed as a procedure different from that set forth in WIS. STAT. § 802.08. WISCONSIN STAT. § 48.297(1) provides: "Any motion which is capable of determination without trial of the general issue may be made before trial." Additionally, § 48.297(2) states:

(continued)

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¶14 WISCONSIN STAT. § 802.08 outlines the summary judgment procedure in civil actions. Subsection (1) provides that “[a] party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim” Section 802.10(3), in turn, grants a circuit court authority to issue scheduling orders on its own motion or on the motion of a party. However, § 802.10 expressly does not apply to actions under WIS. STAT. ch. 48—i.e., the Children’s Code that governs TPR proceedings, among other proceedings. *See* § 802.10(1) (“This section applies to all actions and special proceedings except ... actions under ch[.] 48.”).

¶15 To begin, we agree with Mark that the circuit court lacked direct statutory authority under WIS. STAT. § 802.08 to enlarge the eight-month time

Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition or invalidity in whole or in part of the statute on which the petition is founded shall be raised not later than 10 days after the plea hearing or be deemed waived. *Other motions capable of determination without trial may be brought any time before trial.*

(Emphasis added.) A summary judgment motion is, by definition, capable of resolution without a trial. Further, the notion that these provisions encompass summary judgment motions is bolstered by the fact that they are found within the same subchapter as WIS. STAT. § 48.31(1), which statute also refers to the summary judgment procedure for a TPR.

Given that *Steven V.*'s analysis was not focused on the timeliness of a summary judgment motion, but rather on whether summary judgment was permissible at all in TPR cases, it is not readily apparent that *Steven V.* truly held—as the parties represent—that there are no statutes within the Children’s Code that relate to the time period in which a summary judgment motion can be brought. We therefore question whether the parties read *Steven V.* too broadly. Nevertheless, because the parties agree that WIS. STAT. ch. 48 should not be relied upon here and because neither party cites to WIS. STAT. § 48.297(1) and (2) in their arguments, we do not rely upon § 48.297(1) and (2) in concluding that the circuit court was permitted to allow the Department to file its partial summary judgment motion outside of the eight-month time period prescribed by WIS. STAT. § 802.08(1).

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period pursuant to a scheduling order issued under WIS. STAT. § 802.10 because the latter statute does not apply in WIS. STAT. ch. 48 actions. We therefore conclude that the court lacked direct authority under § 802.08(1) to permit the Department's filing of its December 23, 2019 partial summary judgment motion as it was filed more than eight months after the TPR petition was filed.

¶16 Nonetheless, circuit courts have inherent power, within the limits of their discretion, to control their dockets. *See Hefty v. Strickhouser*, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820. This power of docket control is also granted by statute. *Id.* (citing WIS. STAT. § 802.10).⁵ Consistent with its inherent and statutory powers to manage its docket, a court has broad discretion in deciding how to respond to untimely motions. *See Lentz v. Young*, 195 Wis. 2d 457, 465-66, 536 N.W.2d 451 (Ct. App. 1995), *overruled on other grounds by Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary Dist.*, 2019 WI 43, ¶¶46-48, 386 Wis. 2d 425, 926 N.W.2d 184. Accordingly, “the eight-month deadline is not an inflexible rule that the trial courts must blindly apply.” *Id.* at 465. Importantly, WIS. STAT. ch. 48 does not appear to limit this inherent authority. *See supra*, n.5.

¶17 Moreover, even if a deadline to file a summary judgment motion has already had elapsed, a circuit court has the discretion to enlarge the time under WIS. STAT. § 801.15(2)(a). *See Thorp v. Town of Lebanon*, 225 Wis. 2d 672, 683, 593 N.W.2d 878 (Ct. App. 1999), *aff'd*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. The circuit court may grant relief under § 801.15(2)(a) if it finds reasonable grounds for noncompliance with the statutory time period—i.e.,

⁵ Although WIS. STAT. § 802.10 does not apply to TPR proceedings, there are provisions of the Children's Code that, as noted previously, appear to give the circuit court some statutory power to control its docket. *See* WIS. STAT. §§ 48.297(1), (2); 48.315(2), (3).

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“excusable neglect”—and if the interests of justice would be served by the enlargement of time—e.g., that the party seeking an enlargement of time has acted in good faith and that the opposing party is not prejudiced by the time delay. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 468, 326 N.W.2d 727 (1982). “Excusable neglect” means “neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Id.* (citation omitted). The party seeking relief need not file a motion for the enlargement of time, and the court need not use the term “excusable neglect.” *Thorp*, 225 Wis.2d at 683. “What is critical is that the court explain its analysis, and that its analysis is reasonable.” *Id.* at 683-84.

¶18 Our supreme court in *Hedtcke* further held that “[w]hen the circuit court sets forth no reason or inadequate reasons for its decision, this court may engage in its own examination of the record and determine whether the circuit court exercised its discretion and whether the facts provide support for the circuit court’s decision.” *Hedtcke*, 109 Wis.2d at 471. The *Hedtcke* court went on to hold that this ab initio review includes assessing whether the circuit court’s implicit finding of excusable neglect under WIS. STAT. § 801.15(2)(a) was proper. *Hedtcke*, 109 Wis.2d at 472. In conducting such a review, the appellate court must assume that the circuit court made a finding of excusable neglect as required by the statute and our prior cases. *Id.*

¶19 We find *Hedtcke* instructive because the circuit court here did not explain the basis for its implicit finding of excusable neglect, other than by stating that it believed the court had discretionary authority to enlarge the eight-month time period prescribed by WIS. STAT. § 802.08(1). We therefore assume, as we must, that in granting the Department’s filing of its motion beyond the eight-month deadline, the circuit court made an implicit finding of excusable

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neglect. *See Hedtcke*, 109 Wis. 2d at 471-72. Accordingly, we now review the record to determine whether that implicit finding is supported. *See id.* at 471.

¶20 We determine that the record here does support the circuit court's implicit finding that the Department's noncompliance with WIS. STAT. § 802.08(1) was the result of excusable neglect.⁶ The Department reasonably relied on the court's directive at the November 19, 2019 telephone conference—which was also memorialized in a subsequent hearing notice sent to the parties—that it could bring any pretrial motion by December 27, 2019. That was an act of a reasonably prudent person under the circumstances. *See Hedtcke*, 109 Wis. 2d at 468. The court essentially found as much when it stated that its November 19 directive of when “to file any pretrial motions or motions in limine included motions such as the motion pending before the Court for summary judgment.” Moreover, there is nothing in the record to suggest the Department acted in bad faith by bringing the motion when it did, nor did the court make any finding in that regard.

¶21 Additionally, the circuit court found Mark was not unreasonably prejudiced by the timing of the Department's motion, and the record supports this finding. Mark was able to respond to the motion, and he does not assert the timing of the Department's motion hindered his ability to respond as desired. For the foregoing reasons, we conclude the court's decision in allowing the Department to file its partial summary judgment motion outside of the eight-month time period

⁶ The deadline for the Department to bring its partial summary judgment motion under WIS. STAT. § 802.08(1) was September 24, 2019. We acknowledge that we rely on circumstances occurring after that deadline in concluding the Department's actions were the result of excusable neglect. However, neither WIS. STAT. § 801.15(2)(a) nor case law appears to require that the circumstances relied upon for a showing of excusable neglect to enlarge a deadline need to occur before the expired deadline.

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prescribed by WIS. STAT. § 802.08(1) was a proper exercise of the court's discretion.

¶22 We are not persuaded by Mark's arguments to the contrary. He first argues that the circuit court lacked any authority under WIS. STAT. § 801.15(2)(a) to permit the Department's partial summary judgment motion. In Mark's view, the court had no authority under § 801.15(2)(a) to enlarge the eight-month time period because the Department made neither a showing of "cause" nor excusable neglect, and because the court did not formally enter an "order of enlargement." In the same vein, he contends *Lentz* is materially distinguishable because the party in that case who sought to file a belated summary judgment motion also filed a motion to enlarge the time under § 801.15(2)(a). *See Lentz*, 195 Wis. 2d at 463.

¶23 We reject Mark's arguments. Here, the Department did not formally file a motion to enlarge, and the circuit court did not expressly use the term "excusable neglect" in its decision. However, as noted above, a party seeking relief under WIS. STAT. § 801.15(2)(a) need not file a motion for an enlargement of time, and the circuit court need not use the term "excusable neglect"—what is critical is that the court explain its analysis, and that its analysis is reasonable. *See Thorp*, 225 Wis. 2d at 683-84. And, as explained above, the court made an implicit finding of excusable neglect that we conclude is supported by the record.

¶24 Here, the circuit court correctly observed that it had discretion to permit the Department's partial summary judgment motion, and it found that Mark was not prejudiced by the Department's delay in filing its motion—which determination, as previously explained, we conclude was reasonable. Although the court could have better explained its reasoning on the record, the record supports the court's implicit finding that it effectively ordered the enlargement of

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time for the Department to file its motion, complying with WIS. STAT. § 801.15(2)(a). Consequently, we disagree with Mark that *Lentz* required the Department to file a formal motion to enlarge the time. Pursuant to § 801.15(2)(a), the court properly permitted the Department's partial summary judgment motion outside of the eight-month time period prescribed by WIS. STAT. § 802.08(1).

¶25 Mark also asserts that the circuit court cannot have the inherent authority to accept the Department's motion outside of the eight-month time period prescribed by WIS. STAT. § 802.08(1) because if the court did, then it would have unfettered power, "untethered to any statutes, to entertain untimely motions for summary judgment in TPR cases despite the irrefutable fact that, compared with other civil cases, a parent in a TPR case is entitled to enhanced procedural protections" Mark's concerns, however, are overstated. As we explained above, and as *Lentz* confirms, the court's discretionary authority here is rooted in its inherent authority to control its docket and granted, in part, by at least one statute, WIS. STAT. § 801.15(2)(a).⁷ See *Lentz*, 195 Wis. 2d at 465-66.

¶26 Further, the circuit court's discretionary decision in this regard is not, as Mark argues, without limitations. Again, the court must still find reasonable grounds for noncompliance with the statutory time period, that the party seeking an enlargement of time has acted in good faith, and that the opposing party is not prejudiced by the delay. See *Hedtcke*, 109 Wis. 2d at 468. The court must also explain its analysis, and its analysis must be reasonable,

⁷ As noted previously, WIS. STAT. § 48.297(1) and (2) may also give the circuit court statutory authority in TPR proceedings to entertain the Department's partial summary judgment motion outside of the eight-month time period prescribed by WIS. STAT. § 802.08(1).

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because otherwise the court risks reversal on appellate review. *See Thorp*, 225 Wis. 2d at 683-84. We are therefore unpersuaded by Mark's concern that, under our analysis, a court would have unlimited discretionary authority to entertain partial summary judgment motions in TPR cases outside of the eight-month time period prescribed by WIS. STAT. § 802.08(1).

¶27 Finally, Mark asserts that “[t]he grant of partial summary judgment in a TPR case does not result in the sort of judicial efficiency envisioned in” the cases upon which we rely. In his view, the circumstances here ran afoul of our supreme court's caution in *Steven V.* that summary judgment is appropriate in TPR cases only “if 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.

¶28 The proceedings below did not disregard Mark's rights or run afoul of the applicable legal standards. Mark does not argue that the summary judgment procedure was not followed (other than with regard to the motion's timeliness)—he was given notice, an opportunity to respond, and a hearing at which the Department bore “the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim.” *Id.*; *see also* WIS. STAT. § 802.08(2), (3). And as explained below, we conclude upon our independent review—albeit consistent with the circuit court's decision—that the Department satisfied this burden in its summary judgment filings.

¶29 Under these circumstances, judicial efficiency is plainly promoted by partial summary judgment, especially given the long pendency of the action. Most TPR cases are resolved expeditiously. *See* WIS. STAT. § 48.01(1)(gr)

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(stating one of the legislative purposes of WIS. STAT. ch. 48 is “[t]o allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued in accordance with this chapter and termination of parental rights is in the best interest of the child”). Yet, as the circuit court observed, this case had “been pending for some time,” due in part to the first grounds trial ending in a mistrial. This case had been pending since January 2019, with the second trial having been scheduled approximately one year and four months after the petition was filed.

¶30 The circuit court reasonably concluded that permitting the Department to file its partial summary judgment motion outside of the eight-month time period would properly expedite the litigation and avoid a potential waste of judicial time and resources because granting the Department’s motion, if it had merit, would avoid a multi-day trial and allow for the court to more immediately hold a dispositional hearing. We therefore reject Mark’s arguments that granting the Department partial summary judgment did not promote judicial efficiency and that doing so disregarded the importance of his parental rights.

II. The Merits of the Department’s Motion for Partial Summary Judgment

¶31 Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). We begin by examining the moving party’s submissions to determine whether they sufficiently establish a prima facie case for summary judgment. *B.P.*, 386 Wis. 2d 557, ¶33. If they do, we then turn to the opposing party’s submissions to

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determine whether they show material facts are in dispute, such that the opposing party is entitled to a trial. *Id.*

¶32 The purpose of summary judgment is to avoid trials when there is nothing to try. *Id.*, ¶34. Courts do not resolve issues of fact on summary judgment, but instead only decide whether genuine issues of material fact exist. *Id.* A factual issue is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Id.* Summary judgment also should not be granted if differing reasonable inferences can be drawn from the undisputed facts. *Id.* All favorable facts and all reasonable inferences from those facts must be construed in the nonmoving party’s favor. *Id.* For this reason, the Department shoulders the burden in TPR cases to show it is entitled to judgment as a matter of law when, “taking into consideration the heightened burden of proof specified in WIS. STAT. § 48.31(1) and required by due process,” there are no genuine factual disputes “regarding the asserted grounds for unfitness under WIS. STAT. § 48.415.” See *Steven V.*, 271 Wis. 2d 1, ¶6. We review a grant of summary judgment independently, using the same methodology as the circuit court. *B.P.*, 386 Wis. 2d 557, ¶34.

¶33 The Department alleged that Mark had abandoned Laura. As relevant here, the Department is entitled to partial summary judgment on the ground of abandonment if the undisputed material facts show that Laura “has been placed, or continued in a placement, outside [of her parents’] home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and [Mark] has failed to visit or communicate with [Laura] for a period of 3 months or longer.” See WIS. STAT. § 48.415(1)(a)2.

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¶34 Mark argues there are disputed material facts to whether he failed to communicate with Laura for a period of three months or longer. In support of its partial summary judgment motion, the Department submitted the affidavit of Jessica Wager, a social worker from the Department. As relevant to the issue of Mark's failure to communicate with Laura, Wager averred to the following.

¶35 Wager had been the ongoing social worker assigned to Laura's case since approximately September 2017, and Wager had regular contact with Laura and her foster parents. Wager's job also included trying to provide visits between Laura and her biological parents, and Wager "made repeated attempts at contact with [Mark] to arrange for visits or otherwise arrange services, often to no avail." Mark knew how to reach Wager and the Department for the purpose of contacting or visiting Laura, but he never did so. From approximately December 19, 2017, until May 8, 2018, Mark "did not have contact with [Laura] or visit with her." Additionally, between November 2017 and July 2019,⁸ Mark failed to visit or communicate with Laura, despite:

- a. Knowing she was in out-of-home care;
- b. Knowing the name and address of the foster parents providing the out-of-home care;
- c. Knowing that she was under the jurisdiction of the Court and under the supervision of the Department in the CHIPS case; [and]
- d. Knowing how to contact [Wager] and/or the foster parents by coming to team meetings, coming to the office, and/or calling on the phone.

⁸ Wager averred that Mark "finally decided to resume contact" in July 2019, which was "nearly six (6) months or more after the TPR Petition was filed."

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¶36 When opposing the motion for partial summary judgment, Mark made the following averments regarding his communication with Laura. From November 2017 until July 2019, Mark was “incarcerated at different times for [a] total of about [one] year.” While he was incarcerated, he “sent two letters to [Laura].” He sent one letter directly to her, and he sent the other letter to Laura’s mother to give to Laura. Mark, however, did not know if Laura ever received the two letters.

¶37 Additionally, Mark, “[w]hile incarcerated and out ... frequently talked on the phone to [Laura’s mother] and she kept [him] informed about [Laura].” Mark talked with Laura over her mother’s phone “many times during the November 2017 to July 2019 period” when Laura’s mother was visiting her. Although Mark tried to reach Laura directly by phone on “several” occasions, he was unsuccessful in doing so. Finally, from November 2017 through January 2019, “there was no period as long as three months when [Mark] did not have conversations about [Laura] with her mother, or attempt to reach her by letter or telephone call.”

¶38 We conclude, first, that the Department made a prima facie showing that Mark failed to communicate with Laura for a period of three months or longer and, second, that Mark’s averments regarding his communication with Laura lacked the specificity necessary to demonstrate that genuine issues of material fact are in dispute on the abandonment ground. Mark was required to “set forth specific facts showing that there is a genuine issue for trial.” *See* WIS. STAT. § 802.08(3). He did not do so.

¶39 Mark’s general averment that he talked with Laura over the phone “many times” between November 2017 and July 2019 (a twenty-one-month

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period) is insufficient to create a material question of fact as to whether there was no three-month period in which he failed to communicate with Laura. Although Mark described how he communicated with Laura, no reasonable finder of fact would return a verdict in his favor based on Mark's failure to aver more precise dates of communication and a more precise period of time during which he communicated with her. *See B.P.*, 386 Wis. 2d 557, ¶34.

¶40 We reject Mark's argument that our conclusion "is inconsistent with human behavior and ... with the deference that must be afforded the party opposing summary judgment." Indeed, our conclusion is supported by the fact that Mark specifically averred that between November 2017 and January 2019, "there was no period as long as three months [in which he] did not have conversations about [Laura] with her mother, or attempt to reach her by letter or telephone call." Unlike that averment or, as another example, Wager's averment describing a five-month period in which Mark had no communication with Laura, Mark's general averment that he communicated with Laura an unknown number of times, at unknown intervals between communications, using unknown methods of communication, and during an approximately twenty-six-month time frame cannot meet the specificity required to defeat summary judgment.

¶41 Mark also argues that genuine issues of material fact exist regarding his good cause defense to abandonment. WISCONSIN STAT. § 48.415(1)(c) provides parents an opportunity to show that they had good cause for both failing to visit and failing to communicate with their child during the three-month period when they had no contact.

¶42 We disagree with Mark that genuine issues of material fact exist regarding his good cause defense to abandonment. His affidavit failed to set forth

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specific facts demonstrating why he had good cause for failing to communicate with Laura. *See* WIS. STAT. § 802.08(3). No reasonable finder of fact would conclude Mark had good cause for failing to communicate with Laura based upon his averments regarding his unspecified periods of incarceration and his access to a telephone. *See B.P.*, 386 Wis. 2d 557, ¶34. Neither averment meets the specificity requirement prescribed by § 802.08(3).

¶43 In particular, Mark does not explain how or why his incarceration “at different times ... of about a year” between November 2017 and July 2019, without more, provided good cause for his failure to communicate with Laura. Mark’s averments regarding his telephone access are similarly deficient. No reasonable inference can be drawn in favor of Mark’s good cause defense regarding his lack of communication because he failed to specify when he did not have a telephone or did not have “ready access” to one during the same twenty-six-month period. Consequently, the finder of fact would have to speculate as to the periods of time when Mark did have access to a phone but did not communicate with Laura. Further, the finder of fact would have to speculate to why it was “difficult for [him] to remain in communication with people involved in this proceeding” without additional, specific facts explaining the difficulties he encountered and whether those difficulties occurred when he had access to a phone. We also note that Mark makes no averment about his communicating with Wager, including his inability to do so.

¶44 For the foregoing reasons, we conclude Mark has not demonstrated that disputed issues of material fact exist as to his good cause defense for failing to communicate with Laura. We therefore affirm the circuit court’s grant of partial summary judgment against Mark, as well as its subsequent order terminating his parental rights to Laura.

No. 2020AP1257

By the Court.—Order affirmed.

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

Case 2019TP000002 Document 170 Filed 05-13-2020 Page 1 of 6

FILED
05-13-2020
Barron County, WI
Juvenile Clerk
2019TP000002

BY THE COURT:

DATE SIGNED: May 13, 2020

Electronically signed by The Honorable J. M. Bitney
Circuit Court Judge

STATE OF WISCONSIN, CIRCUIT COURT, BARRON COUNTY

IN THE INTEREST OF

Amended

L. R. B.
Name

Order Concerning Termination of Parental Rights
(Involuntary)

7/23/2011
Date of Birth

Case No. 19TP02

This termination of parental rights hearing was held on (Date) Tuesday, 5/12/2020, which is the effective date of this Order.

THE COURT FINDS:

- 1. Notice was given to all those entitled to notice.
- 2. The provisions of the Indian Child Welfare Act do not apply. An inquiry has been made on the record to each participant in this proceeding as to whether the participant knows or has reason to know that the child is an Indian child. *[For an Indian child, use the Indian Child Welfare Act version (IW-1639) of this Order.]*

3. The parent(s) are

- A. Parent #1's name: A. J. B. Date of birth: 4/15/1992
- B. Parent #2's name: M. C. S. Date of birth: 1/19/1991
- C. Other possible parent(s):
Name: _____ Date of birth: _____
Name: _____ Date of birth: _____
Name: _____ Date of birth: _____

4. There was no declaration of paternal interest.

5. Name(s) _____ failed to appear at the hearing, and is/are in default.

6. This matter was tried to a jury. the court.
The following grounds for termination of the parental rights of M. C. S. were found to exist:

- | Parent #1 | Parent #2 | |
|--------------------------|-------------------------------------|--|
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | abandonment |
| <input type="checkbox"/> | <input type="checkbox"/> | relinquishment |
| <input type="checkbox"/> | <input type="checkbox"/> | continuing need of protection or services |
| <input type="checkbox"/> | <input type="checkbox"/> | continuing parental disability |
| <input type="checkbox"/> | <input type="checkbox"/> | continuing denial of periods of physical placement or visitation |
| <input type="checkbox"/> | <input type="checkbox"/> | child abuse |
| <input type="checkbox"/> | <input type="checkbox"/> | failure to assume parental responsibility |
| <input type="checkbox"/> | <input type="checkbox"/> | incestuous parenthood |
| <input type="checkbox"/> | <input type="checkbox"/> | homicide or solicitation to commit homicide of parent |

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- parenthood as a result of sexual assault
- commission of a felony against a child
- prior involuntary termination of parental rights to another child

7. Parent #1 Parent #2 is unfit.

8. It is in the best interest of the child that the parental rights of the Parent #1 Parent #2 (s) be terminated after considering the following factors:

- The likelihood of the child's adoption after termination.
- The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- The wishes of the child.
- The duration of the separation of the parent from the child.
- Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

b. Reasonable efforts to achieve the permanency goal of the permanency plan, including through an out-of-state placement if appropriate, were *[Complete one of the following only if there is a permanency plan]*

made by the department or agency responsible for providing services.

not made by the department or agency responsible for providing services.

10. Any parent who has appeared was informed of the provisions of §§48.432, 48.433 and 48.434, Wis. Stats.

11. Other: _____

12. The evidence does not warrant the termination of the parental rights of [Name] _____

THE COURT ORDERS:

1.A. The parental rights of [Name of Parent(s)] MICHAEL S. [REDACTED] is/are terminated.

Guardianship, placement and care responsibility, and custody of the child

remain with the parent whose rights have not been terminated.

are transferred pending adoption to State of Wisconsin Department of Children & Families

Other: _____

If guardianship or custody is transferred to an agency, that agency shall be responsible for securing the adoption of the child or establishing the child in a permanent family setting. The child's permanency plan

was filed. is attached. will be filed within 60 days.

The provisions of §§48.432, 48.433 and 48.434, Wis. Stats., are attached.

1.B. The Petition to Terminate Parental Rights of [Name] _____ is dismissed.

2. Other: _____

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

Case 2019TP000002 Document 120 Filed 12-23-2019 Page 3 of 4

§802.08 and the applicable legal standards in §§48.415 and 48.31 are met. See *id.* at ¶5.

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Wis. Stat. §802.08(2). A material fact is one that affects the resolution of the controversy. See, e.g., *Clay v. Horton Mfg. Co., Inc.* 172 Wis.2d 349, 354, 493 N.W.2d 379, 381 (Wis. Ct. App. 1992).

In this case it is the County's position that there is no genuine issue of material fact as to existence of the ground for termination under Wis. Stat. §48.415(1)(a)2, as to Mr. S█████, and that therefore partial summary judgment (as to these grounds) is appropriate. As it relates to Respondent S█████, there is no genuine issue of material fact that the child subject of these proceedings – L█████ R. B█████ – was placed outside of both of her parents' homes pursuant to an order of the Court containing the termination of parental rights notice required by law, nor is there any genuine issue of material fact that she has remained out-of-home since that time. In addition, there is no dispute or genuine issue of material fact that Respondent S█████ failed to visit or communicate with L█████ for a period of three (3) months or longer. Insofar as there is no good cause shown, abandonment is established, and the County is entitled to judgment as a matter of law.

For these reasons, where there is no genuine issue of material fact on the issue of these grounds as to the parents, Mr. S█████ should be found unfit and the matter should be set for Disposition.

ARGUMENT AS TO ABANDONMENT UNDER WIS. STAT. §48.415(1)(A)2, AS TO RESPONDENT S█████

- a. There is no genuine issue or dispute of material fact that L█████ R. B█████ is a child who has been placed, or continued in a placement, outside of either of her parents' homes pursuant to a court order which contains the termination of parental rights notice required by law.

In Barron Co. CHIPS case 17JC76, the child subject of these proceedings, L█████ R. B█████, was found to be in need of protection or services on the basis of neglect (amongst other grounds). See Exhibit A, the Dispositional Order in 17JC76, effective November 21, 2017, pertaining to L█████ R. B█████. That order – dated November 21, 2017, and filed December 14, 2017 – placed L█████ outside of both of her parents' home(s). Since that time, L█████ has been continuously placed outside of either parents' home(s). See Exhibit B, the affidavit of social worker Jessica T. Weger, the ongoing social worker in this case. L█████ has been placed outside of either parents' home(s) since July 28, 2017, and has been continued in an out-of-home placement since that time. See Exhibit C (a true and correct copy of the Department's original temporary physical custody request, filed July 28, 2017) and Exhibit D (a true and correct copy of the Temporary Physical Custody order in this case, entered July 31, 2017).

- b. There is no genuine issue or dispute of material fact that M█████ C. S█████ failed to visit or communicate with L█████ R. B█████ for a period of three (3) months or longer, without good cause.

In addition to the showing that the child has been placed outside of the parents' home(s) pursuant to the

Case 2019TP000002 Document 120 Filed 12-23-2019 Page 4 of 4

appropriate order containing the appropriate notice, there must also be a showing that the parent or parent(s) have failed to visit or communicate with the child for a period of three (3) months or longer. See Wis. Stat. §48.415(1)(a)2.

To the extent that abandonment is not shown if there is good cause pursuant to Wis. Stat. §48.415(1)(c), it is a parent's burden to establish such good cause. See Wis. Stat. §48.415(1)(c). When a motion for summary judgment is made and supported as provided in [Wis. Stat. §802.08], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or otherwise provided in [Wis. Stat. §802.08], must set forth specific facts showing that there is a genuine issue for trial. See Wis. Stat. §802.08(3).

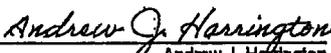
In this case, there is no genuine issue of material fact that Mr. S. has not had contact with L. for three (3) months, or more. Since removal on July 28, 2017, L. has been placed in foster care: (1) the home of T. H., her maternal grandmother, and (2) the home of M. and R. W. See, e.g., the UCCJEA affidavit already on file with the Court, filed on January 24, 2018, contemporaneous with the filing of the Petition to commence these TPR proceedings. See also Exhibit E, the Court's order in 17JC78 filed September 5, 2017, changing placement. As set forth in the affidavit of ongoing social worker Jessica T. Wager, Mr. S. went extensive periods of time without having contact with L. of three (3) months or longer. At the longest stretch, he went a period of 20 months, between November, 2017, and July, 2019 (after the January 24, 2019, date of filing in this case).

It is Mr. S.'s burden to establish good cause. See, e.g. Wis. JI-Children 313. See also Wis. Stat. §48.415(1)(c). Mr. S. is without good cause in this case, and as such, abandonment is established.

CONCLUSION

The standards for summary judgment have been met, and the County's motion for partial summary judgment should be granted. There is no genuine issue or dispute of material fact that L. R. B. was a child placed, or continued in a placement outside of both A. B.'s home and M. C. S. home pursuant to a court order which contained the termination of parental rights notice required by law. In addition, Mr. S. failed to visit or communicate with L. R. B. for a period of three months or longer, without good cause. To the extent that abandonment is not shown if there is good cause pursuant to Wis. Stat. §48.415(1)(c), it is a parent's burden to establish such good cause. See Wis. Stat. §48.415(1)(c). In the absence of a showing of good cause, abandonment is established. As such, where the County is entitled to judgment as a matter of law as to grounds, its motion for partial summary judgment should be granted. Mr. S. should be found unfit, and the matter should be scheduled for disposition.

Respectfully submitted,
Dated this 16 day of December, 2019.


Andrew J. Harrington
Wisconsin Lic. # 1061492
LIDEN, DOBBERFUHL & HARRINGTON, S.C.
425 E. LaSalle Ave., PO Box 137
BARRON WI 54812
(715) 537-5636 (p)
(715) 537-5639 (f)

Case 2019TP000002

Document 122

Filed 12-23-2019

Page 1 of 3

FILED
12-23-2019
Barron County, WI
Juvenile Clerk
2019TP000002

STATE OF WISCONSIN

CIRCUIT COURT

BARRON COUNTY

In the Interest of L. B. (D/O/B 07/12/2011),

Case No. 19TP02

Jessica T. Wager's Affidavit in Support of Motion for Partial Summary Judgment

Jessica T. Wager, being first duly sworn, and under oath states:

- 1) That I am a social worker employed with the Barron County Department of Health and Human Services.
- 2) That in my capacity as a social worker I am familiar with a child by the name of L. B., who was found to be a child in need of protection or services and placed outside of her parents' home(s) by the Circuit Court in Barron County by the Dispositional order in Barron Co. 17JC78 on November 21, 2017. Her father is Mr. C. S., and her mother is one A. B., the Respondents in this case.
- 3) That the order contained the written termination of parental rights warnings that are required by law. See Exhibit A, a copy of the aforementioned Dispositional Order. By virtue of a Change of Placement order that was entered after L. B. was first removed from her parents' home(s), and the subsequent Dispositional Order, L. B. has resided in foster care in the home of M. and R. W. See Exhibits A and E.
- 4) That, as the ongoing social worker, I would have regular contact with L. B. and with the W. - It was also a part of my job to try to provide visits between L. B. and her parents, Ms. B. and Mr. S.
- 5) That since before Disposition, L. B. has been placed outside of either parents' home(s) and in the care of one or more foster parents. First, she was placed with her maternal grandmother, T. H. See Exhibit D, a true and correct copy of the Temporary Physical Custody order dated July 31, 2017. As set forth more fully in Exhibit E, as a result of the Request to Change Placement granted on August 15, 2017, L. B. was placed with M. and R. W., a placement which continues through the date of this affidavit. On information and belief, based upon my work on the file over the period of time that I have been the ongoing social worker, my work with Mr. S., my review of the file, court documents, and other notes kept in the normal course of business as to the Department, during that period of Mr. S. knew how to contact me and/or the foster parents.
- 6) That I have been the ongoing social worker on L. B.'s case since approximately September, 2017, and I continue to be the ongoing social worker in this case as of the date of this affidavit. Throughout the period of time that I worked with L. B. and her parents, Mr. S. did have contact with me, did attend court proceedings (albeit sporadically). As such, on information and belief, in addition to knowing how to reach the foster parents (their names and addresses were on both the Change of Placement Order and the Dispositional Order), Mr. S. knew how to reach me and/or the Department for the purpose of contacting or visiting L. B. Despite this knowledge, he failed to do so.

Case 2019TP000002 · Document 122 Filed 12-23-2019 Page 2 of 3

- 7) I made repeated attempts at contact with Mr. S█████ to arrange for visits or otherwise arrange services, often to no avail.
- 8) That Disposition occurred in this case on November 21, 2017, a hearing at which Mr. S█████ was present. See, e.g. Exhibit F, a certified copy of the minutes from the Dispositional hearing on November 21, 2017, indicating his attendance. I met with Mr. S█████ after that hearing to discuss various issues with him related to the case and he committed to a number of actions, including a commitment to attend his visits with his child.
- 9) That my next contact with Mr. S█████ was on or about December 19, 2017, approximately one (1) month later. Mr. S█████ admitted to me that he had not followed through on his commitments, including his commitment to visit L█████
- 10) After that, Mr. S█████ did not have contact with me or the Department until May 8, 2018, nearly five (5) months later. During that time, he did not have contact with L█████, or visit with her. He also missed a hearing that related to his daughter: A Permanency Plan review hearing on January 24, 2018.
- 11) He did attend a subsequent Permanency Plan review hearing on July 23, 2018, at which he was represented by counsel. At that time, as L█████ had been out-of-home for almost a full year, the goals of permanency changed, calling for a primary goal of adoption, with a concurrent goal of reunification. See Exhibit G, a true and correct copy of the July 23, 2018 Permanency Plan review order.
- 12) The Petition in this case was filed on January 24, 2019. Between the time of Disposition in November, 2017, and July, 2019 (nearly six (6) months or more after the TPR Petition was filed) Mr. S█████ failed to visit or communicate with L█████ despite:
 - a. Knowing she was in out-of-home care;
 - b. Knowing the name and address of the foster parents providing the out-of-home care;
 - c. Knowing that she was under the jurisdiction of the Court and under the supervision of the Department in the CHIPS case;
 - d. Knowing how to contact me and/or the foster parents by coming to team meetings, coming to the office, and/or calling on the phone.
- 13) That the period of time between November, 2017, and January 24, 2019 (the date of the filing of the Petition in this case) was/ is a period of more than three (3) months;
- 14) That the period of time between November, 2017, and July, 2019 (when he finally decided to resume contact) was/ is a period of more than three (3) months;
- 15) That I submit this affidavit in conjunction with the Department's filing of a Petition for the Involuntary Termination of Parental Rights, and the Department's request for Partial Summary Judgment as to the issue of grounds/unfitness under Wis. Stat. §48.415(1)(a)2, ("Abandonment"), as to Mr. S█████.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 20 day of November, 2019.

Signed and sworn to before me on November 20, 2019

[Signature]
 Notary Public

By: [Signature]
 Jessica T. Wagar, Social Worker
 Barron Co. Department of Health and Human Services



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Notary Public, State of Wisconsin
My commission expires: Jan 5, 2020

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FILED
01-17-2020
Barron County, WI
Juvenile Clerk
2019TP000002

STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

In Re the Interest of: L [REDACTED] B [REDACTED]

Case No. 19-TP-002

RESPONDENT FATHER M [REDACTED] S [REDACTED]'S RESPONSE TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Jury Instruction Involuntary Termination of Parental Rights: Abandonment, contains the following questions which a jury must resolve in reaching a decision as to this ground:

Question 3 states, "Did (parent) have good cause for having failed to visit with (child) during that period?"

Question 4 states, "Did parent have good cause for having failed to communicate with (child) during that period?"

Question 5, states, "Did (parent) communicate about (child) with _____ who had physical custody of (child) during that period?"

Question 6 states, "Did (parent) have good cause for having failed to communicate about (child) with _____ who had physical custody of child during that period?"

All of the forgoing factors are addressed in Mr. S [REDACTED] Affidavit in Opposition to Motion for Summary Judgment thereby placing these issues in dispute and creating questions of fact that only the trier of fact can address and resolve.

For the foregoing reasons and the record in this matter, the respondent, M [REDACTED] S [REDACTED] requests that the Petitioner's Motion for Summary Judgment be denied.

Case 2019TP000002 Document 138 Filed 01-17-2020 Page 2 of 2

Dated this 17th day of January, 2020

Electronically Signed
Laurence M. Moon, #1013347, Attorney for
Respondent Father

P.O. Box 170677
Milwaukee, WI 53217
414-962-3151
lmmoon@sbcglobal.net

Case 2019TP000002

Document 135

Filed 01-17-2020

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01-17-2020
Barron County, WI
Juvenile Clerk
2019TP000002

STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

In Re the Interest of L. B.

Case No. 19-TP-002

RESPONDENT FATHER M. S.'S VERIFIED STATEMENT
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

M. S. states the following under oath:

In October or November, 2017, I was told by Jessica Weger that I could not see my daughter because I had missed visits.

During the period November, 2017 until July, 2019 I was incarcerated at different times for total of about a year. I was not able to have visits when I was incarcerated. While incarcerated, I sent two letters to L. B. One was sent directly to L. B. and the other one was sent to her mother, A. B. to give to her. I do not know whether L. B. received the letters.

While incarcerated and out, I frequently talked on the phone to A. B. and she kept me informed about L. B. There were many times during the November 2017 to July 2019 period when I talked to L. B. over A. B.'s telephone, while A. B. was visiting with her. On several occasions, I tried to reach L. B. directly by phone but was unable to.

During this period of time I also lived a considerable distance from L. B. and did not have a driver's license or vehicle for travel to visits. During that time, I lived in Bloomer, WI, Chetek, WI and Turtle Lake, WI. During that same time, L. B. lived in Barron and then was moved to Prairie Farm. No one offered to take me to visits. There were times when I did not have a telephone, or ready access to one which made it difficult for me to remain in communication with people involved in this proceeding.

Jessica did not return my phone calls. On one occasion it took her three months to

Case 2019TP000002

Document 135

Filed 01-17-2020

Page 2 of 3

respond to an inquiry relating to the drug treatment course I was taking.

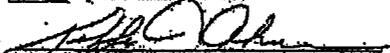
During the period November, 2017 through January, 2019 there was no period as long as three months when I did not have conversations about L. [redacted] with her mother, or attempt to reach her by letter or telephone call.

Affiant sayeth farther not.

Dated this 2 day of January, 2020.


Michael Snipes

Subscribed to and Sworn
to before me this
20 day of January, 2020.


Notary Public, State of Wisconsin
My Commission expires: 10/19/2021



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FILED
03-09-2020
Barron County, WI
Juvenile Clerk
2019TP000002

STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

In Re the Interest of: L. [REDACTED] B. [REDACTED]

Case No. 19-TP-002

**RESPONDENT FATHER M. [REDACTED] S. [REDACTED]'S MOTION TO DISMISS
PETITIONERS'S MOTION FOR SUMMARY JUDGMENT**

The Petition For Termination of Parental Rights was filed in this matter on January 29, 2019. It included abandonment as a ground for termination of Mr. S. [REDACTED] parental rights. On December 23, 2019, the petitioner filed a Notice of Motion and Motion for Summary Judgment based upon its theory of abandonment. The interval between the time of filing the Petition and the Motion for Summary Judgment was over 10 months.

Wisconsin Statutes, 802.08, Summary Judgment, states in part as follows:

“(1) Availability. A party may, within 8 months of the filing of a summons and complaint, or within the time set in scheduling order under s. 802.10, move for summary judgment on any claim, counterclaim, cross claim or 3rd party-claim which is asserted by or against the party.”

The time for filing a motion for summary judgement had lapsed at the time the petitioner's motion was filed. Therefore, thus court has not jurisdiction to consider or grant the motion.

Dated this 9th day of March, 2020

Electronically Signed

Laurence M. Moon, #1013347, Attorney for
Respondent Father M. [REDACTED] S. [REDACTED]

P.O. Box 170677
Milwaukee, WI 53217
414-962-3151
lmmoon@sbcglobal.net

Case 2019TP000002 Document 113 Filed 11-19-2019 Page 1 of 2

STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

FILED
11-19-2019
Barron County, WI
Juvenile Clerk
2019TP000002

In the Interest of [REDACTED] R. B. [REDACTED]

Notice of Hearing
(Juvenile)

Date of birth: 07-23-2011

Case No: 2019TP000002

COURT ORIGINAL

Additional cross referenced cases:

2019TP000003 In the Interest of N. J. C. [REDACTED] Date of birth: 05-30-2018

This case is scheduled for: Jury trial

Date 04-01-2020	Time 08:00 am	Location JMB Check Monitor & Posted Calendar for Courtroom Barron County Justice Center 1420 State Hwy 25 North Barron WI 54812
Circuit Court Judge/Circuit Court Commissioner J. M. Bitney		
Re 1 - TPR-Contin.Need/Protect.-Fall/Meet Cond. 2 - TPR-Fall/Assume Parental Responsibility 3 - TPR-Abandonment/Out of Home Placement		

- If this hearing is for waiver of juvenile jurisdiction, the juvenile must be represented by counsel and any request for a substitution of judge must be filed before the close of the working day before the day the waiver hearing is scheduled.
- You have the right to have an attorney present. A juvenile age 14 or under alleged to be delinquent must be represented by an attorney.
- If a child/juvenile wants to be represented by an attorney, or the juvenile is required to be represented by an attorney, the State Public Defender will appoint one. Based on ability to pay, the parents may be ordered to reimburse the state or county for the cost of an attorney.
- If the Indian Child Welfare Act applies to this case, use form IW-1724.
- PURSUANT TO THE TELEPHONE CONFERENCE HELD WITH COUNSEL ON NOVEMBER 19, THE JURY TRIAL IS MOVED UP FROM APRIL 29, 30 AND MAY 1 TO APRIL 1, 2 AND 3, 2020.

ANY MOTIONS IN LIMINE OR PRETRIAL MOTIONS ARE TO BE FILED BY DECEMBER 27, 2019. ONCE MOTIONS ARE FILED, THEY WILL BE SET IN ADVANCE OF THE JURY TRIAL.

Tammy Vucenic, Clerk of Juvenile Court, 715/537-6399

See attached

If you require reasonable accommodations due to a disability to participate in the court process, please call 715-537-6265 prior to the scheduled court date. Please note that the court does not provide transportation.

Barron County Circuit Court
Date: November 19, 2019

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DISTRIBUTION	Address	Service Type
Court Original		
A. J. B.	21426A Spring Street, Robert E. Ellsworth Center, Union Grove, WI 53182-9408	Mail Notice
Andrew Joseph Harrington		Electronic Notice
Matthew Z Kirkpatrick		Electronic Notice
Laurence M Moon		Electronic Notice
Gail Renee Prock		Electronic Notice
M. C. S.	402 West Fritz Street, Apt. 1, Ladysmith, WI 54848	Mail Notice
Jessica Wager	335 East Monroe Ave, Barron County DHHS, Barron, WI 54812	Mail Notice
R. W.	316 Bluff Avenue, Prairie Farm, WI 54762	Mail Notice
T. J. C.	254 West Monroe Avenue, Barron, WI 54812	No Notice
Cynthia J. Fiene		Mail Notice

Case 2019TP000002 Document 158 Filed 04-01-2020 Page 1 of 2

FILED
04-01-2020
Barron County, WI
Juvenile Clerk
2019TP000002

DATE SIGNED: April 1, 2020

Electronically signed by The Honorable J. M. Bitney
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

BARRON COUNTY

In the Interest of L. R. B. (D/O/B 7/23/2011)

Case No. 19TP02

Order on Department's Motion for Partial Summary Judgment

A hearing on the Department's motion for partial summary judgment was held in this matter on Wednesday, April 1, 2020. As to the hearings, the Department appeared by counsel, Andrew J. Harrington, telephonically. The Respondent, M. C. S. (hereinafter, Respondent S.), did not appear (either in person or by phone), but was represented by his attorney, Laurence M. Moon, LAURENCE M. MOON LAW OFFICE, P.O. Box 170677, Milwaukee, WI 53217, who also appeared telephonically. The child's mother, A. B., did not appear, nor did her attorney, having consented to the termination of her parental rights to the child at a separate hearing on Monday, March 23, 2020. Guardian ad litem Gail R. Prock, PROCK LAW OFFICE, 411 N. Bridge St., Ste. 205, Chippewa Falls, WI 54729, appeared telephonically, on behalf of the child's interests. The Hon. J. Michael Bitney presided.

All parties appeared by phone pursuant to the orders of both the Barron County Circuit Court and the Wisconsin Supreme Court suspending in-person court proceedings.

At the hearing, the court first heard argument on the motion filed by Attorney Moon on March 9, 2020, asking that the Department's motion for summary judgment be dismissed as untimely under Wis. Stat. §802.08(1). After that procedural issue was resolved, the court then gave its decision on the merits of the summary judgment motion.

The Court, having noted the appearances on the record and based upon the aforementioned motion(s) of the parties, their briefs and affidavits in support of their motions, the arguments of the parties and/or counsel at the hearing, and the record of the proceedings herein, the court makes the following

FINDINGS AND ORDER:

1. The motion filed by Respondent S. on March 9, 2020, asking that the Department's motion for partial summary judgment filed December 23, 2019 be dismissed, is DENIED. The filing of the Department's motion was made and filed within the parameters of Wis. Stat. §802.08(1), and the court's scheduling order of November 19, 2019.
2. The Department's motion for partial summary judgment filed on December 23, 2019, is GRANTED, as follows:
 - a. The Department's motion for partial summary judgment was brought on the allegation of abandonment under Wis. Stat. §48.415(1)(a)2. To establish this ground, the petitioner must show:
 - I. (1) That the child was placed, or continued in a placement, outside the parent's home

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pursuant to a court order which contained the termination of parental rights notice required by law; and

- II. (2) That the parent failed to visit or communicate with child for a period of three months or longer.
 - b. The parent may defeat a claim on abandonment if it can be shown that there was good cause for the failure to visit or communicate. See Wis. Stat. §48.415(1)(c)1.-3.
 - c. The first element was not disputed by any party, and as such, there is no genuine issue of material fact on that issue.
 - d. As to the second element, and the question of good cause:
 - I. On the various defenses/ denials asserted by Respondent S. [REDACTED] in his responsive pleadings, whether they were as to either the alleged denial of visits by the Department, and/or his incarceration, the court finds that these defenses/ denials are vague, and without specificity to raise any genuine issue of material fact on the questions of whether or not there were visits or contact, or good cause existed for the failure to visit or communicate;
 - II. As to his apparent communications with the child's mother (or others), these do not raise a genuine issue of material fact as to whether he visited or communicated with the child, or whether good cause existed for the failure to visit or communicate.
 - e. As such, on the whole, Respondent S. [REDACTED] did not assert specific material facts to create or raise a genuine issue of material fact.
 - f. Where there was no otherwise genuine issue of material fact, the Department's motion is GRANTED.
3. Pursuant to Wis. Stat. §48.424(4), where the ground for termination of Abandonment pursuant to Wis. Stat. §48.415(1)(a)2. has been established, M. [REDACTED] C. S. [REDACTED] is found unfit.
4. This matter is set for Disposition on Tuesday, May 12, 2020, at 2:30 P.M., and is set for one (1) hour.
5. As requested by counsel for Respondent S. [REDACTED], the Department shall provide updated discovery by May 1, 2020.

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STATE OF WISCONSIN CIRCUIT COURT BARRON COUNTY

In the Interest of: MOTION FOR SUMMARY JUDGMENT

L [REDACTED] B [REDACTED]. Case No. 19 TP 2

COPY

The above-entitled matter came on to be heard before the Honorable J. M. Bitney, Circuit Court Judge - Branch 2, on April 1, 2020, at the hour of 8:30 a.m. in the Barron County Justice Center, Barron, Wisconsin.

APPEARANCES

ANDREW J. HARRINGTON, PO Box 137, Barron, Wisconsin, 54812, appearing telephonically as counsel on behalf of the County.

LAURENCE M. MOON, 316 East Silver Spring Drive, Milwaukee, Wisconsin, 53217, appearing telephonically as counsel on behalf of M [REDACTED] S [REDACTED].

GAIL PROCK, PO Box 542, Chippewa Falls, Wisconsin, 54729, appearing telephonically as Guardian ad Litem.

1 THE COURT: We have Mr. Harrington. Gail, are
2 you there?

3 MS. PROCK: Yup, I am, Your Honor.

4 THE COURT: All right, and then we had was it
5 Jessica, you're there?

6 MS. WAGER: I'm here, Judge.

7 THE COURT: Anybody else besides those folks?

8 MR. HARRINGTON: Your Honor, we have R [REDACTED]
9 W [REDACTED] on, she's one of the foster parents, and Mary
10 Matthys is also present on the phone from the Department.

11 THE COURT: All right. This is Barron County
12 Juvenile File 19 TP 02, In the Interest of L [REDACTED] R.
13 B [REDACTED]. The County appears with the Department of Health
14 and Human Services by Attorney Andrew Harrington. The
15 child's Guardian ad Litem Gail Prock is appearing
16 telephonically, as well. The child's mother does not
17 appear, as she recently voluntarily terminated her
18 parental rights or consented to the termination of her
19 parental rights with Mr. Kirkpatrick. That occurred on
20 March 23rd.

21 The child's father, M [REDACTED] Sn [REDACTED] does not
22 appear in person or by phone. His attorney, Laurence
23 Moon, is appearing telephonically, having been contacted
24 by the Court this morning to remind him of this motion
25 hearing today on the County or the Department's motion

1 for partial summary judgment.

2 I have received the pleadings that have been
3 filed in support of and in opposition to the Department's
4 motion for summary judgment on one of the grounds alleged
5 for termination, to-wit: Abandonment by the child's
6 father.

7 One of the issues, Mr. Harrington, I'd like you
8 to respond to, because I don't think you responded to it
9 yet. It looks like Mr. Moon had filed on behalf of Mr.
10 S█████ as one of the bases to deny the partial summary
11 judgment request was the claim that the request was not
12 filed timely in accordance with statute, and I believe
13 that was -- hang on just a second. I believe that was
14 filed back on March 9th; is that correct, Mr. Moon?

15 MR. MOON: Yes.

16 THE COURT: Mr. Harrington, I assume you've
17 seen that?

18 MR. HARRINGTON: Yes, Your Honor, I have.

19 THE COURT: Is that procedurally correct, that
20 the State -- that the Department did not file the motion
21 for partial summary judgment within the time frames set
22 forth under 802.08, and if that's true, is that fatal to
23 the motion? Do you wish to respond at this time or
24 respond in writing? What's your pleasure,
25 Mr. Harrington?

1 MR. HARRINGTON: Your Honor, I can respond
2 right now. I did not respond in writing because I
3 believe that filing came after I filed my reply brief.
4 But I will agree that it is a correct citation to the
5 statute under 802.08(1) which reads that a party may,
6 within eight months of the filing of a summons and
7 complaint, or within the time set in a scheduling order
8 under 802.10, move for summary judgment.

9 I would agree it's not within the eight months
10 of the time the case was commenced by the filing, but it
11 was within the time set by the Court in a scheduling
12 order. I refer the Court to the record, and specifically
13 to the telephone conference in this case on November 19th
14 of last year, there was a notice of hearing issued
15 subsequent to that conversation which read, in relevant
16 part: Any motions in limine or pretrial motions are to
17 be filed by December 27th, 2019. Once motions are filed,
18 they will be set in advance of the jury trial.

19 It's the Department's position that that would
20 constitute a scheduling order under 802.10 where the
21 Court made an order addressing the filing of those
22 pretrial motions and motions in limine and distinguished
23 between the two. I believe the Court's order of November
24 19th gave the parties until December 27th of last year to
25 file any other pretrial motions, which would include a

1 summary judgment motion. If the Court were to disagree,
2 I would agree that it would be, as a procedural matter
3 would preclude the Department's motion for summary
4 judgment.

5 THE COURT: Mr. Moon, do you wish to respond?

6 MR. MOON: Yes, Your Honor. That is not a
7 pretrial motion. Pretrial motions relate to matters
8 confined to the trial itself. A summary judgment motion
9 is a dispositive motion, does not relate to the trial,
10 and therefore has to be filed within the time period set
11 by the statute. The only exception is if the moving
12 party in a summary judgment motion can convince the Court
13 that excusable neglect exists for exceeding the term
14 specified by the statute.

15 THE COURT: Give me just a moment.

16 All right, the Court has reviewed Statute
17 802.08(1), also reviewed Mr. Moon's motion to dismiss the
18 Department's motion on the grounds that it was not timely
19 filed. I've listened carefully to the arguments of
20 counsel this morning. The Court denies Mr. S [REDACTED]
21 motion to dismiss the Department's motion for partial
22 summary judgment based upon the timeliness or the time
23 frame within which the motion was filed.

24 The Court notes two things for the record in
25 denying Mr. S [REDACTED] motion to dismiss on a procedural

1 basis. Number one, 802.08(1) reads as follows: A party
2 may, within eight months, move for summary judgment. It
3 doesn't say shall. It says it may. And then it also
4 says "or within any other time frame set forth in a
5 scheduling order under 802.10."

6 The Court agrees with Mr. Harrington that the
7 Court's earlier directives allowing the parties on or
8 about November 19th of '19, time frame within which to
9 file any pretrial motions or motions in limine included
10 motions such as the motion pending before the Court for
11 summary judgment. And to that extent, the Department's
12 motion for summary judgment was filed within the time
13 frame set forth by the Court as the time for filing
14 motions after this matter had been pending for some time.

15 Even if the Court were not to construe that as
16 a formal pretrial order under 802.10, the Court does not
17 view 802.08(1) as being mandatory that anything filed
18 outside of eight months would be an outright bar. I
19 think it's discretionary upon the Court as to whether
20 dispositive pleadings filed outside that time frame would
21 be allowed or would not be allowed.

22 In this case, there is not -- the Court has
23 not -- in review of its entire file and the pleadings
24 that are before the Court, there's nothing that's been
25 done to prejudice Mr. S██████ rights in terms of

1 contesting the involuntary TPR petition and the grounds
2 therefore simply on the basis of the timing of the motion
3 filed by the Department for partial summary judgment.

4 For these reasons, the Court denies the
5 respondent or Mr. S [REDACTED] motion to dismiss the
6 Department's partial motion for summary judgment on the
7 basis of the timing of the petition or the motion being
8 filed.

9 We will now move, therefore, into the substance
10 of the Department's motion itself in which the Department
11 seeks partial summary judgment on the grounds of
12 abandonment, Mr. S [REDACTED] having failed to communicate with
13 the child for a period of three months or more. And
14 again, the Court has read the pleadings that have been
15 filed to date, both in support of and in opposition to
16 the Department's motion.

17 I have read carefully Mr. S [REDACTED] response
18 thereto and his affidavit or verified statement that was
19 filed on or about January 17th in opposition to the
20 Department's motion for summary judgment or partial
21 summary judgment on the grounds of abandonment.

22 The Court notes that the grounds for
23 abandonment have essentially two elements to be proven.
24 One is that the child has been placed outside of the
25 parent's home pursuant to a court order that contained

1 termination of parental rights notices as required by
2 law. That's not contested. That's fact. L. [REDACTED] has
3 been placed outside of her parental home, both her mother
4 and her father, pursuant to a court order for a prolonged
5 period of time, and all of those contained the requisite
6 TPR notices to date. So element number one is not
7 contested.

8 The gravamen of this motion is whether or not
9 Mr. S. [REDACTED] failed to communicate or visit the child for a
10 period of three months or longer. Mr. S. [REDACTED] alleges in
11 his affidavit, if you will, or verified statement as
12 follows: He makes several averments or allegations, most
13 of which, if not all of which are vague and nonspecific.
14 He claims that Ms. Wager, back in October or November of
15 2017, advised him that he could not see the child. He
16 doesn't say how long that was for, whether it was an
17 outright ban for the balance or duration of the
18 dispositional order, he simply makes that bold and
19 unsupported and vague claim that he was told by the
20 social worker he could not see the child. The Court does
21 not view that as the type of specific denial that's
22 required to defeat a motion for summary judgment by
23 statute.

24 Mr. S. [REDACTED] goes on to allege that he was
25 incarcerated for different periods of time cumulatively

1 totaling nearly a year. The time frame here is about .14
2 months from November of 2017 through January of 2019, and
3 the issue is did he communicate with his daughter within
4 that 14-month period?

5 Again, Mr. S [REDACTED] averment or allegation in
6 opposition to that is vague. It doesn't say how long he
7 was incarcerated, whether these incarcerations were of a
8 single or multiple durations, whether he was released in
9 between periods of incarceration, for how long, and as
10 Mr. Harrington noted in his response, it's not lost on
11 the Court that the periods of incarceration certainly
12 didn't prohibit M [REDACTED] from reaching out and
13 communicating with the child's mother or others while he
14 was in jail, but apparently he couldn't bother to reach
15 out to his daughter and communicate with her. .

16 And I agree with Mr. Harrington, communication
17 requires a two-way street. It's not just an attempt to
18 reach out to somebody, it's you're communicating with
19 someone and they are communicating with you, and Mr.
20 S [REDACTED] doesn't allege that when he talks about such
21 things as sending letters to the child or the child's
22 mother. That doesn't constitute communication as that is
23 defined by the statute and the case law interpreting it.
24 Neither does talking to the child's mother on the phone
25 constitute communication that's required within a

1 three-month period to defeat a motion for summary
2 judgment based upon abandonment.

3 There's also an allegation by Mr. S [REDACTED] that
4 there are times when he talked to L [REDACTED] between
5 November of 2017 and July of 2019. He doesn't say how
6 many times those were, how far apart they were, whether
7 any of them were more than three months apart. Again,
8 it's a bold, vague, nonspecific, unsupported allegation
9 that's not sufficient, in this Court's opinion, to defeat
10 a motion for partial summary judgment on the grounds of
11 failing to communicate or otherwise abandon the child for
12 the requisite three-month time frame..

13 And the fact that he may have lived a distance
14 from the child or had difficulties with having access to
15 an automobile or driver's license, things of that nature,
16 again, those are not the type of allegations that
17 constitute communication with a child within a three-
18 month period that would otherwise defeat the moving
19 party's motion on that basis.

20 And finally, Mr. S [REDACTED] alleges that between
21 November of 2017 and January of 2019, 14 months, there
22 was no period for three months in which he did not have
23 conversations with the child -- did not have
24 conversations about the child with her mother. Again,
25 for the reasons that I've already stated on the record,

1 that's not communication as that is defined by statute or
2 the instructions that interpret this statute or these
3 statutory grounds for abandonment.

4 As such, the Court believes that Mr. M [REDACTED]
5 S [REDACTED] has failed to allege any specific material facts
6 that would otherwise put a material issue before this
7 Court that warrants the time and expense of taking this
8 to a fact-finding jury trial. For these reasons, the
9 Court grants the Department's motion for summary judgment
10 on the grounds of abandonment.

11 Mr. Harrington, you will draft up the order
12 accordingly?

13 MR. HARRINGTON: Yes.

14 THE COURT: Anything else for the record,
15 Mr. Harrington?

16 MR. HARRINGTON: Your Honor, with the Court
17 having granted the Department's motion for partial
18 summary judgment, I believe the Court needs to make the
19 finding that Mr. S [REDACTED] is unfit, and we need to schedule
20 the dispositional hearing.

21 THE COURT: The Court makes that finding, and
22 we will schedule this matter for dispositional hearing.
23 Anything else for the record, Mr. Moon?

24 MR. MOON: No.

25 THE COURT: Anything else for the record,

1 Ms. Prock?

2 MS. PROCK: No, Your Honor.

3 THE COURT: All right. With the COVID-19
4 limitations right now, we're not going to be able to do
5 anything by way of face-to-face for at least a month and
6 perhaps longer. Do we want to do the dispositional
7 hearing farther out when face-to-face is allowed, do you
8 want to try to get creative and do this by Zoom or video
9 means, or do you want to simply schedule this for a
10 status and see where we're at in about 30 days with this
11 whole virus flattening out and whether restrictions will
12 be lifted? Mr. Harrington?

13 MR. HARRINGTON: Well, Your Honor, the
14 statutory time limit within which we would have to hold
15 the hearing would be 45 days from today, and if I'm --
16 unless I'm mistaken, Your Honor, the orders of the
17 Supreme Court and the orders of the Supreme Court
18 suspending in-person court appearances only go to the end
19 of April, so if we were to schedule into mid-May, I think
20 that would be in compliance with both statutory time
21 limits and the orders of both the circuit court and the
22 Supreme Court. The Supreme Court prohibition on jury
23 trials until after May 22nd or Memorial Day weekend would
24 still remain in place, but that wouldn't be a factor
25 here. So I think if we were to schedule into mid-May we

1 could still do that and comply with time limits, barring
2 any further order of either the circuit court or the
3 Supreme Court.

4 THE COURT: I have -- the week of May 11th, I
5 have May 12th, 14th and 15th open. 15th would be
6 preferred.

7 MR. HARRINGTON: I'm open on the 15th, Judge.
8 I have a number of hearings, including a motion hearing
9 in another TPR before Judge Babler that afternoon, so if
10 we did it in the morning, that would be preferable on the
11 15th.

12 THE COURT: Mr. Moon?

13 MR. MOON: The 15th will work for me.

14 THE COURT: Ms. Prock?

15 MS. PROCK: Are we talking about like 8:30? I
16 have a stipulated hearing in Eau Claire at 9:30, so --

17 MR. MOON: Wait a minute, the 15th does not
18 work for me. I'm sorry.

19 THE COURT: What about May 12th?

20 MS. PROCK: Yes.

21 MR. MOON: 12th is okay.

22 MR. HARRINGTON: Yes.

23 THE COURT: Mr. Harrington?

24 MR. HARRINGTON: Yes, the 12th will work.

25 THE COURT: Mr. Moon, 2:30?

1 MR. MOON: 2:30 is fine.

2 THE COURT: May 12th at 2:30 for the
3 dispositional hearing. I'll allow one hour for that
4 hearing. That should be sufficient time. Anything else
5 for the record?

6 MR. MOON: I would like the Court to order that
7 discovery be updated. I have not received any discovery
8 in this matter for many months.

9 THE COURT: Mr. Harrington?

10 MR. HARRINGTON: Ms. Wager is on the phone.
11 She can provide whatever additional documents and case
12 notes have been generated since the case has commenced
13 since discovery was last provided.

14 THE COURT: I'll have that ordered within 30
15 days, Mr. Harrington, by May 1st.

16 MR. HARRINGTON: Yes, Your Honor.

17 THE COURT: Anything else, Mr. Moon?

18 MR. MOON: No, Your Honor.

19 THE COURT: Ms. Prock?

20 MS. PROCK: No, Your Honor.

21 THE COURT: That's the order of the Court.

22 We'll be in recess. Thank you, everyone.

23 (Proceedings were concluded at 8:55 a.m.)

24

25

In re A.K., 391 Wis.2d 496 (2020)

842 N.W.2d 498, 2020 WI App.18

391 Wis.2d 496

Unpublished Disposition

See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME, THE DISPOSITION WILL APPEAR IN A REPORTER. Court of Appeals of Wisconsin.

IN RE the termination of parental rights to A.K., a person under the age of 18:
Racine County Human Services Department, Petitioner-Respondent,
v.

S.J.A., Respondent-Appellant.
IN re the termination of parental rights to L.K., a person under the age of 18:
Racine County Human Services Department, Petitioner-Respondent,
v.

S.J.A., Respondent-Appellant
Appeal Nos. 2019AP2160, 2019AP2161
DATED AND FILED February 5, 2020

APPEALS from orders of the circuit court for Racine County, Cir. Ct. Nos. 2019TP5, 2019TP6; DAVID W. PAULSON, Judge. *Reversed and cause remanded for further proceedings.*

Opinion

DAVIS, J.¹

**1 ¶1 These consolidated termination of parental rights (TPR) cases concern mother S.J.A. and her minor children, A.K. and L.K. S.J.A. appeals from the circuit court's order on partial summary judgment declaring her an unfit parent on the ground of abandonment, pursuant to WIS. STAT. § 48.415(1)(a), and from the subsequent orders involuntarily terminating her parental rights. Because there are genuine issues of material fact as to whether S.J.A. had "good cause" under § 48.415(1)(c) for failing to visit or communicate

with A.K. and L.K., we reverse and remand for a fact-finding hearing.

Background

¶2 A.K. and L.K. were born to S.J.A. and father J.K. in November 2011 and November 2012, respectively. S.J.A. takes issue with the validity of grounds for the removal of the children from her home, and she disputes the facts concerning her efforts at communication. It is undisputed, however, that A.K. and L.K. have lived with R.A., their great aunt (and S.J.A.'s aunt), since January 30, 2015. It is also undisputed that on February 5, 2015, the Racine County Human Services Department (the Department) commenced a children in need of protection or services (CHIPS) proceeding. That proceeding was resolved by virtue of an April 4, 2016 dispositional order, in which A.K. and L.K. were found to be in need. The Department took legal custody of the children, and they were formally placed in licensed foster care with R.A. The dispositional order was later extended through the children's eighteenth birthdays.

¶3 Attached to the dispositional order are a set of "ORDERS AND CONDITIONS REQUIRED FOR SAFE RETURN/CONTINUED IN-HOME PLACEMENT OF CHILD." These require S.J.A. to "COOPERATE WITH THE [Department]," "MAINTAIN A SUITABLE RESIDENCE," "MAINTAIN A RELATIONSHIP WITH THE CHILDREN," "DEMONSTRATE THE ABILITY TO SAFELY PROVIDE FOR THE NEEDS OF THE CHILD," and "PARTICIPATE IN SERVICES." Each of the five conditions lists numerous subconditions; for example, cooperation with the Department requires S.J.A. to "[m]aintain contact with the Department" and "not interfere with the placement of the children." The dispositional order further states that S.J.A. has "been orally advised of the applicable grounds for termination of parental rights (TPR)" and that "[w]ritten TPR warnings are attached."

¶4 At some point after her children's removal, S.J.A. moved to Washington state. Her last actual communication with her children was a March 24, 2017 telephone call. She made additional efforts to contact them; on May 30, 2017, a Department case manager wrote the following to S.J.A., denying her request for contact:

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Given the lengthy amount of time since you last visited with the children, their therapist is not recommending phone/video contact with them as the phone call will most likely have a negative impact on them, resulting in difficult behaviors to manage in the home and at school.... If you would like to discuss this matter further —please contact me at [telephone number].

The record does not indicate whether S.J.A. contacted her case manager or received instructions on how to reestablish telephone or video contact. S.J.A. attested in her affidavit, however, that she continued to make efforts to stay involved with her children, despite the Department's prohibition on communication; various pieces of electronic communication, also in the record, such as social media posts and text messages, support this assertion.²

**2 ¶5 S.J.A. returned to Wisconsin in January 2018. On February 6, 2018, S.J.A.'s case manager left her a voicemail, informing her that "[v]isits are not going to be arranged for [S.J.A.] and the kids yet," but that the case manager "touched base with the kids' therapist a couple of weeks ago and got recommendations for what it is that would be expected of [S.J.A.] to re-establish visits and that can be discussed Thursday."³ On Thursday, February 8, S.J.A. met her case manager in person. According to the case manager's notes, at that meeting, the case manager

went through the disposition order [with S.J.A.] and reviewed conditions for return. [The case manager] also highlighted TPR grounds [S.J.A.] stated that she understands all the paperwork and requirements regarding the disposition, expectations, grounds for termination of parental rights and the permanence plan.

... [S.J.A.] asked if the kids will come home in August [The case manager] replied that reunification will occur if/ when conditions for return are met....

...

[S.J.A.] asked when she can see her children. [The case manager] informed [S.J.A.] that at this time, the kids' therapist is recommending no contact until [S.J.A.] shows some stability and follows through with any recommended services.... [The case manager] stated that [S.J.A.] must first participate in an evaluation and demonstrate stability.

[S.J.A.] stated that, to date, she has not signed anything and this is why she has never been permitted to visit her kids. [S.J.A.] agreed to sign a consent form for ... a psychological evaluation.

¶6 On April 5, 2018, S.J.A. underwent the psychological evaluation that was a condition of reestablishing contact with her children. There is no record of S.J.A.'s complying (or not complying) with any other conditions for return, or taking (or not taking) any additional steps to "demonstrate stability" (this court does not have the case manager's complete file on S.J.A., as only select notes are included in the record). Therefore, it is unclear what, if any, steps S.J.A. took to promote reunification with her children. It is also unclear when S.J.A. relocated; at some point, however, she was again residing in Washington state.

¶7 On February 5, 2019, the Department⁴ filed petitions to terminate S.J.A.'s parental rights; one asserted ground was abandonment pursuant to WIS. STAT. § 48.415(1)(a)2.⁵ That subdivision provides for the termination of parental rights where "the child has been placed ... 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." WIS. STAT. § 48.415(1)(a)2. The statute, however, also provides a defense: "[a]bandonment is not established ... if the parent proves ... by a preponderance of the evidence ... [t]hat the parent had good cause for having failed to visit with the child throughout the time period specified ... [and] [t]hat the parent had good cause for having failed to communicate with the child throughout the time period specified." WIS. STAT. § 48.415(1)(c).

**3 ¶8 On May 17, 2019, the Department filed a motion for partial summary judgment seeking a finding that grounds for termination existed based on abandonment. The Department argued that although "living out of state may constitute good cause for failing to visit her children, it does not constitute good cause for failure to communicate with her children." The motion also modified the period of abandonment to begin

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on March 24, 2017 (the date of S.J.A.'s last communication with her children) through the date of the motion. In response, S.J.A. argued that genuine issues of material fact precluded summary judgment. She contended that she had good cause to not communicate with her children, because the Department would not allow her to talk to her children via telephone or video, let alone visit them. S.J.A. also noted that she was complying with a condition for having contact with her children, by meeting with the Department's psychologist.⁶ In its reply, the Department conceded that S.J.A. underwent psychological evaluation, but summarily argued that S.J.A. "failed to complete any of the other recommended services."

¶9 On June 18, 2019, the circuit court held the summary judgment hearing. The Department argued that as a matter of law, there was no good cause for S.J.A.'s failure to communicate with her children: there was a "condition precedent" to reestablishing communication, but S.J.A. "didn't participate in services" and "did not even come close to meeting that condition in order to connect with her children." The Department did not specify what these services or conditions were, and in fact, counsel for S.J.A. argued:

It is very ambiguous to say she did not comply with services. What services did she not comply with? It's ambiguous to say that she's not cooperating. They need to delineate because it is their job what specifically she needs to do in order to be able to have telephone, video contact or even physical contact.... But they don't indicate that.

The children's guardian ad litem (GAL) also appeared; he agreed with the Department that summary judgment was warranted and argued that "[S.J.A.'s] situation was created by her... [S.J.A.] had not participated in services that were offered." It is unclear, however, to which time period the GAL was referring—he may have been pointing to a failure to participate in services following S.J.A.'s February 8, 2018 meeting with her case manager, but he could also have been referring to nonparticipation prior to moving back to Wisconsin. In either case, the "services" were not identified; nor was it shown how or whether they were explained to S.J.A.

¶10 The circuit court found that S.J.A. lacked good cause for not visiting or communicating with her children and that consequently, the Department had established grounds for abandonment as a matter of law. The court noted that "the dispositional order contained conditions precedent to visitation or communication," but that "[t]he good cause argument for failing to visit or communicate by [S.J.A.] does not include any history of any compliance [with those conditions] other than the case worker meeting on [February 8, 2018,] and the psychological exam of [April 5, 2018,] and then a series of e-mails, which do not seem to make any progress." It is unclear to which e-mails the circuit court was referring, as the record does not contain any e-mails between S.J.A. and anyone representing the Department subsequent to the February 8 case manager meeting.⁷ In any case, the court determined that

[S.J.A.'s] route would have been to work with Human Services and start setting up the gradual reintegration that she would be looking for with these children through therapy, group meetings, counseling, however it was determined to be in the children's best interest to reintegrate their mother.

What I read in the documents is that [S.J.A.] wanted direct communication or visits with the children and did not appear anxious to set forth the steps she needed to take before she got there.

**4 This is a situation where [S.J.A.] chose to leave the state of Wisconsin.^[8] This impeded any ability to provide local services....

....

The response to the summary judgment motion by [S.J.A.] does not indicate efforts at compliance that would rise to the level of good cause for failing. There's more of an argumentation back and forth rather than a willingness to be open and comply.

... I do find that based on the record that's been presented, [S.J.A.] failed or refused to engage in available recommended services....

The circuit court concluded that S.J.A. was an unfit parent, based on the ground of abandonment.

¶11 The circuit court held the dispositional hearing on July 26, 2019. The court determined that it was in the best interest of the children to terminate S.J.A.'s parental rights and entered

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written orders involuntarily terminating those rights. This appeal follows.

Discussion

¶12 We review a grant of summary judgment de novo, while benefiting from the circuit court's analysis. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Partial summary judgment is appropriate in the unfitness phase of a TPR case where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2); *Steven V. v. Kelley H.*, 2004 WI 47, ¶6, 271 Wis. 2d 1, 678 N.W.2d 856. Summary judgment "is designed to eliminate unnecessary trials" because "there is no triable issue of fact" to present to a jury. *Maynard v. Fort Publ'ns., Inc.*, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980). "The court takes evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. "[I]nferences to be drawn from the underlying facts," however, "should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *Id.* (footnotes omitted).

**5 ¶13 On summary judgment the moving party has the initial burden of showing the absence of genuine issues of material fact. *Central Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178. "A 'material fact' is one that is 'of consequence to the merits of the litigation.'" *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). A factual issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Cl. App. 1991) (citation omitted). Once the moving party has satisfied the initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the pleadings but ... must set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3). If the court is satisfied that there is no genuine issue of material fact, the court shall enter judgment as a matter of law. Sec. 802.08(2);

¶1 *Jackson v. Benson*, 218 Wis. 2d 835, 852, 578 N.W.2d 602 (1998).

¶14 TPR proceedings involve "the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (citation omitted). For this reason, due process requires proof of parental unfitness by clear and convincing evidence. *Steven V.*, 271 Wis. 2d 1, ¶23. In Wisconsin, this involves a two-part procedure for involuntary termination. *Id.*, ¶24. In the first or "grounds" phase, the petitioner must prove by clear and convincing evidence that there exist one or more of the twelve statutory grounds for parental unfitness under WIS. STAT. § 48.415(1)-(10). *Steven V.*, 271 Wis. 2d 1, ¶¶24-25. If the parent is declared unfit in this phase, then the proceeding moves to the dispositional phase, which focuses on the best interests of the child. *Id.*, ¶¶26-27. The present appeal involves the grounds phase only.

¶15 In the grounds phase, a parent does not have an absolute right to a jury trial, and parental unfitness may be determined on summary judgment. *Id.*, ¶¶33-34. Summary judgment, however, "will ordinarily be inappropriate in TPR cases premised on ... fact-intensive grounds for parental unfitness" such as abandonment (this is in contrast to "so-called 'paper grounds'" or "statutory grounds for unfitness ... [that] are expressly provable by official documentary evidence, such as court orders or judgments of conviction"). *Id.*, ¶¶36, 37. Where, as here, "the applicable statutory basis for unfitness ... provides for a 'defense' or 'explanation' that would preclude a finding of unfitness, and there are material facts in dispute regarding a parent's asserted 'defense' in this regard, then summary judgment will not be appropriate." *Id.*, ¶48 n.8; see also *J.M.W. v. J.R.P.*, No. 2017AP1390, unpublished slip op. ¶18 (WI App Sept. 20, 2017) ("[W]e strongly caution against the use of summary judgment at a TPR proceeding where the parent is present and objecting.").

¶16 In the present case, the argued-for period of abandonment is March 24, 2017, through May 17, 2019. WISCONSIN STAT. § 48.415(1)(a)2. establishes abandonment as grounds for termination where the parent has not visited or communicated with the child for at least three months. However, as of February 8, 2018, the Department still anticipated S.J.A.'s being able to reestablish contact with her children, provided that she engage in "recommended services," "participate in an evaluation," and "demonstrate stability." The focus of the summary judgment briefs, along

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with the circuit court's focus at the motion hearing, was on whether S.J.A. was taking any steps to follow through on these conditions. That this was the focus of inquiry by the circuit court seems appropriate given that (1) beginning in May 2017, the Department expressly told S.J.A. that contact with the children would not be permitted; (2) there is virtually nothing in this record to indicate what she needed to do to change that directive; and (3) her affidavit and documents in the Department's file suggest that she was continuously making efforts at communication. The circuit court implicitly determined, and we agree, that if S.J.A. were fulfilling or seeking to fulfill conditions imposed in early February 2018, then "good cause" could exist as a defense to abandonment. See *Carla B. v. Timothy N.*, 228 Wis. 2d 695, 706, 598 N.W.2d 924 (Ct. App. 1999) (discounting father's defense to abandonment on the theory that he was "judicially foreclosed from visiting his daughter," because the court order merely created "a condition precedent"—seeking extended counseling—that father did not fulfill). Therefore, we will not focus on S.J.A.'s conduct during any three-month period prior to February 8, 2018. Instead, the real question is whether, as a matter of law, S.J.A.'s actions subsequent to meeting with her case manager in February 2018 fail to establish good cause.

6 ¶17 We conclude that this is not a question that can be decided on summary judgment. Put another way, there are facts and inferences that can be genuinely disputed as to whether S.J.A. was attempting to reestablish contact with her children. Pursuant to **WIS. STAT. § 48.415(1)(c), S.J.A. had the burden of proof (by a preponderance of the evidence) as to good cause for abandonment, meaning she needed to present evidence that at least raised an issue of fact to support this defense. See *Odd S.-G. v. Carolyn S.-G.*, 194 Wis. 2d 365, 372, 533 N.W.2d 794 (1995). In that regard, S.J.A. showed that she fulfilled at least one of the Department's requirements (and arguably the only requirement that was set forth with specificity): she underwent a psychological evaluation. Although S.J.A. did not reference any other steps she took, the Department's requirements are decidedly vague; as defense counsel put it, "[i]t is very ambiguous to say [S.J.A.] did not comply with services." We find noteworthy the unrefuted fact that there is no record of the Department's informing S.J.A. of any specific services she needed to obtain following her psychological evaluation. In addition, it was only (for the first time) in its reply brief to the circuit court that the Department raised the primary argument it presented at the summary judgment hearing and which formed the basis for the circuit court's decision: that the Department's

decision to prohibit communication did not constitute per se "good cause" for not communicating with her children and that S.J.A.'s case for "good cause" required her to meet a "condition precedent" to reestablishing communication.⁹ Therefore, S.J.A. may not have had a fair opportunity to offer evidence as to her knowledge of and compliance with the "conditions" that ultimately led to the circuit court's decision.

See *Leske v. Leske*, 197 Wis. 2d 92, 97-98, 539 N.W.2d 719 (Ct. App. 1995) (noting that "[t]he burden is on the moving party to demonstrate a basis in the record" showing that nonmoving party lacks evidence on point on which nonmoving party bears burden of proof); *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993) (party moving for summary judgment must "explain the basis for its motion").

¶18 In response to the summary judgment motion, perhaps S.J.A. should have attested that she was working towards fulfilling the numerous conditions contained within the original dispositional order. She did in fact attest to this point later, at least to a degree, at the dispositional hearing.¹⁰ Be that as it may, S.J.A.'s response set forth at least some facts in support of her "good cause" defense. The Department, on the other hand, pointed to no specific conditions that S.J.A. failed to meet, nor did it explain when or how these conditions were clearly communicated to her. See, e.g., *Brown County v. B.P.*, 2019 WI App 18, ¶36, 386 Wis. 2d 557, 927 N.W.2d 560 (reversing grant of summary judgment in part because "the record is also unclear as to what services the Department wanted T.F. to complete before she would be permitted to visit Allie, and if T.F. had the opportunity to complete those services"). Perhaps the conditions were clearly explained, and perhaps S.J.A. could have, but did not, meet them. If so, that can be addressed at trial. But on this record it is simply not sufficiently clear. This is particularly true given the inherently fact-based nature of this issue and the fundamental rights at stake, which have led our supreme court and this court to generally discourage the use of summary judgment in TPR cases, and on this issue specifically.

¶19 It appears that the Department, in moving for summary judgment, was motivated by a desire to achieve stability for A.K. and L.K. The result, however, was a misapplication of summary judgment methodology. In determining that there was no good cause for abandonment, the circuit court made findings arising out of disputed facts, or facts not conclusively established, as to S.J.A.'s knowledge, efforts, and motivations—all of which are necessarily relevant to a "good cause"

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analysis centered on whether S.J.A. was fully aware of, and made a good-faith effort to meet, conditions for reunification. As a result, S.J.A. was denied her right to a fact-finding hearing, pursuant to WIS. STAT. §§ 48.31 and 48.422. We express no opinion as to what the appropriate outcome should be in this case, but simply hold that the circuit court should resolve it following a fact-finding hearing in which evidence is presented and duly considered on the issue of abandonment. Whether other grounds may exist for termination we leave to the circuit court's determination.

**7 ¶20 For the foregoing reasons, we reverse the order finding that S.J.A. abandoned A.K. and L.K. and is therefore an unfit parent. Because the Department did not establish grounds for termination, this court also reverses the order involuntarily terminating S.J.A.'s parental rights. This matter

is remanded for a fact-finding hearing in accordance with WIS. STAT. § 48.424. In light of the mandate in *Bobby G.*, 301 Wis. 2d 531, ¶6, we note that if the Department prevails in the grounds hearing, a new disposition hearing would also be necessary.

By the Court.—Orders *499 reversed and cause remanded for further proceedings.

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

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Footnotes

- 1 This appeal is decided by one judge pursuant to Wis. Stat. § 762.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version.
- 2 It does not appear that these materials were properly authenticated, and in some cases are undated and incomplete. However, the materials were not objected to below, nor are they essential to the court's decision. On remand, a more complete record should be developed in connection with S.J.A.'s claimed efforts to communicate.
- 3 The case manager provided an affidavit in support of summary judgment, but this history is based solely on what appear to be her notes in the case file. Substantively, the case manager's affidavit is limited to stating that there has been a CHIPS order since April 4, 2016, and that to the case manager's knowledge S.J.A. has not visited or communicated with the children since the March 24, 2017 phone call.
- 4 Although the Department filed the original CHIPS petition, the State actually brought the petitions for termination of parental rights, along with the subsequent summary judgment motion. For consistency, however, this decision refers to the petitioner/respondent as the Department.
- 5 The other ground was failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6).
- 6 S.J.A. further argued that the Department's decision to prohibit communication with her children constituted a court order, because the Department "is an extension of the court." The circuit court rejected this argument, which S.J.A. does not argue on appeal.
- 7 The materials submitted by S.J.A. in response to the summary judgment motion include various forms of electronic communication between and among S.J.A., the caseworker, R.A. (S.J.A.'s aunt, who has current custody), and the children's father (who agreed to voluntarily terminate his rights). We note that the clear import of these communications was that S.J.A. desired, and made efforts, to communicate with her children. Indeed, one could infer from these communications that S.J.A.'s aunt was actively attempting to impede these efforts. For example, in one exchange S.J.A. wrote to her aunt, in a message obviously intended to be partially conveyed to her children, "Happy Easter [A.K.] and [L.K.]—love mom. Can they call me? Or can you at least send a picture? I'm asking you to take a picture. Of their faces. A nice picture and don't worry that won't count as contact." Her aunt wrote back, "I don't care what it counts as and Jackie already told you that phone calls are not allowed. I would have just sent you a picture until you have to be so sassy. Now you

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can wait until I have time." S.J.A. wrote back later to say, "Well hopefully you can find time today. Hope they enjoyed their Easter Morning." While not entirely clear due to the foundational issues previously noted, see *supra* note 2, R.A. appears to have written back "still too busy."

8 It is unclear whether this is in reference to S.J.A. initially moving to the state of Washington or in reference to S.J.A.'s returning to Washington at some point following her April 2018 psychological evaluation.

9 The original motion, and each of the supporting affidavits, were exclusively focused on the lack of any communication as the basis for the motion. These did not address the fact that S.J.A. was precluded from having any communication with her children; or why that did not constitute "good cause." S.J.A.'s purported failure to meet "conditions" for reunification was not raised until the Department's reply.

10 At the dispositional hearing, S.J.A. explained the positive progress she was making in her life, such as securing stable housing and employment, in order to have a "better life for [her] and [her] children." Although this could establish that S.J.A. was "demonstrat[ing] stability," seemingly a condition of reestablishing contact, S.J.A. did not present this information at summary judgment. Our review must be confined to the record before the circuit court on summary judgment; therefore, we cannot consider any dispositional hearing testimony for purposes of showing a disputed issue of fact. See *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 556, 508 N.W.2d 610 (Ct. App. 1993). This evidence does, however, lend support to the court's concern that S.J.A. may not have been given a fair opportunity to oppose summary judgment on the "failure to meet conditions" grounds on which it was granted.

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