STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP001289

In re the termination of parental rights to B.K.,
a person under the age of 18:
C.K. and A.K.

Petitioners-Respondents,

v.

K.L.,

Respondent-Appellant.

On Appeal from an Order Granting
Partial Summary Judgment, Entered in
the Portage County Circuit Court, the
Honorable Thomas B. Eagon, Presiding

REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

The circuit court erred by granting summary judgment and declaring Kate an unfit parent on the ground of abandonment when there were genuine issues of material fact that should have been decided by a jury.

The grandparent petitioner-respondents, "April"[1] and "Charles," argue as though the issue presented is sufficiency of evidence after a trial, and claim the mother respondent-appellant "Kate" relies on facts not established until the disposition hearing. Their argument is wrong on both points. April and Charles ignore that at the summary judgment stage the burden of proof is on the moving party and facts are to be viewed in a light most favorable to the non-moving party. The facts or evidence proving the case presented genuine issues of material fact for a jury to resolve regarding the "good cause" aspect of the alleged abandonment ground derive from April and Charles' own pleadings, Kate's written response, and Kate's deposition, all of which were established prior to or at the summary judgment hearing.

The respondents' claim that "Kate made no attempts to visit or communicate with Beth, and

[1] Pursuant to Wis. Stat. § 809.19(1g), K.L., her daughter, and other family members will be referred to by pseudonyms.

therefore, did not encounter any interference with any attempts to visit or communicate with Beth" is false. (Respondents' brief p. 23). Kate's deposition establishes Kate had three daughters with her first husband, that a paternity action determined April and Charles' son to be the father of the child "Beth" (d/o/b 12-19-2012) whom they were seeking to take from Kate, and that Kate later had a fifth child with her new husband. (Deposition transcript, 34:5-6). A court order in February 2015 appointed April and Charles as Beth's temporary legal guardians, with Kate given a right to "at least two visits a month." (34:8; 46:1). In August 2015 the court granted April's petition to require that the visits be supervised, with Kate's aunt named as the supervisor. (34:11). When April learned Kate and her aunt did not timely return Kate's other kids from a supervised visit, April petitioned the court to remove the aunt and name Kate's parents as the only approved supervisor. (34:12, 22).

April unilaterally imposed conditions for Kate's court-mandated visits and interfered with or refused visits if Kate did not comply. Beginning in 2016 April barred visits unless Kate agreed to a public meeting place, and she did not want Kate's husband or other children to be present. (34:14, 52-53; 51:3). At one visit when she saw Kate's husband, April "screaming at us that he could not be there," tried to quickly drive away with Beth not secured in her car seat, and only stopped and allowed the visit when Kate's husband yelled back "hey, I'm sorry. I will leave." (34:52, 63-64). April refused visits entirely while Kate was briefly on home-monitoring, forcing Kate to litigate a contempt action

to see her daughter and compel April to comply with the court-ordered visitation. (34:20, 22).

April allowed the ordered visits when it worked for her, with "take it or leave it" inflexibility regarding the court-ordered visitation window, and then only on April's terms. (34:26, 47). During the interactions there was "a lot of animosity and daggers from [April]," with Kate stating "she just hated me and would keep every information she could from me." (34:63, 65). Kate got information and photos from Beth's father, but with him telling her they "had to keep that secret" as April would withhold visitation from him if she found out he cooperated with Kate. (34:47, 65-66).

The respondent's brief does not meaningfully rebut that April was the architect of the disrupted visitation period at issue here. By November 2019 Kate's parents no longer wanted to or "refused" to supervise Kate's visits with Beth. (34:31). Though she soon would regret it, Kate acquiesced to April supervising visits, the next one of which occurred at a Children's Museum on December 2, 2019. (34:33). During that visit Kate, her older daughters and Beth were horsing around and "playfully biting each other and laughing." (49:1; 34:33). The visit ended seemingly innocuously, with April not saying anything or intervening in any way. *Id.* All that, and everything, changed when Kate later learned April called police and social services, presumably reporting Kate's playful interactions with her daughters to be some sort of crime. *Id.*

The respondents' brief completely glosses over the devastating impact April's false police and social services report caused. After that the "children were afraid of" April, and Kate decided she could not risk having police baselessly summoned if her children played in a manner April did not approve. (34:34, 37). Kate concluded she was no longer comfortable having April supervise visits and rather than subject her children to April's "emotional abuse," her "only option" to protect her children was to have the court "step in" to either end the guardianship or modify the visitation order. (34:46, 47, 57).

To try to protect her daughter and other children after the false report police incident, Kate in January 2019 undertook the daunting task of trying to litigate a petition to terminate guardianship, believing it "was the only thing I could do." (34:35, 37; 49:1). After Kate filed the petition "[April] refused to allow [her] to see [Beth] during that time." *Id.* Kate's petition was dismissed, though, for non-appearance at a hearing of which Kate had no notice, as the clerk erroneously sent the notice of hearing to an old address and not to the P.O. box address Kate provided. (34:38-40; 49:2). When Kate tried to re-file she was told, erroneously, that she would first have to pay outstanding guardian ad litem and attorney fees, which she could not afford. (34:42; 49:2). What the respondents dismissively posit as Kate's "antics in the guardianship proceedings" is more accurately an example of the system failing a mother with limited resources and options, trying to protect her child and preserve her family. (Respondent's brief p. 28).

The respondents claim Kate relies on facts not established until the disposition hearing is puzzling and false. (Respondent's brief pp. 18-23). The respondents argue at p. 20 evidence from "outside of the summary judgment record … should be disregarded," and describes the "offending passages … as follows:"

> 1. Kate explained that April never allowed visits beyond what was court ordered.

Except, Beth's deposition establishes: "All I know is any time that it wasn't the first or third of the month her response would be, it's the first and third of month from 3:00 to 4:30. Take it or leave it." (34:26).

> 2. When Kate has asked to come to gymnastics or Beth's other activities, April has denied the request.

At her deposition Beth testified: "I used to ask her about [Beth's] schooling, all those kind of questions. And [April] would pretty much just shut me down" and "[p]retty much has done everything she can to seclude me from knowing anything, other than my visitation." (34:64-65).

> 3. Kate said it was not until she was speaking with social workers who were working with her and her son that she learned April could not prevent her from seeing her daughter. Kate stated that prior to that, she did not know that

> she had a legal right to see or communicate with Beth if April did not allow it.

Again, from the deposition: "I was given guidance from the department, even though [April] had been refusing to allow me to see [Beth] for that time, that she was not able to do that, that there was still a court order" … "[a]nd until that point I was unaware of that." (34:51).

> 4. During the last few years, Kate explained that she has spoken with Beth's dad multiple times to get pictures of Beth and find out how she is doing.

Regarding Kate seeking to keep abreast of how Beth was doing through Beth's dad, see 34:47 and 34:65 -66, described *supra* at p. 5.

> 5. At the summary judgment hearing, the guardians were critical of Kate's submissions and arguments, saying they focused on her lack of visitation but did not address her lack of communication.

At the summary judgment hearing the respondents' attorney argued: "She failed to – she never sent [Beth] a note, a card, a Christmas card, birthday card, Easter card, postcard, letter, and [Beth] is eight at the time. She's now nine. So she was an eight year old who could very well read a letter, a communication from her mother." (84:4). The problem with the argument isn't its timing, it is the math. Beth was born on 12-19-

2012, and turned six on 12-19-2018, not eight. She was in Kindergarten. (34:67).

The respondent's argument on appeal and in the circuit court focus on Kate's use of the words "discomfort" or being "uncomfortable" with exposing her children to April after April filed the bogus police and social services complaints; the argument being that mere discomfort cannot, as a matter of law, be good cause for not visiting one's child. It is true that discomfort or being uncomfortable can reference something trivial—e.g. sitting on a too-hard bench or laying in too-soft bed. But it is also true that discomfort can come from accidentally cutting one's finger off with a band saw, or confronting one's own mortality, or risking the well-being of one's children or family by exposing them to a person who has proven herself willing to call police and social services when a mother and child play in manner that does not meet her approval.

The respondent claims Kate: "never actually used the word 'fear' to describe her feelings toward April. The use of the word 'fear' was the court's invention, based upon Kate's deposition testimony and submissions." (Respondent's brief p. 29). The Respondents, thus, appear to be disavowing their own statement of facts in their summary judgment motion, wherein they note "[Kate's] excuses for not visiting with [Beth] were, that she was afraid of [April]." (45:2).

The respondents' reliance on *In re A.P.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560, is curious as

the decision actually supports Beth's position that summary judgment here was erroneously granted. (Respondents' brief, pp. 17, 23-27). In *In re A.P.* summary judgment was granted on the grounds stage of the TPR against the father, B.P., and the mother, T.F. The court concluded that B.P.'s generalized claim regarding anxiety and mental health issues was insufficient to rebut or defeat summary judgment. *Id.* 386 Wis. 2d at 587-89. Here Kate is not claiming anxiety or mental illness prevented her from seeing her daughter, she is claiming that after the court-approved supervisor for visits backed out and she could no longer have April supervise after the false police and social services report, April barred Kate's attempts to see or communicate with Beth and so Kate tried to gain access by going to court.

The significance of *In re A.P.*, is not the court's ruling with regard to the father, B.P., but in reversing the summary judgment order erroneously granted against the mother, T.F., on abandonment without "good cause" grounds. T.F. asserted she had good cause for failing to communicate or visit with her three-year-old daughter because she lacked transportation to travel over the 100-mile distance between her place of residence and the child's placement in Madison, and "the Department wanted her to receive unknown services before renewed visits" but "failed to both advise her of the services required and arrange for them to be provided." *Id.* 386 Wis. 2d at 582-83. The *A.P.* court concluded there were "disputed issues of material fact" as to these "good cause defenses," and thus ruled the circuit court erred

in granting partial summary judgment against her. *Id.* at 585.

Kate's "good cause" factors are far more compelling than those which garnered reversal in *A.P.* The record establishes April's history of unilaterally imposing conditions before allowing Kate access to her daughter, once leaving Kate no choice but seek access through court in a contempt proceeding. After April successfully petitioned the court to require that Kate's visits with Beth be supervised, and the approved supervisor would no longer participate and April was not an option after lodging a false police complaint, Kate tried to gain access via court proceedings to either end the guardianship or amend the visitation rules, but was thwarted by court errors regarding notice of hearing and mistakenly requiring payment of fees. Kate filed the court action in January 2019, April refused to grant Kate access to Beth when she tried in May, Kate tried to maintain indirect contact through Beth's father, and April refused to allow Kate to speak with Beth by phone on her birthday.

The respondents may have had arguments to make at a trial to rebut Kate's good cause claims, but that is the point. The case should have gone to trial and Kate had a right to have a jury determine whether her efforts in trying to gain access to her daughter via court, or attempts at visits or calls thwarted by April, constituted good cause for not having direct contact with her daughter during the period alleged in the TPR petition.

CONCLUSION

For the reasons set forth above and in Kate's opening brief, Kate requests that the court reverse the order terminating Kate's parental rights to Beth and remand the case to the circuit court for a fact-finding hearing in accordance with Wis. Stat. § 48.424.

Dated this 17th day of November, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,237 words.

Dated this 17th day of November, 2022.

Signed:
Electronically signed by
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