WISCONSIN SUPREME COURT

In re the termination of parental rights to E.A. and D.L.A., persons under the age of 18:

JACKSON COUNTY DEPTARTMENT OF HUMAN RESOURCES,

Petitioner-Respondent,

v.

I.J.R.,

Respondent-Appellant-Petitioner.

Appeal Nos. 23-AP-1495 & 23-AP-1496 (consol.)

Jackson County Circuit Court Case Nos. 22-TP-1 & 22-TP-2

PETITION FOR REVIEW OF I.J.R.

ON PETITION FROM THE APRIL 11, 2024 OPINION OF THE WISCONSIN COURT OF APPEAL, DISTRICT IV
Jackson County Circuit Court Case Nos. 22-TP-1 & 22-TP-2
Hon. Anna L. Becker

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ISSUES FOR REVIEW

Jackson County DHS (hereafter "County") moved for partial summary judgment on grounds to terminate I.J.R.'s (hereafter "Isla") parental rights to her children. At a status conference, the Circuit Court scheduled oral arguments on the County's motion. Isla asked if she could attend oral arguments in person, with her attorney. The Circuit Court granted her request. Because she would likely be incarcerated by the time of the scheduled hearing, the Circuit Court ordered the County to secure her in-person appearance by writ.

The County failed to do so. Upon realizing that Isla was not present and was, instead, appearing by Zoom videoconference, defense counsel objected and requested a short adjournment to allow Isla to appear in person. The Circuit Court overruled the objection and denied the request. It reasoned that, because the hearing was non-evidentiary, Isla had no right to appear in person.

The Circuit Court granted the County's partial summary judgment motion, finding that grounds for termination existed as to abandonment and failure to assume parental responsibility. The Court of Appeals ultimately affirmed the ruling on the abandonment ground alone. In doing so, it held that, to establish "good cause" under Wis. Stat. § 48.415(1)(c) so as to avoid partial summary judgment, the respondent "bears the initial burden to identify evidence in the summary judgment materials sufficient to support it" because she "bears the overall burden of proof on her good-cause defense[.]" Because the Court of Appeals found that Isla had not identified sufficient evidence of the "good cause" elements, it granted partial summary judgment to the County.

1. After previously granting a parent's request to be physically present for oral arguments on the government's motion for partial summary judgment—a request that went unfulfilled only because the government failed to follow a court order that it secure her transport—does a circuit court erroneously exercise its discretion under due process and subch. III of Wis. Stat. ch. 885 if it denies the parent's motion for a continuance and, instead, forces her to appear by videoconference, based solely on a belief that parties have no right to be physically present at non-evidentiary hearings?

METHOD OR MANNER OF RAISING THE ISSUE: Isla'a trial counsel objected to her remote appearance and requested a short adjournment. This argument was then raised on remand to the Circuit Court under Wis. Stat. Rule 809.107(6)(am) and again before the Court of Appeals.

ISLA'S POSITION: Yes.

ANSWERED BY THE CIRCUIT COURT: No.

ANSWERED BY THE COURT OF APPEALS: No.

2. Did the 1995 amendments to Wis. Stat. § 48.415(1)(c), which removed the "rebutted" language and introduced the "good cause" exception to abandonment, abrogate the holding from *Odd S.-G. v. Carolyn S.-G.*, 194 Wis. 2d 365, 533 N.W.2d 794 (1995) that § 48.415(1)(c) creates a rebuttable presumption? If so: Despite the parent having the burden of persuasion to prove the good cause exception to abandonment at trial, when the government moves for partial summary judgment on abandonment, must it bear the initial burden of producing prima facie evidence that the good cause exception to abandonment does not apply to show that it is entitled to judgment as a matter of law?

METHOD OR MANNER OF RAISING THE ISSUE: Isla argued before both the Circuit Court and the Court of Appeals that, to be entitled to judgment on the abandonment ground as a matter of law, the County must produce prima facie evidence which shows that the good cause exception does not apply. She did not raise the prefatory question concerning the 1995 amendments and *Odd S.-G.*

M.S.'S POSITION: Yes, to both.

ANSWERED BY THE CIRCUIT COURT: No, as to the second question.

ANSWERED BY THE COURT OF APPEALS: No, as to the second question.

REASONS TO GRANT REVIEW

The Court should grant this petition because it presents novel issues of both constitutional and statutory concern, the clarification of which will benefit TPR litigants statewide. *See* Wis. Stat. Rule 809.62(1r)(a), (1r)(c)2.

These issues involve parents' fundamental due process rights. The first issue seeks to clarify the extent to which due process protects parents from being forced to appear remotely, including under the test provided in *Lassiter v. Dept. of Soc. Servs.*, 452 U. S. 18 (1981). The second issue implicates due process as it seeks to clarify the extent of the government's burden to produce evidence when requesting partial summary judgment on the question of parental unfitness. "[A]s a matter of procedural due process, parental unfitness must be proved by clear and convincing evidence." *Steven V. v. Kelley H. (In re Alexander V.)*, 2004 WI 47, ¶ 4, 271 Wis. 2d 1, 678 N.W.2d 856 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

This petition also involves novel questions of statutory interpretation. As an issue of first impression, it affords the Court an opportunity to discuss the exercise of judicial discretion to use videoconferencing technology under subch. III of ch. 885. Indeed, the County denies that these statutes even apply in TPR cases, and the Court of Appeals elected not to address this important question at all. With the emerging prominence of technologies such as Zoom, Teams, and Meet, litigants and courts alike would benefit from this Court's insights on the issue.

The second issue, too, is an issue of first impression involving statutory construction. It asks for guidance in how courts should apply the summary judgment methodology set forth in Wis. Stat. §

802.08(2) to the "good cause" exception to abandonment under Wis. Stat. § 48.415(1)(c).

Before the "good cause" exception was enacted into law, § 48.415(1)(c) contained a rebuttable presumption governed by Wis. Stat. § 903.01. *See Odd S.-G. v. Carolyn S.-G.*, 194 Wis. 2d 365, 372, 533 N.W.2d 794 (1995); *T.P.S. v. G.D.*, 168 Wis. 2d 259, 266, 483 N.W.2d 591 (Ct. App. 1992). Despite the fact that, in 1995, the Legislature removed this presumption and replaced it with the good cause exception, the Court Appeals still often cites to *Odd S.-G.* and adheres to law based on an outdated version of the § 48.415(1)(c).

This petition asks to clarify who, on summary judgment, bears the initial burden to produce prima facie evidence as to the good cause exception. Isla asserts that it is the government, as movant, who bears the burden to put forward some evidence showing why the exception to abandonment does not apply. Unlike a rebuttable presumption, if good cause exists, no abandonment has occurred within the meaning of § 48.415(1)(a)2.-3. Therefore, despite the parent having the burden of proving good cause by a preponderance of the evidence, if the government wishes to avoid a trial, it cannot show by clear and convincing evidence and to a reasonable certainty that there is no genuine dispute as to any fact necessary to ultimately prove that an abandonment occurred without proffering at least some evidence that the good cause exception to abandonment doesn't apply.

STATEMENT OF THE CASE

This statement of the case is separated into three subsections: (A) the nature of the case; (B) pertinent background facts; and (C) postdisposition and appellate proceedings.

A. Nature of the Case

On May 19, 2022, the County moved for partial summary judgment on the TPR grounds that Isla abandoned her children and failed to assume her parental responsibilities for them. At a status hearing, she requested that she be physically present alongside her attorney at the partial summary judgment hearing, a request that the Circuit Court granted. The Circuit Court directed the County to file a writ to effectuate the same. Isla responded to the County's motion on October 28, 2022, but trial counsel did not file any opposition affidavits along with the brief.

On November 15, 2022, the Circuit Court convened the partial summary judgment hearing. However, because the County never filed the writ, Isla was not physically present alongside her attorney. She objected and requested a brief adjournment to allow her to appear in person, a request that the Circuit Court denied. The Circuit Court granted the County's motion for partial summary judgment on March 14, 2023. On April 3, 2023, the Circuit Court convened a 48-minute disposition hearing and found that it was in the best interests of both children that Isla's parental rights be terminated. She appealed, and on remand, unsuccessfully moved for postdisposition relief. The Court of Appeals affirmed.

B. Pertinent Background Facts

On April 28, 2022, the State commenced case numbers 22-TP-1 and 22-TP-2 by filing petitions to terminate Isla's parental rights to her children, alleging abandonment, continuing CHIPS, and a failure to assume parental responsibility as grounds. (R.3 [22TP1], R.3 [22TP2].)[1]

i. *Proceedings Relating to Isla's Physical Presence at the Hearing on the County's Motion for Partial Summary Judgment*

The County moved for partial summary judgment on May 19, 2022. (R.18.) The Circuit Court then held a status conference on September 13, 2022. (R.64; P-App 023-031.) During the hearing, it scheduled oral arguments on the County's motion for partial summary judgment for November 15, 2023. (P-App 028.) Isla's trial counsel, Attorney Carly Sebion, mentioned that, by the time of the hearing, Isla would be in custody and participating in a treatment program at Taycheedah Correctional Institution. (Id.) Asked whether she would like to attend by Zoom teleconference or in person, Isla asked to attend in person. (P-App 028-029.) The Circuit Court granted the request and adjusted the time of the hearing to better accommodate Isla's transportation to and from the hearing. (P-App 089.) The Circuit Court then stated: "If we can confirm at some point that [Isla] is in Taycheedah, then DA would do a writ to have her transported in person back for that appearance." (Id.) The prosecutor replied, "Yes." (P-App 030.)

However, when the Circuit Court convened the hearing on November 15, 2022, Isla had not been transported, as requested.

[1] The two files—22-TP-1 and 22-TP-2—are largely identical. Going forward, this brief will cite only to the court record in 22-TP-1, unless otherwise indicated.

(R.63; P-App 032-053.) According to the record, no writ or other proposed order had been filed, and no arrangements had been made, to have Isla transported to attend the hearing in person. She, instead, attended by Zoom videoconference. (P-App 033.) Attorney Sebion requested a brief adjournment to allow her to attend in person:

> MS. SEBION: Your Honor, I did want to make the record clear, too, though, that [Isla] had requested to be in person for this hearing. I apologized to her, I did make the mistake of not following up on this a couple of weeks ago. I know that I -- I honestly thought that we had already put it on the record that she wanted to be here in person for this final decision on the motion and I guess that I just noticed a couple days ago that a writ hadn't ever been done.
>
> So I do want to at least ask the Court to consider a short adjournment on this motion hearing so that we can hopefully get [Isla] there so she can be -- appear in person. I do think that this is a really important decision with the Court whether, you know -- kind of, obviously, depends a big part on what direction this case -- both of these cases go. And I do think it's important that she be heard on the ability to be there in person.

(P-App 035-036.)

Even though it had been the County's duty to file a writ and ensure Isla's physical presence, the County objected to her request for a brief adjournment: "Well, Judge, it's not an evidentiary hearing, so she's not required to be here in person. And I'm not sure why there was no writ completed, but I would object to having a continuance of the hearing." (P-App 036.) The Circuit Court agreed and denied the request. (P-App 036-037.) It reasoned that, because there would be no testimony, only legal arguments, and given that she was able to hear everything, it was not the type of hearing for which in-person attendance was necessary. (Id.)

ii. *Proceedings Relating to Partial Summary Judgment on Abandonment*

The County sought partial summary judgment on the grounds of abandonment and failure to assume parental responsibility, supporting it with a witness affidavit. (R.18.) Relevant here, it argued that there was no genuine issue of material fact that Isla abandoned her children. (Id.) With respect to her daughter E.A., for example, the County contended that partial summary judgment was appropriate because Isla had not had placement of her since September 28, 2021, had not had an in-person visit since April 14, 2021, had not communicated with her since September 27, 2021, and "ha[d] not expressed to the department a good cause for her failure to communicate or visit with [E.A.]" (Id.)

Isla responded on October 28, 2022. (R.35.) Attorney Sebion filed no supporting affidavit. Instead, she presented two general arguments: (1) that the Circuit Court should decline to order partial summary judgment because the two grounds at issue—abandonment and failure to assume—involve weighing fact-intensive factors and applying fact-intensive standards, (id. at 1-4), and (2) that, as County's affidavit demonstrates, there existed genuine disputes of material fact precluding the Circuit Court from ordering partial summary judgment, (id. at 4-8).

The County completed briefing by filing a reply brief in support of its motions. (R.36.) It focused exclusively on the effect, if any, that a court order prohibiting Isla from visiting her children should have on the question of abandonment. (Id.)

The Circuit Court granted the County's motion in an oral ruling on March 14, 2023, (R.67; P-App 164-190), finding Isla to be an unfit

parent on both grounds of abandonment and failure to assume parental responsibility, (R.46; P-App 167-86, 091-104).

As to abandonment, the Circuit Court found that Isla failed to visit or communicate with her children for a period of three months or longer between October 4, 2021 and April 28, 2022, the date the TPR petition was filed. (P-App 076-077.) It explained that Isla was released from incarceration on October 4, 2021 and February 14, 2022, during which her whereabouts were unknown. (Id.) On November 8, 2021, the County moved to revise the dispositional order to have Isla's right to visitation suspended for lack of consistent attendance and to put in place conditions precedent that she was required to satisfy to have her visitation right reinstated. (Id.) As conditions, she had to complete 30 days of one-on-one counselling, alcohol and drug rehabilitation, and parenting classes. (Id.) The Circuit Court entered an order to that effect on December 7, 2021. (Id.)

The Circuit Court found that, between October 4, 2021 and February 14, 2022, Isla was out of custody but did not complete the conditions precedent to allow her visitation with her children. (Id.) It noted that the no-visitation order did not prohibit communication with the children; it prohibited only "face-to-face visits until she could get some track record that she was willing to do some of the conditions necessary . . . ." (P-App 078.)

Turning to the good cause exception under Wis. Stat. § 48.415(1)(c), the Circuit Court rejected Isla's argument that her children were too young to meaningfully interact or bond. (P-App 078-079.) It also commented on "whether there was a direct contact," stating:

> [Isla] may have generally asked how her kids are, but did not elaborate at all with Ms. [C.] or with the social worker and I don't believe that that constitutes general inquiry beyond, you know, are my kids okay or not. That is not a good cause for communicating. What I believe would be addressed as good cause would be how are my kids doing; have they been able to get their doctor appointments done; how were their birthdays; are they okay with their clothing; do they have the necessary supplies; are they healthy; are they having any struggles educationally or learning, you know, do they have speech difficulty. We haven't had any information whatsoever. It's just a void.

(P-App 079-080.) According to the Circuit Court, other than a 2021 visit on Easter, "[t]here was nothing substantial, no real demonstrated desire by mom to have that tie that a parent engages with where they're truly interested in their child . . . ." (P-App 080.)

The Circuit Court acknowledged Isla's periods of incarceration but noted that she was out of custody between December 2020 to June 2021 and between October 2021 and February 2022. (Id.) "During those times, she made no effort at all to make herself regularly available, to attend services, to keep in touch with her social worker." (P-App 080-081.) The Circuit Court found that Isla was offered and provided phones, phone cards, and transportation, but while she would leave messages, she would not receive voicemails at times because her phones had switched. (P-App 081.) It found that she also did not have a consistent address where she could be located. (Id.) In the Circuit Court's view, Isla did not care about or attend to her AODA needs. (Id.)

The Circuit Court conceded that Isla communicated with M.C., the foster mother, but that it was only to ask how the kids were doing before requesting additional supportive services. (Id.) It denied that Isla attempted to attend medical or dental appointments or engage in services to comply with the December no-visitation order—which did

not, in any event, "prevent her from communicating with the children . . . ." (P-App 081-082.)

The Circuit Court did not believe that the County could be blamed for failing to provide Isla services while she was incarcerated, reasoning that "she was in the county jail where the jail only has finite ability of a few things that they can offer as it wasn't an institutionalized prison or treatment-type facility." (P-App 082.) It further explained that Isla needed AODA treatment but that she had history of now following. Therefore, according to the Circuit Court, "there was really no point in the Department setting [services] up for her to have available until she actually was due for release and indicating that she was actually ready, willing, and able to engage, and that never ever happened either in or out of jail." (Id.)

For those reasons, the Circuit Court concluded that the good cause exception to abandonment did not apply. (Id.) It also found Isla to be an unfit parent based on the other ground, failure to assume parental responsibility.

On April 3, 2023, the Circuit Court convened a 48-minute disposition hearing. (R.54.) It found that it was in the best interests of both children that Isla's parental rights be terminated.

C. Postdisposition and Appellate Proceedings

Isla appealed and, upon remand, filed a postdisposition motion on October 13, 2023, arguing that the Circuit Court erred in not granting her request for a short continuance to allow her appear in person and that her trial counsel was ineffective for not submitting any witness affidavits to oppose the County's motion. (R.98.) Undersigned counsel also submitted a three-page, 19-paragraph

affidavit from Isla as an offer of proof to show prejudice on her IAC claim. (R.105.) The Circuit Court convened a *Machner* evidentiary hearing on December 18, 2023. (R.127; P-App 105-39.) Attorney Sebion testified at Isla's request. (P-App 112-33.)

At a hearing on February 13, 2024, the Circuit Court denied the postdisposition motion. (R.133, R.135; P-App 140-56.) The Court of Appeals later affirmed. (P-App 001-022.)

ARGUMENT

I. THE COURT SHOULD GRANT THIS PETITION TO ADDRESS FOR THE FIRST TIME THE EXTENT OF A CIRCUIT COURT'S DISCRETION TO FORCE A LITIGANT TO APPEAR BY VIDEOCONFERENCE, OVER HIS OR HER OBJECTION, AND CONSISTENT WITH DUE PROCESS AND SUBCH. III OF WIS. STAT. CH. 885.

This petition presents an opportunity for the Court to address, for the very first time, a circuit court's exercise of discretion to require a party's appearance by videoconference under subch. III of ch. 885. This petition asks the Court to review the opinion below to analyze these underlying circumstances through the lens of both a parent's due process rights and the requirements of ch. 885.

A. The Court Should Review the Opinion Below Affirming the Circuit Court's Decision Not to Allow Isla to be Physically Present for the Hearing Because It Involves Important Questions of Due Process.

If granted, the petition would afford the Court an opportunity to delineate if and to what extent a TPR parent's due process rights protect against arbitrary decisions to refuse her physical presence at a non-evidentiary hearing. Isla will argue that the Circuit Court violated her due process rights when, without notice, it vacated its

prior order allowing her to appear in person, disregarded the County's role in preventing her from appearing in person, and refused to adjourn the hearing to allow her to appear in person.

The process for deciding when a litigant may be forced to appear by videoconference must be fair. *See* Wis. Stat. § 885.50(3) (declaring "that improper use of videoconferencing technology . . . can result in abridgement of fundamental rights of litigants . . . , unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice"). "[T]he use of video-conference technology is expressly '[s]ubject to' an individual's right 'to be physically present in the courtroom.'" *Racine County v. P.B.*, 2022 WI App 62, ¶ 21, 405 Wis. 2d 383, 983 N.W.2d 721.

The federal and state constitutions promise due process of law. The due process clause "guarantees more than fair process" as it also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Heightened procedural safeguards are necessary to protect parents' fundamental liberty interests in TPR proceedings:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it

> must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

"Accordingly, 'a proceeding to terminate parental rights addresses a fundamental right which requires judicial protection.'" *State v. Lavelle W.*, 2005 WI App 266, ¶ 2, 288 Wis. 2d 504, 708 N.W.2d 698 (citation omitted). "But 'judicial protection' is meaningless unless a person whose fundamental rights may be abridged has an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* Affording parents a meaningful opportunity to be present has many justifications: "Ideally, a person whose parental rights the State seeks to terminate should be present at the proceedings, so he or she can not only see and hear what is going on and assess the witnesses' demeanor, *but also assist his or her lawyer without any undue difficulties*." *Id.* ¶ 3 (emphasis added).

Turning to the test for procedural protections, due process requires that the parent be afforded safeguards if they are appropriate upon a balancing of three factors: "[1] the private interests affected by the proceeding; [2] the risk of error created by the State's chosen procedure; and [3] the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754 (citing *Lassiter v. Dept. of Social Services*, 452 U. S. 18, 27-31, 37-48 (1981)).

First, the private interest in being physically present in a courtroom, particularly alongside one's counsel, when there is the prospect that judgment may be pronounced is no trivial matter. In addition to commentary from *Lavelle W.* quoted above, this Court has explained:

> Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," *see Cox v. Louisiana*, 379 U.S. 536, 583 (1965) (Black, J., dissenting), so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding. Finally, requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom. *See generally* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089 (2004).

State v. Soto, 2012 WI 93, ¶ 23, 343 Wis. 2d 43, 817 N.W.2d 848.

Indeed, at the *Machner* hearing, Attorney Sebion testified to her surprise upon observing that Isla was not present in person on November 15, 2022. (P-App 126.) Agreeing that there are benefits to having the client there in person, Attorney Sebion explained that Isla's presence would have made it easier "[f]or her to ask questions, for her to add input, for me to be able to communicate with her and explain what's going on." (Id.) The benefits, she added, are "probably endless, honestly." (Id.)

Second, the risk of error created by barring Isla's in-person presence was real given that the circumstances effectively minimized and deterred attorney-client interaction. The summary judgment hearing included argument from the attorneys about whether Isla should summarily be found to be an unfit parent of her two children. If Isla wanted to whisper something to her counsel or slip her counsel a note, her only option would have been to bring the hearing to a halt by calling aloud or motioning her arms. Even then, at best, Isla would only have been placed in a computerized "breakout room" with her

attorney, disrupting the flow of the hearing. At worst, her interruption of the hearing would have been met with a rebuke from the Circuit Court. Either way, Isla's teleconference appearance was not tantamount to an in-person appearance alongside her attorney, as she had duly requested (and that, but for the County's neglect, would have occurred).

Finally, Isla cannot think of any countervailing governmental interest. During briefing, the County suggested that the countervailing governmental interest in not allowing Isla to appear in person was economics. This is a remarkable position. The County was *ordered* to file a writ to have her produced for the hearing. Disobeying a court order to save gas money is not a legitimate governmental interest. While one might be tempted to argue that barring her from the hearing and denying her request for a short adjournment would bring about a more expeditious final disposition for her children, quite the opposite is actually true. If anything, barring Isla from the hearing has only prolonged matters, as exemplified by this appeal. Consequently, under the circumstances here, barring Isla from an in-person appearance alongside her attorney violated her right to due process of law.

In rejecting this argument during postdisposition proceedings, the Circuit Court reasoned that it is not even necessary that a summary judgment hearing be held and that, because there was no risk that Isla's parental rights would be terminated at the hearing, she did not have a due process right to be there in person. (P-App 144-45.)

The Circuit Court's explanation misses the point. Isla *does not* argue that parents have a due process right to be present in person at summary judgment hearings. However, if process is offered, it must

be fair, and unfairness cannot be excused simply because a particular process, like a summary judgment hearing, is optional. Whether or not judgment was to be pronounced that day, the Circuit Court granted Isla's request to be at the summary judgment hearing in person, giving both Isla and her attorney the unquestionable expectation that that would occur. And but for the neglect of the *adversary party*, Isla would have been there, in person, beside Attorney Sebion. Isla had a due process right to just that.

The Court should grant this petition to weigh in on this issue of statewide importance to Wisconsin litigants.

B. The Court Should Review the Opinion Below Affirming the Circuit Court's Decision to Force Isla to Appear by Videoconference Because the Law on Judicial Exercises of Discretion Under Subch. III of Ch. 885 is Woefully Underdeveloped.

As an issue of first impression, the Court should take this opportunity to interpret and develop the law on subch. III of ch. 885, the statutes governing the use of teleconferencing technology in Wisconsin.

The County insisted in the courts below that ch. 885 does not apply to TPR cases. The Court of Appeals then declined to address the issue, leaving the question open. The Court should grant review to clarify that ch. 885 does, in fact, apply to TPR cases.

Subch. III of ch. 885, titled "Use of Videoconferencing in the Circuit Courts," contains an "[a]pplicability" statute, Wis. Stat. § 885.64, which states in relevant part that "[t]he provisions of this subchapter shall govern the procedure, practice, and use of videoconferencing in the circuit courts of this state" and that

> [a]ll circuit court proceedings, with the exception of proceedings pursuant to s. 972.11 (2m), that are conducted by videoconference, interactive video and audio transmission, audiovisual means, live audiovisual means, closed-circuit audiovisual, or other interactive electronic communication with a video component, shall be conducted in accordance with the provisions of this subchapter.

§ 885.64(1), (2).

Subch. III also contains a "[s]tatement of intent" statute, Wis. Stat. § 885.50, which states, *inter alia*, that "it is the intent of the Supreme Court that circuit court judges be vested with the discretion to determine the manner and extent of the use of videoconferencing technology, except as specifically set forth in this subchapter." § 885.50(1).

Furthermore, subsections (1) and (2)(a) of Wis. Stat. § 885.60, titled "[u]se in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980," instructs that ch. 885 does, indeed, govern appearances by videoconference in TPR hearings:

> (1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in *any* criminal case or *matter under chs. 48*, 51, 55, 938, or 980, permit the use of videoconferencing technology in *any pre-trial*, trial or fact-finding, or post-trial proceeding.
>
> (2)
>
> (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings.

(Emphases added).

Additionally, this Court published statements of intent as annotations to Wis. Stat. § 885.60, one of which states:

> It is the intent of s. 885.60 *to scrupulously protect the rights of . . . respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such litigants the right to be physically present in court at all critical stages of their proceedings*. This section also protects such litigants' rights to adequate representation by counsel by eliminating *the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court*.

S. Ct. Order 07-12, 305 Wis.2d at xlviii (emphases added).

Having established that ch. 885 applies, Isla further argued that the Circuit Court erred when it decided to proceed with oral arguments, giving her no choice but to appear by videoconference, without ever considering Wis. Stat. § 885.56, titled "[c]riteria for exercise of court's discretion." "If an objection is made by the . . . respondent in a [TPR case], regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56." § 885.60(1)(d).

Wis. Stat. § 885.56 "sets forth criteria to guide the court's exercise of discretion when considering a motion to permit the use of videoconferencing technology . . . ." *State v. Atwater*, 2021 WI App 16, ¶ 18, 396 Wis. 2d 535, 958 N.W.2d 533. Therefore, when the Circuit Court originally granted Isla's request to appear in person, only to vacate that order and force her to appear by videoconference just

minutes before the oral arguments, it did so as an exercise of discretion subject to § 885.56(1).

Wis. Stat. § 885.56(1) states in relevant part:

> 885.56 Criteria for exercise of court's discretion.
>
> (1) In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the circuit court may consider one or more of the following criteria:
>
> (a) Whether any undue surprise or prejudice would result.
>
> (b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.
>
> (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
>
> (d) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
>
> (e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.
>
> (f) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

> (g) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.
>
> (h) Whether the participation of an individual from a remote location presents the person at the remote location in a diminished or distorted sense such that it negatively reflects upon the individual at the remote location to persons present in the courtroom.
>
> (i) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding so as to undermine the integrity, fairness, and effectiveness of the proceeding.
>
> (j) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom.
>
> (k) Waivers and stipulations of the parties offered pursuant to s. 885.62.
>
> (L) Any other factors that the court may in each individual case determine to be relevant.

The Circuit Court never addressed Wis. Stat. § 885.56, either at the summary judgment hearing itself or when given another chance at the postdisposition hearing. This was an erroneous exercise of discretion.

Instead, at the summary judgment hearing, the Circuit Court ruled, seemingly as a matter of law, that Isla was not entitled to be present in person with her attorney because the hearing was non-evidentiary. (P-App 036-037.) But this is not the law. *See Dane Cnty. DHS v. Mable K.*, 2013 WI 28, ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198

(stating that a circuit court properly exercises its discretion only if "it examines the relevant facts, *applies a proper standard of law*, and using a demonstrated rational process reaches a conclusion that a reasonable judge could reach" (emphasis added)).

Moreover, on these facts, § 885.56(1) clearly militated against the use of remote videoconferencing. Isla and Attorney Sebion were unpleasantly surprised and prejudiced by her remote appearance. Just as clearly, the County failed to undertake "diligent effort[s]" to secure her in-person appearance. Given that these were TPR proceedings, Isla had a "fundamental interest" at stake. Finally, as to "[a]ny other factors that the court may in each individual case determine to be relevant[,]" Isla pointed to the obvious: the Circuit Court *ordered* the County to file a writ to guarantee her in-person appearance. There was no legitimate excuse for why Isla was not present alongside her attorney at the summary judgment hearing. Because denying her request for an adjournment and proceeding without her in-person presence violated her statutory rights and constituted an erroneous exercise of discretion, the Circuit Court should have vacated its partial summary judgment ruling.

The Court should grant this petition to provide guidance to lower courts on how to apply these statutes.

II. THE COURT SHOULD GRANT THIS PETITION TO ADDRESS FOR THE FIRST TIME WHICH PARTY ON SUMMARY JUDGMENT HAS THE BURDEN OF PRODUCING PRIMA FACIE EVIDENCE REGARDING THE GOOD CAUSE EXCEPTION TO ABANDONMENT UNDER WIS. STAT. § 48.415(1)(c).

The Court should review this case to clarify the law as it applies to Wis. Stat. § 48.415(1)(c). First, it should recognize that the 1995

amendments to § 48.415(1)(c) abrogated case law holding that it contained a rebuttable presumption. *See Odd S.-G. v. Carolyn S.-G.*, 194 Wis. 2d 365, 372, 533 N.W.2d 794 (1995); *T.P.S. v. G.D.*, 168 Wis. 2d 259, 266, 483 N.W.2d 591 (Ct. App. 1992). Second, the Court should now hold that, when the government moves for partial summary judgment, it must produce prima facie evidence that § 48.415(1)(c)'s "good cause" exception to abandonment doesn't apply.

The predecessor to the current version of § 48.415(1)(c) (1993-94) provided that: "A showing under par. (a) that abandonment has occurred may be rebutted by other evidence that the parent has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being."

Interpreting the predecessor version, the Court held in *Odd S.-G.* that, once the government proved the elements of abandonment by clear and convincing evidence, a rebuttable presumption of abandonment was established, which the parent opposing the petition could rebut by a preponderance of the evidence. This reaffirmed the holding provided by the Court of Appeals in *T.P.S.*

Following these opinions, the Legislature passed a series of laws which overhauled the language of § 48.415(1)(c). The 1995 amendments to § 48.415(1)(c) removed the above provision, including the word "rebutted," and replaced it with the current "good cause" exception to abandonment. It now reads:

> (c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.
>
> 3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
>
> > a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
> >
> > b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

§ 48.415(1)(c) (2021-22).

Although no court has addressed the impact of the 1995 amendments on *Odd S.-G.* and *T.P.S.*,[2] the Court of Appeals has repeatedly held, without analysis, that *Odd S.-G.* remains good law. Yet, it is clear that the Legislature intended a change. *See Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296 ("The legislature is presumed to act with full knowledge of existing case law when it enacts a statute.").

[2] To be more precise, at least one Court of Appeals opinion spotted this issue: "The parties use [*Odd S.-G.* and *T.P.S.*] and the language of 'rebuttable presumption' to present the framework for our analysis, apparently assuming that there is a rebuttable presumption under the current version of § 48.415(1)(c), even though the term 'rebutted' no longer appears in the statute." *Stacy A.T. v. Matthew J. S. (In re Dyllan M.S.)*, 2006 WI App 244, ¶ 15, 297 Wis. 2d 586, 724 N.W.2d 704 (unpublished, single-judge op.) (P-App 159-66).

Isla does not dispute that the current version of § 48.415(1) has a similar structure to its predecessor insofar as it places the burden of persuasion on the State to prove the elements of abandonment by clear and convincing evidence and on the parent to prove the good cause exception to abandonment by a preponderance of the evidence. However, the burden of persuasion and the burden of production are separate concepts. As the Court long ago explained:

> The phrase "burden of proof" is used in the sense of burden of persuasion rather than who has the burden of going forward with the evidence. The burden of going forward with the evidence is a procedural device for the orderly presentation of a case, and shifts to the other party when a prima facie case has been established. The trial court was correct in stating that the allocation of this burden is of no significance as long as a fair hearing is conducted. The burden of persuasion, however, never shifts -- it remains on the same party throughout the whole case. As this court said in *Murphy v. Estate of Skinner* (1915), 160 Wis. 554, 564, 152 N. W. 172:
>
> > ". . . It is not accurate to say that the burden of proof has been shifted because a prima facie case has been made. Where the plaintiff has the burden of proof at the beginning of a trial it remains with him to the end."

Reinke v. Pers. Bd., 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971).

The Court should grant this petition and hold that the burden of producing prima facie evidence of the good cause exception under § 48.415(1)(c) should lie with the movant for summary judgment. The reasons are threefold.

First, the good cause exception is just that: an *exception*, not a *presumption* or a *defense*. If the elements of good cause are present, then an abandonment has not occurred, by definition. In other words, the plain meaning of the statutory language—specifically,

"Abandonment is not established under par. (a) 2. or 3. if . . ."—is to limit the definition of abandonment provided in § 48.415(1)(a)2.-3.

An exception is different from a *presumption*. If it was meant to be a presumption, then the Legislature would have kept the word "rebutted" and would have, instead, stated, "A presumption that abandonment is not established under par. (a) 2. or 3. arises if . . . ." But that language is conspicuously absent.

Likewise, an exception is different from a *defense*, where the existence of certain elements, if proved, entitle the defending party to a finding in its favor. Take self-defense, for example. If the elements of self-defense are proved, it is untrue to say that an assault didn't occur but, rather, that an assault was justified under the law. Similarly, if the statute of limitations of an offense has run, it is untrue to say that a theft didn't occur but, rather, that a theft was untimely charged under the law.

What are the consequences of an exception to abandonment? One consequence is that, to show that it is entitled to judgment without a trial, the government must address the *entire* definition of abandonment. In other words, requiring the government to establish that there is no genuine dispute of material fact that an abandonment occurred includes a prima facie showing that the parent cannot establish that there is no genuine dispute of material fact that, through an exception to its definition, an abandonment *did not* occur.

Second, due process requires that the government must have the burden on every fact necessary to prove that a parent is unfit and that the burden must be met by clear and convincing evidence and to a reasonable certainty. *See Steven V. v. Kelley H. (In re Alexander V.)*, 2004 WI 47, ¶ 4, 271 Wis. 2d 1, 678 N.W.2d 856 (citing *Santosky v.*

Kramer, 455 U.S. 745 (1982)). This burden of proof is steeper than the parent's burden to prove the good cause exception, which requires only a preponderance of the evidence.

The disparity between these evidentiary thresholds supports making the government responsible for the burden of production on the good cause question in the context of summary judgment. To find for the government on the ultimate issue of fact—i.e., whether an abandonment occurred—the factfinder must be reasonably certain that the credible evidence supporting a finding of abandonment clearly has greater weight and more convincing power than the evidence opposing it. *See* Wis JI-Children 313 (2024). But if the credible evidence shows that it's more likely than not that the parent had good cause for not visiting or communicating with her children, then the parent didn't, in fact, abandon them.

Accordingly, to be reasonably certain that no reasonable factfinder could disagree that the evidence of abandonment is clear and convincing such that it complies with due process, the government must produce *some* evidence that the good cause elements—which, if found, exclude the existence of an abandonment—aren't present.

Finally, while, at trial, the burdens of both production and persuasion usually lie with the same party, the summary judgment methodology under Wis. Stat. § 802.08 does not require this arrangement. In fact, it routinely requires the movant to make a prima facie case from the record on an issue for which the non-movant has the burden of persuasion. Consider civil cases. If the defendant seeks summary judgment on one or more of the plaintiff's claims, it cannot baldly assert that the plaintiff lacks evidence to support them. Rather, the defendant must point to the record to

affirmatively show that the plaintiff lacks evidence to support those claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Leske v. Leske*, 197 Wis. 2d 92, 97-98, 539 N.W.2d 719 (Ct. App. 1995); *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993).

Indeed, in one unpublished TPR opinion, the Court of Appeals raised this rule in relation to the good cause exception to abandonment. *See In re A.K. v. S.J.A.*, 2020 WI App 18, ¶ 17, 391 Wis. 2d 496, 942 N.W.2d 498 (unpublished, single-judge op.) (P-App 167-74). On the one hand, it explained that the parent "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." *Id.* (citing *Odd S.-G.*, 194 Wis. 2d at 372). On the other hand, in the very same paragraph, it cited case law "noting that '[t]he burden is on the moving party to demonstrate a basis in the record' showing that [the] nonmoving party lacks evidence on [a] point on which [the] nonmoving party bears [the] burden of proof." *Id.* (quoting *Leske*, 197 Wis. 2d at 97-98).

Clearly, the lower courts would benefit from this Court's input on the burden that applies to the current version of the good cause exception to abandonment under § 48.415(1)(c).

CONCLUSION

For the foregoing reasons, Isla respectfully requests that the Court grant this petition.

Dated this 13th day of May, 2024.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. RULE 809.19(8g)(a)

I hereby certify that this petition for review meets the form and length requirements of Wis. Stat. Rules 809.19(8)(b), (bm), and (c), and 809.62(4), as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this petition for review is **7,932 words**.

Dated this 13th day of May, 2024.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. RULE 809.19(8g)(b)

I hereby certify that separately filed with this petition for review is an appendix that complies with Wis. Stat. Rules 809.19(2)(a) and 809.62(2)(f) and (4), and that contains:

(1) A table of contents;

(2) The decision and opinion of the court of appeals;

(3) The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

(4) Any other portions of the record necessary for an understanding of the petition; and

(5) A copy of any unpublished opinion cited under Rule 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of May, 2024.

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