State of Wisconsin
Supreme Court
Case No. 23 AP 1946 & 23 AP 1947

In re the termination of parental rights to J.K. and N.K., persons under the age of 18:

Dane County Department of Human Services,
Petitioner-Respondent-Respondent,

vs.

J.K.,
Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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CRITERIA FOR REVIEW

While the issues here also involve the exercise of court discretion, there is precedent for courts granting discretionary appellate review even where the only issue presented is the discretionary actions of the circuit court and the Court of Appeal's review of those issues. *See State v. Grant,* 139 Wis. 2d 45, 406 N.W.2d 744 (1987) (single issue was whether the court of appeals

properly applied the harmless-error rule to the trial court's erroneous admission of other-acts evidence) and *In the Interest of X.S.*, 2022 WI 49 (a reversal of a discretionary juvenile waiver decision by a trial court.). Given the nature of the rights involved in this case, it may be worthy of review by this court.

STATEMENT OF CASE

On April 22, 2022, the Dane County Department of Health and Human Services filed a petition to terminate the parental rights of J.K. (mother) to her children, Janet and Nancy[1]. (Record, 4:1)[2]. The petition alleged three grounds for termination: abandonment as defined in Wis. Stat. § 48.415(1)(a)2., continuing need of protection and services as defined in Wis. Stat. § 48.415(2)(a), and failure to assume parental responsibility as grounds for termination as defined in Wis. Stat. § 48.415(6)(a). (4:1).

J.K. contested the petition, and the public filed a motion for partial summary judgment as to unfitness. (33:1).

Summary Judgment

In its motion, the public argued that there was no material dispute as to the abandonment ground for termination and filed

[1] Pseudonyms are used for the children for ease of reading and to preserve confidentiality.
[2] All references to the record are to case 23AP1946, unless otherwise noted.

affidavits in support of the motion. (33:1).

J.K. opposed the public's motion for partial summary judgment, arguing good cause, and filed three exhibits in support of her response. (35:1, 36:1, 37:1, 38:1).

The public filed a reply to J.K.'s response to the motion for partial summary judgment. (39:1). In its reply, the public argued that J.K. failed to set forth facts showing a genuine issue of material fact because her response was not supported by affidavits or other evidence and asserted that there was no issue of material fact as to good cause, as supported by the additional affidavits. (39:1).

On February 13, 2023, the circuit court issued a decision and found that J.K. had not demonstrated a material issue of fact as to good cause sufficiently to oppose the motion. (44:1, Appendix). In its written decision, the circuit court granted the motion for partial summary judgment as to J.K. (44:1, Appendix).

The reasoning of the court was that:

> In support of her good-cause defense based on her mental health, J.K. presents, through affidavits of her counsel and a paralegal, a number of medical documents documenting that she sought treatment for mental illness several times during the three-month period. These documents are not properly considered by the court in summary judgment without the foundation of an affidavit based on first-hand knowledge. *See* Wis. Stat. § 802.08(3).
>
> Even if the court considers the medical documents, at best

they show that J.K. intermittently sought, and in some instances received, medical attention for her mental health symptoms during the relevant period. It does not show that her mental illness precluded her from visiting or communicating with her children for the entire period. Likewise, J.K.'s deposition testimony that she was "dealing with mental health stuff" supports a reasonable inference that she was experiencing mental illness during the relevant time period, but it is not sufficient to create a genuine issue of material fact that her mental illness precluded her from visiting or communicating with her children. As the Department points out, proof of this fact would generally require expert testimony. *See Brown Co. v. B.P.*, 2019 Wis. App. 18, ¶45, 386 Wis.2d 557, 927

N.W.2d 560 (upholding summary judgment against parent, where record lacked evidence showing how or why parent's mental health problems prevented him from visiting or communicating with child). Evidence in the form of an affidavit from J.K. describing the severity and duration of her symptoms, and their effect on her ability to visit or communicate with the children, might also be sufficient to create a material factual dispute. But J.K. does not provide such evidence of such facts, and the court is left to speculate about how her mental illness affected her. *Cf. B.P.*, ¶ 47.

Even if J.K. had produced sufficient facts to create a factual dispute regarding a good-cause defense for her failure to visit her children, she does not produce sufficient facts to excuse her failure to communicate with the children for the relevant period. J.K. argues that the age of the children is sufficient good cause to excuse her lack of communication with them for over three months. The children, born on July 20, 2020, were between 11 and 14 months old during the period alleged in the petition. J.K. asserts that anything short of in-person visits (letters, texts, phone calls, or Zoom videoconferences) would not have been an efficient or effective means of communicating with these very young children. She states that the Department conceded that Zoom

visits are "not the same" as an in-person visit. She concludes that in-person visits were the "best and only way" for her to communicate with the children, providing a good-cause excuse for her failure to communicate with them by other means.

Again, the petitioner fails to present sufficient evidence under Wis. Stat. § 802.08(3) to show a genuine issue of material fact supporting this proposed good-cause defense. The age of the children is not sufficient, standing alone, to raise a good-cause defense for the parent's failure to communicate by any means for over three months.

Phone or video communication with a very young child, even if one-way due to the age of the child, is not necessarily meaningless. It may help the child maintain familiarity with the parent's voice and appearance, and likewise may assist the parent in understanding and tracking the child's growth and development. An affidavit by an expert witness that videoconferencing with children of that age is harmful or inappropriate, or an affidavit from J.K. or an observer that attempts at videoconferencing had been unsuccessful or disruptive, could create a dispute of material facts on this potential good-cause defense. J.K. does not present such evidence.

J.K. does not meet her burden of showing a material factual dispute regarding good cause for her failure to visit or communicate with the children for the relevant period. Accordingly, the court need not address whether there is a material factual dispute regarding J.K.'s communication with the foster parent or the Department under Wis. Stat. § 48.415(1)(c).

Because J.K. has not met her burden of showing a genuine issue as to any material fact regarding the alleged ground of abandonment under Wis. Stat. § 48.415(1)(b), the Court must grant partial summary judgment to the petitioner on this ground. (44:1, Appendix)

Disposition Hearing

The disposition hearing took place on March13, 2023. (64:1) Testimony was received from Dr. Claire Patterson, Paula Kedzie, ongoing social worker, A.A., foster parent, Katheryn Roman, social services specialist, Cheryle Wade, social services specialist, and J.K., the mother. (64:10, 64:25, 64:97, 64:128, 64:175, 64:246)

J.K. testified that she loves both her children. (64:246) She has been consistent with her visits with the children. (64:246) She has been meeting with her therapist weekly. (64:247) She has started using a different medication that is helping her now. (64:247) She is better mentally and financially at the present time. (64:247) J.K. is looking to better herself and stay out of trouble. (64:247) There are no words to describe how much she loves her children. (64:247) The best place for her children is to be with her. (64:248-9)

Following the dispositional hearing testimony and argument, the circuit court entered an order terminating J.K. parental rights to her children. (64:1, 54:1). J.K. filed a notice of intent to seek post disposition relief pursuant to Wis. Stat. § 809.107(2)(bm). On October 18, 2023, J.K. filed a notice of appeal pursuant to § 809.107(5)(a).

On November 16, 2023, J.K. filed a motion to remand the case to the circuit court for the purpose of postdisposition fact finding, pursuant to Wis. Stat. § (rule) 809.107(6)(am). On November 22, 2023, the court of appeals granted the motion for remand, in order to

preserve issues for appellate review.

Postdisposition Proceedings

J.K. filed a postdisposition motion alleging that trial counsel was ineffective for not having filed an affidavit of J.K. with the response to Dane County's motion for summary judgment. (104:1) The postdisposition motion supplemented the response to the summary judgment motion by setting forth the deficient information from the original summary judgment response. *Id*. The supplemented response included, during the relevant time period, that.:

1. During the time period from June 17, 2021, to November 5, 2021, J.K. did frequently communicate with the department and that she had good cause for having failed to visit or communicate otherwise.
2. J.K. will testify that had she known that it was necessary, she would have signed an affidavit averring to the following facts:
3. J.K. believed she had good cause for failing to visit or communicate with her children during the alleged abandonment period.
4. On 7/16/21, Ms. Kedzie wrote a letter to J.K. which indicated "we have put your visits with Janessa and Nevaeh on hold as you have missed the last three." The letter does not give J.K. any guidance as to how to get visits reinstated other than, "Please give me a call so we can schedule a time to meet and to discuss this further."
5. On 9/22/21, Ms. Kedzie engaged in email correspondence with J.K.'s PACT case manager (Liz Macpherson). In that correspondence, when Ms. Macpherson inquired about visits, wanting PACT not to interfere with them, Ms. Kedzie informed Ms. Macpherson that Ms. Kedzie "had to put these visits on hold because [J.K.] missed too many of them." Ms.

Kedzie then stated, "I really need to meet with her or have someone else meet with her as we need her permission to continue services with Birth to Three." When Ms. Macpherson replied that PACT staff will be seeing J.K. every day at 1 at the Y and offer to assist with obtaining signatures, Ms. Kedzie responded, "I don't need to be there."

6. On 9/23/21, Ms. Kedzie engaged in email correspondence with J.K.'s case manager at the Y (Carmin Valerdi). In that correspondence, Ms. Kedzie was informed that J.K. does not want to sign the Birth to Three consents without an explanation. Ms. Kedzie is further told that J.K.'s phone does not work, but that J.K. is open to Ms. Kedzie stopping by the Y. This exchange resulted in a meeting being scheduled at the Y for 9/29 at 1:30. On 9/29 at 11, Ms. Kedzie texted J.K. to say that she needs to reschedule their meeting.
7. On 9/24/21, Ms. Kedzie conducted a home visit at the foster home and was told by the foster parent that the foster parent "heard from [J.K.] on 8/6 and they messaged back and forth."
8. On 10/5/21, Ms. Kedzie engaged in email correspondence with Ms. Macpherson. Ms. Macpherson informed Ms. Kedzie that J.K. was still hesitant to sign the Birth to Three consents and, further, J.K. believed "some worker" was supposed to meet with her and did not show. In response, Ms. Kedzie indicated that she will ask the Court for permission to sign the consents. Ms. Kedzie filed a revision request to transfer legal custody to the Department the next day.
9. On 10/13/21, there was a text exchange between Ms. Kedzie and J.K. about setting up a meeting for the next day; on 10/14/21, J.K. indicates early the following week is better for meeting.
10. On 10/26/21, Ms. Kedzie met with J.K. at the Y. She learned that J.K. has reconnected with PACT and that PACT brings her medications to her every weekday. A plan to restart visits next week was discussed: the visit supervisor will pick J.K. up and they will go together to get the girls from daycare. In the meeting, J.K. also mentioned waiting for Ms. Kedzie to come to an appointment in the recent past and that Ms. Kedzie never showed up.
11. On 7/10/21, J.K. went to the Meriter ER, reporting feeling

depressed. When asked if she felt like she wanted to be admitted, she indicated "I don't know what else to do." She admitted that she had not been taking her medications and was unable to offer an explanation. She was discharged home and encouraged to follow-up with her providers.

12. On 7/17/21, J.K. called Journey Mental Health reporting "I am not doing well," but could report nothing more by way of explanation than "I feel like people are laughing at me." The assessment notes indicate "J.K. spoke softly and was hard to understand as her speech was sometimes mumbled. She may be attending to internal stimuli as there were long pauses each time I asked her a question."
13. On 8/14/21, J.K. was transported to the Meriter ER by ambulance. While the initial complaint was for chest pain, J.K. told ER staff that she was there for depression and "wants her mind to feel better." The notes reflect, "Patient seems very depressed, despondent, very meek, poor eye contact, barely audible voice, patient appears reluctant to say much at all to anyone and here in the ER." She was discharged after a couple of hours.
14. On 8/19/21, J.K. was transported to the Meriter ER by ambulance after a bystander found her "altered/non-responsive." She was held overnight for observation and released to PACT (Ms. Macpherson) the next morning.
15. On 8/21/21, J.K. was brought to the Meriter ER after she called 911 multiple times but didn't say anything. J.K. was non-verbal, but nodded and shook her head in response to questions. She indicated that she was agreeable to a voluntary admission, which the on-call psychiatrist supports, but it was determined that Meriter does not have a bed. When UW hospital is called about a bed, UW told Meriter that they do not believe she meets the criteria for one of their beds. J.K., therefore, was discharged after approximately 5 hours.
16. On 9/12/21, J.K. was transported to Meriter ER by ambulance. She was able to answer questions and reported that she was "confused." She was not taking any medications. Nursing notes indicate, "Patient is feeling increased depression, and finding herself overwhelmed." A social work consult was done, the result of which was a plan to discharge

J.K. to the Dane County Care Center "for stabilization and restart on medications." Medications were then restarted by her prescribing psychiatrist.

17. On 9/14/21, the Dane County Care Center discharged J.K. to her PACT worker. The summary notes, inter alia, J.K. was "unable to complete the intake process with staff due to her mental health hindering her ability to speak with staff." Further, J.K. "struggled with eating, drinking and proper hygiene."
18. Upon picking her up from the Dane County Care Center, Ms. Macpherson took J.K. back to the Meriter ER, where J.K. was ultimately admitted and remained until discharged on 9/20/21.
19. Phone contact with her children would have been meaningless due to her children's ages and their lack of verbal abilities at the time.
20. J.K. had communicated with the department and made attempts to comply with its requirements for her children's return to the home and resuming visitation with her children.
21. J.K. was afraid to overly communicate with the department because her previous attempts had been used against her and she feared adverse legal action.
22. The department did not inform her of her right to continue to communicate with her children and the foster family despite the suspension of her visits.

The court conducted a hearing on January 19, 2024, where testimony was received from trial counsel. (120:1) Trial counsel believed that, in retrospect, he would have provided an affidavit that included the supplemented information and he acknowledged that his response to the summary judgment motion was deficient. (120:25)

Following the postdisposition hearing, the postdisposition

court[3] affirmed the trial court's decision to grant partial summary judgment and found that there was no ineffective assistance of counsel in this case. (120:37) The postdisposition court reasoned that:

> I didn't hear any testimony from her today at all. And so I'm trying to figure out how we get to the good cause. And the position that it puts an attorney like Mr. Gonring, where as Ms. Dorman pointed out, he doesn't think there's a medical professional that he could rely on for an affidavit. And then based on his experience with the client, doesn't believe that there is sufficient facts that could be alleged in an affidavit to oppose summary judgment.
>
> And I believe he was asked about what could he have put in an affidavit for J.K.. And he said that he thinks that he would have been able to, with a straight face, not his words, mine, provide texts that she sent to the Department staff. And then there was a question about whether he thought that she would be able to either locate the texts or testify as to the texts, I believe it was. And he said that, based on his experience with her, that he didn't think that she would be able to do that.
>
> And then the second area, where he said that he thought that he could have submitted an affidavit, would have been with regards to her trips to the hospital and her mental care. But even if that were the case, I do believe that that requirement that there be an expert helping the Court understand how her mental health impacted her during the period of abandonment and caused her not to be able to communicate or have contact with the children, having that information in an affidavit would not have been enough, I think, to defeat summary judgment without something from

[3] The judge in the postdisposition proceeding was different from the judge in the pre-disposition proceeding. This court is thus referred to as the postdisposition court.

> an expert.
>
> So I think where that leaves the Court is whether or not Attorney Gonring could be held to have acted deficiently in this case, based on his assessment of the matter when he was working on the summary judgment motion? I do know that he indicated that there are things he might have done differently, but even with that, I don't think that would have been enough to overcome the summary judgment standard and show that there was a genuine issue of material fact. So even though there is evidence of contact with the foster parents, we don't get there until we can show good cause. And I think it would be difficult to show that if the Court were to reverse my colleague, Judge Crawford, and allow this to go to trial.
>
> So based on everything that I've heard today, I don't believe that the standard has been met. I don't believe that I can find Attorney Gonring acted deficiently, and I don't think we would be able to get to any prejudice to her.

J.K. appealed the decisions of both the circuit court and the post-disposition court. In a decision dated March 28, 2024, the court of appeals affirmed the circuit court orders. (Appendix.) J.K. now petitions for review.

ARGUMENT

I. The circuit court erred when it granted the petitioner's motion for partial summary judgment.

A. Standard of Review

Appellate courts review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

With respect to summary judgment in a proceeding for termination of parental rights (TPR), the court in *Bobby G.* at ¶ 15 explains that partial summary judgment at the grounds phase of a termination of parental rights proceeding is permitted, although the court has also acknowledged that not all termination of parental rights cases are suited for partial summary judgment. The court has explained that "[t]he grounds for unfitness most likely to form the basis of a successful motion for partial summary judgment in a [termination of parental rights] case are those that are sustainable on proof of court order or judgment of conviction, the reliability of which is generally readily apparent and conceded. *Id*.

The court has cautioned that "[i]n many [termination of parental rights] cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the

adjudication of parental conduct vis-à-vis the child." The court has further explained that" summary judgment will ordinarily be inappropriate in [termination of parental rights] cases premised on these fact-intensive grounds for parental unfitness. The court has instead stressed that "[t]he propriety of summary judgment is determined case-by-case." *Id.* at ¶¶39-40.

B. Summary judgment legal principles.

"Parental rights termination adjudications are among the most consequential of judicial acts, involving as they do 'the awesome authority of the state to destroy permanently all legal recognition of the parental relationship.'" *Steven V. v. Kelley H.*, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856. A parent's interest in the parent-child relationship is a fundamental liberty interest under the due process clause of the fourteenth amendment. Thus, "[w]hen the state seeks to terminate familial bonds, it must provide a fair procedure to the parents, even when the parents have been derelict in their parental duties." Brown county v. Shannon R., 2005 WI 160, ¶¶18-19, 286 Wis. 2d 278, 706 N.W.2d 269.

"The protection of a parent's interests in termination of parental rights proceedings is particularly important in light of the 'vast disparity in an involuntary termination case between the ability of the state to prosecute and the ability of the parent to defend.'" Id. ¶62. The United States supreme court has described the challenge a parent faces in defending herself against the involuntary termination

of parental rights as follows:

> The state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The state's attorney usually will be an expert on the issues contested and the procedures employed at the fact-finding hearing and enjoys full access to all public records concerning the family. The state may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the state has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the state even has the power to shape the historical events that form the basis for termination. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

Therefore, "[a]lthough they are civil proceedings, termination of parental rights proceedings deserve heightened protections because they implicate a parent's fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. at 769.

C. Abandonment is generally not subject to summary judgment.

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, abandonment is not shown if a parent proves all the following:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified …
2. That the parent had good cause for having failed to communicate with the child throughout the time period specified …

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:

3. 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, 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.
4. 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.

Wis. Stat. § 48.415(1)(c). The above is referred to as the "good cause" exception.

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., 271 Wis. 2d 1, ¶6. "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.

Summary judgment "will ordinarily be inappropriate in TPR cases premised on fact-intensive grounds for parental unfitness" such as abandonment. *Steven V.,* 271 Wis. 2d 1, ¶36. Inferences from the facts, such as whether her children's age prevented meaningful communication would have been drawn in J.K.'s favor. Inferences drawn from the facts alleged "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." *Lambrecht v. Estate of Kaczmarczyk,* 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

Further, our supreme court has held that 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." *Steven V. v. Kelley H.,* 2004 WI 47, ¶48 n.8, 271 Wis. 2d 1, 678 N.W.2d 856.

D. The grant of partial summary judgment was inappropriate in this case.

The circuit court in its grant of partial summary judgment focused on the medical information that was provided in the response, stating that it required expert testimony to be properly considered, relying on *Brown County v. B.P.*, 2019 Wis. App 18, ¶36, 386 Wis. 2d 557, 927 N.W.2d 560. What the trial court failed to consider was the other information provided by J.K. regarding the time period alleged from June 17, 2021, to November 5, 2021.

There was evidence that J.K., on August 8, 2021, had been in contact with the foster home and that J.K. and the foster home had "messaged back and forth." (36:3) This fact interrupts the three-month time period of abandonment in that it is arguable that this is a "communication with the child."

Even if the above contact is not considered to have been contact with the children, J.K. was only required to show that she had good cause for having failed to visit. (See Wis. Stat. 48.415(1)(c)). In response to the summary judgment motion, J.K. attached an affidavit containing the excerpts from the notes of the Department, showing that J.K.'s contacts were placed on hold by the Department. (36:2) J.K. had regular contact with the Department and she was looking to restart her visits. *Id.* J.K. was having contact with the physical custodian of the children, both the Department and the foster home. *Id.* There is evidence that J.K. attempted to contact the children through the foster home. *Id.* Again, there is evidence that the

Department, the agency responsible for the care of the children, had prevented J.K. from having contact with the children. *Id.*

As the circuit court noted, the term "good cause" is not defined in this statute, but a standard jury instruction regarding abandonment, WIS JI—CHILDREN 314, sets forth the following factors pertinent to this situation which may aid in determining whether a parent had good cause for failing to visit or communicate: (1) "whether [the parent] had a reasonable opportunity to visit or communicate with [the child] or communicate with [the person] who had physical custody of [the child]"; (2) "attempts to contact [the child]"; (3) "whether person(s) with physical custody of [the child] prevented or interfered with efforts by [the parent] to visit or communicate with [the child]"; and (4) "any other factors beyond [the parent's] control which prevented or interfered with visitation or communication."

J.K.'s response to the summary judgment motion touched on each of the "good cause" points noted above. Thus, because there is evidence that would permit a reasonable jury to return a verdict in J.K.'s favor on her good cause argument, and that does not require a finder of fact to speculate, J.K. had shown a genuine issue of fact that should have defeated summary judgment.

Again, appellate review a circuit court's grant of summary judgment is *de novo*. It is clear that J.K. had set forth evidence that a genuine issue regarding contact and visits with her children occurred and evidence that she had good cause for not have more visits, contacts or communications during the relevant time period in this case. *State v. Lamont D.*, 2005 WI App 264, ¶15, 288 Wis. 2d 485,

709 N.W.2d 879. There was a sufficient showing by J.K. to have defeat the request for summary judgment.

II. The postdisposition court erred when it denied the motion for postdisposition relief claiming ineffective assistance of trial counsel.

A. Standard of review and principles of ineffective assistance of trial counsel.

Parents have the right to effective assistance of counsel in actions to involuntarily terminate parental rights. See *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992); Wis. Stat. § 48.23(2)(b). Ineffective assistance of counsel claims in a termination of parental rights proceeding are analyzed using the two-part test described in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See *Oneida Cty. DSS v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). Prejudice is proven where the lawyer's errors were so serious that the parent was deprived of a fair trial and a reliable outcome. *State v. White*, 2004 WI App 78, 10, 271 Wis. 2d 742, 680 N.W.2d 362. Put another way, '"the [parent] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id*.

Whether counsel was ineffective is a mixed question of fact and law. *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis.2d 488, 681 N.W.2d 500. The conclusion as to whether there was ineffective assistance of counsel is a question of law. *Flores*, 183 Wis.2d at 609, 516 N.W.2d 362.

It is axiomatic that the right to be represented by appointed counsel is worthless unless that right includes the right to effective counsel. *A.S. v. State* at 1003. Representation by counsel means more than just having a warm body with "J.D." credentials sitting next to you during the proceedings. *Id*.

A parent's right to the custody and care of his or her children is an extremely important interest that demands protection and fairness. The United States Supreme Court recognized the formidable task faced by parents in defending themselves against the involuntary termination of their parental rights.

B. Trial counsel's failure to file an affidavit in opposition to the public's summary judgment motion constitutes deficient performance.

The issue in the postdisposition motion was that trial counsel for J.K.'s failure to meet the statutory requirement for J.K.'s response in opposition to the public's summary judgment motion. (104:1) Trial counsel's failure constitutes per se ineffective assistance of counsel because Wis. Stat. § 802.08(3) requires more than a bare assertion of

one or more genuine issue of material fact for trial. There can be no strategic reason to allege genuine issues of material fact in a responsive brief but failing to properly support those allegations by affidavit or other evidence.

Wis. Stat. § 802.08(3) provides that "when a motion for summary judgment is made and supported" by affidavits "made on personal knowledge … Set[ting] forth such evidentiary facts as would be admissible in evidence … [,]" to oppose the motion, "an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." (emphasis added). The statute also explains, unequivocally, that "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." Wis. Stat. § 802.08(3).

Counsel's response to the public's motion was deficient under Wis. Stat. § 802.08(3). The public's motion for summary judgment set out facts, with supporting affidavits and documentation, as to the elements of abandonment. (33:1). The summary judgment motion argued that J.K. had not visited her children from June 17, 2021, to November 5, 2021 (35:1).

Counsel's brief in opposition to the public's motion for summary judgment alleged that there were genuine issues of material fact on abandonment and attached three documents, which counsel

referred to as exhibits. (35:1). The brief also argued that J.K. asserted that she had good cause for failing to communicate or visit with her children (35:2). Additionally, the brief inappropriately conceded the time period for abandonment. (35:2)

As the circuit court stated, counsel did not, however, attach a proper affidavit, deposition or answer to an interrogatory as required by Wis. Stat. § 802.08(3). This was deficient and unreasonable professional behavior. (44:7-8)

Here, J.K. would have asserted facts in a signed affidavit to support a defense or explanation that would create a dispute of material fact and entitle her to a trial. In addition, J.K.'s trial counsel had access to and the ability to provide an affidavit that attached the relevant department notes and should have made arguments as to those notes. (44:7-8) brownTherefore, had counsel provided *effective* assistance, the motion for summary judgment as to grounds would have been defeated and J.K. would have been entitled to a jury trial as to grounds.

C. J.K. was prejudiced by trial counsel's deficient performance.

J.K. was prejudiced by trial counsel's failures. Had J.K.'s trial counsel prepared and filed the necessary affidavit, J.K. would have been able to demonstrate the existence of a genuine issue of material for trial and the public's motion for summary judgment would have

been denied.

Trial counsel had received and presumably reviewed discovery containing the department's notes prior to filing J.K.'s response to the summary judgment motion. Excerpts were filed, as Exhibit PJM-1, with the postdisposition motion. (105:1, 106:1, 107:1) While the public may have conceded that the notes contained the above facts, the exhibits filed with trial counsel's response were insufficient to create a "genuine issue of material fact" for trial regarding the medical claim of J.K. The notes also included evidence of multiple instances of contact between J.K., foster family, the department, and other service providers. Counsel therefore should have filed an affidavit attaching other notes showing that J.K. had communicated with the social worker (agency) responsible for her children, making various attempts to comply with the requirements to resume visits, and had communicated with the placement provider about her children during the abandonment period.

Moreover, counsel should have argued, based on the discovery, that J.K. had "good cause" not to visit her children during the abandonment period. Had counsel properly included the notes via an affidavit, any vagueness of the department's requirements for resuming visitation would have been apparent. The notes would also demonstrate that the department had not clearly informed J.K. that visits would not resume until some unknown time or department requirement. Therefore, counsel should have argued that the department failed to show that it clearly communicated the conditions

for visitation to J.K. see, e.g., *Brown County v. B.P.*, 2019 Wis. 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 the child, and if T.F. had the opportunity to complete those services"*).

The above argument applies equally to the failure by trial counsel to obtain an affidavit and medical information regarding the claims made to support "good cause" for her failure to visit or communicate with the child, the department, or the foster family, as outline in the jury instruction for Abandonment. Counsel affidavit is not sufficient in that "[t]he 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. These supporting facts, if put in an affidavit, would have created a genuine issue of material fact as to good cause and allowed J.K. to defeat the motion for summary judgment.

The postdisposition court appeared to indicate that it was constrained by the actions of the trial court. (120:40) The postdisposition upheld the grant of summary judgment by also only relying on the fact that in order to consider J.K. medical issues as a defense to summary judgment that expert testimony was required according to *Brown County v. B.P*. *Id*. The postdisposition court ignores the other defenses to summary judgment and only decided the ineffective assistance claim.

III. The finding that the termination of J.K.'s parental rights was in Janet and Nancy's best interest was an erroneous exercise of discretion.

D. Standard of review and relevant case law.

There are two phases in an action to terminate parental rights. First, the court determines whether grounds exist to terminate the parent's rights. *Kenosha County. DHS v. Jodie W*. 2006 WI 93, ¶10 n.10, 293 Wis. 2d 530, 716 N.W.2d 845. In this phase, "`the parent's rights are paramount.'" Id. If the court finds grounds for termination, the parent is determined to be unfit. Id. The court then proceeds to the dispositional phase where it determines whether it is in the child's best interest to terminate parental rights. Id.

Whether circumstances warrant termination of parental rights is within the circuit court's discretion. *Gerald O. v. Cindy R*., 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, the reviewing court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. See *Rock County DSS v. K.K*., 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "A determination of the best interests of the child in a termination proceeding depends on the first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court." *David S. v. Laura S*., 179 Wis. 2d 114, 150, 507 N.W.2d 4 (1993). Therefore, "[a] circuit court's determination will not be upset unless the decision represents an erroneous exercise of discretion." *Id*.

However, a trial court's finding of fact will be set aside if it is against the great weight and clear preponderance of the evidence. *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

In making its decision in a termination of parental rights case, the court should explain the basis for its disposition on the record by considering all the factors in Wis. Stat. § 48.426(3) and any other factors it relies upon to reach its decision. *Sheboygan County Dept. of Health & Human Servs. v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

In order to determine whether termination of parental rights is in the best interests of the child, under Wis. Stats. §48.426(3), the Court must consider the following factors:

a. The likelihood of the child's adoption after termination;

b. 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;

c. 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;

d. The wishes of the child;

e. The duration of the separation of the parent from the child; and

f. 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.

E. Terminating J.K.'s parental rights was an erroneous exercise of the court's discretion.

At the disposition hearing, the court heard testimony from several witnesses. Testimony was received from the social workers and J.K. As required by Wis. Stat. § 48.426, the court weighed each of the required factors. J.K. believes that the court's weighing produced an erroneous result in this case.

Viewing the testimony, the court made its findings under sec. 48.426(3). When considering the likelihood of adoption, under sec. 48.426(3)(a), the court determined that the foster parents were committed to adoption of Janet and Nancy if termination is granted. (64:265) The court stated, regarding sec. 48.426(3)(b), that Janet and Nancy have been separated from J.K. for a lengthy period. (64:266) Likewise, the visits have not progressed beyond supervised visits. (64:268) As to sec. 48.426(3)(e) and (f), the court found that Janet and Nancy deserve stability. (64:274

There was evidence that a substantial relationship exists between J.K. and her children. J.K. testified that she loves both her children. (64:246) She has been consistent with her visits with the children. (64:246) She has been meeting with her therapist weekly. (64:247) She has started using a different medication that is helping

her now. (64:247) She is better mentally and financially at the present time. (64:247) J.K. is looking to better herself and stay out of trouble. (64:247) There are no words to describe how much she loves her children. (64:247) The best place for her children is to be with her. (64:248-9) Given this evidence, termination is not clearly in the best interest of Janet and Nancy, as to this factor. See, Wis. Stats. § 48.426(3)(c)

The court accepted the guardian ad litem's position as that of the child. (64:272) There was no direct evidence of the wishes of Janet and Nancy, but only the statement of the guardian ad litem, that was adopted by the court, who recommended that J.K.'s parental rights be terminated. See, Wis. Stats. § 48.426(3)(d).

While the decision by the court at the dispositional hearing is one of discretion, after reviewing the facts and the finding made here, the findings are not fully supported on this record where the court found that it was in Janet and Nancy's best interest that the parental rights of J.K. be terminated. As to discretionary decisions, the courts have said that, despite the broad range of factors that a court may consider in the exercise of its discretion, the exercise of discretion is not unlimited. See, *State v. Salas Gayton*, 2016 WI 58, ¶24, 370 Wis. 2d 264, 882 N.W.2d 459 (2016). Terminating J.K.'s parental rights given the evidence and factors examined by the court constitutes an erroneous exercise of its discretion.

CONCLUSION

Summary judgment was inappropriate in this case. This matter should be remanded for a fact-finding hearing.

The finding that it is in the children's best interest to have J.K.'s parental rights terminated was erroneous. These matters should be remanded to the trial court for further proceedings on the disposition of this case.

Dated: April 6, 2024

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[redacted]

Respondent-Appellant-Petitioner

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8098 words.

A paper copy of this brief and certificate has been served on all non-electronic parties.

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