STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP001071

In re the termination of parental rights to F.R.W., a person under the age of 18:

A.M.D.,

Petitioner-Respondent,

v.

G.R.B., JR.,

Respondent-Appellant.

Appeal from an Order Terminating Parental Rights, entered in the Fond du Lac County Circuit Court, the Honorable Douglas R. Edelstein, Presiding

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BRIEF OF RESPONDENT-APPELLANT

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ISSUES PRESENTED

Mr. Bartel[1] fathered a child. When Franny was four years old, her mother, Ms. Daniel, moved away with Franny without notifying Mr. Bartel or the family court of her new address. She then changed her last name and ultimately moved at least nine times, never providing Mr. Bartel notice or her new address. After Ms. Daniel finally moved back to Franny's hometown, Mr. Bartel promptly filed a motion for mediation. Ms. Daniel immediately filed a petition to involuntarily terminate Mr. Bartel's rights, claiming that he abandoned Franny.

1. Did the circuit court err in denying Mr. Bartel's motion for judgment notwithstanding the verdict?

The circuit court denied the motion. This Court is asked to reverse.

2. Did the circuit court err in denying Mr. Bartel's motion to dismiss the case on the basis of the "clean-hands" doctrine?

The circuit court denied the motion. This Court is asked to reverse.

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[1] Pseudonyms are used in place of the parties' names in order to protect confidentiality, as required by Wis. Stat. § 809.19(1)(g).

3. Did the circuit court err in denying Mr. Bartel's motion to dismiss on grounds that the abandonment statute, as applied to Mr. Bartel, is a violation of substantive due process?

The circuit court denied the motion. This Court is asked to reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, but would be welcomed if the Court would find it helpful. A request for publication is not permitted in a one-judge appeal. Wis. Stat. § 809.23(4)(b).

INTRODUCTION

Mr. Bartel did not abandon his daughter, Franny. Instead, Franny's mother, Ms. Daniel, absconded with Franny, moving at least nine separate times, never once asking for Mr. Bartel's consent, giving him advance notice, or providing him with her new address. Ms. Daniel's actions were in flagrant violation of a family court order, civil statute, and the criminal law. Despite the obvious irony—given that she willfully took Franny away from him—she now unjustly claims that Mr. Bartel abandoned Franny.

The termination of Mr. Bartel's parental rights to Franny is a miscarriage of justice and the order must be reversed. First, the circuit court should have dismissed the jury's verdict upon Mr. Bartel's motion

for judgment notwithstanding the verdict because, as a matter of law, he did not abandon Franny. Second, Ms. Daniel came to the court with unclean hands and cannot use the fruits of her own unlawful conduct to obtain termination of Mr. Bartel's parental rights. Finally, the abandonment statute, as applied to Mr. Bartel, violates substantive due process.

STATEMENT OF THE CASE AND FACTS

Franny was born in Fond du Lac, Wisconsin on January 2, 2014. (3:1). Mr. Bartel was adjudicated Franny's father. (87:4). On May 22, 2014, the family court granted primary placement of Franny to Ms. Daniel, and secondary placement to Mr. Bartel. (77:2). *See* Wis. Stat. § 767.001(5).[2] The court ordered that Mr. Bartel "shall have reasonable periods of secondary physical placement at reasonable times with reasonable notice" to Ms. Daniel. (77:2).

The court order stated that Ms. Daniel "shall give [Mr. Bartel] not less than a 60 day written notice" before establishing a residence outside the State or moving 150 miles or more from Mr. Bartel. (77:2). It also informed both parties that Mr. Bartel had a right to file a written objection within 15 days, and if an

[2] "'Physical placement' means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." Wis. Stat. § 767.001(5). Placement may be shared.

objection was filed, Ms. Daniel could not move without an order of the court. (77:2). *See also*, Wis. Stat. § 767.481(1)(a) (parent who intends to relocate with a child 100 miles away must file a motion with the court seeking authorization for the relocation).

The last time Mr. Bartel saw Franny was on February 10, 2018. (40:1). At that time, Ms. Daniel moved away, taking Franny with her. (27:23). She did not notify Mr. Bartel of her move. (27:18). Mr. Bartel was still attempting to see Franny. (27:17). He scheduled visits. However (as Ms. Daniel explained), because Mr. Bartel did not call her the day beforehand like she wanted him to—and would instead show up at the agreed upon time and place without double confirming—she would not bring Franny to the agreed-upon visits. (27:17). By her own admission, Ms. Daniel "blocked" Mr. Bartel on social media. (163:25).[3] She also blocked his friends and family on social media. (163:25). She kept the same phone number. (27:11). In August of 2018, Ms. Daniel got married and changed her last name. (27:24-25, 91:2). The last time she spoke to Mr. Bartel on the phone was in August or September of 2018. (27:10).

Over the next five years, Ms. Daniel moved at least nine different times, all across the country. (91:3). Within Wisconsin, she moved from Fond du Lac

[3] The meaning of "block" can vary across social networking sites. On Facebook, a block prevents that person from seeing your posts or sending you any messages. *See* "Help Center, What happens when I block a profile," *available at*, https://www.facebook.com/help/1000976436606344

to Waukesha, to Oshkosh (two different addresses), to Neenah, and to Appleton, and then she moved out of state to Vancouver, Washington and to Raleigh, North Carolina (two different addresses), and then, finally, back to Fond du Lac. (91:3).

Ms. Daniel admitted that she did not attempt to notify Mr. Bartel when she moved. (27:18). She was aware of the family court order that she notify Mr. Bartel and the court of relocations beyond 150 miles, and she intentionally failed to follow the order. (161:94, 101-102). All along, Mr. Bartel continued paying child support, without complaint, and Ms. Daniel continued to accept the child support payments. (78:1-2).[4]

Finally, in January of 2023, Ms. Daniel moved back to Fond du Lac. (161:101). Shortly thereafter, on February 27, 2023, Mr. Bartel filed an application for mediation in family court. (3:4). He averred, "I need to see my daughter and want to be in my daughter's life. [Ms. Daniel] moved out of state without notifying me." (41:2). On February 28, 2023, the family court entered an order for mediation. (87:3).

Eleven days after the order for mediation, on March 10, 2023, Ms. Daniel signed a petition to terminate Mr. Bartel's parental rights, alleging that he abandoned Franny and failed to assume parental responsibility for her. *See* Wis. Stat. §§ 48.415(1)(a)3.,

[4] The paternity judgment and order also ordered Ms. Daniel to notify the child support agency of any change of address within 10 days. (77:7).

(1)(c) and (6)(a) and (b).[5] (3:1-2). The petition was filed on March 13, 2023. On the same date, Ms. Daniel, by counsel, filed a motion to suspend Mr. Bartel's physical placement order and order for placement mediation in the family court case file. (10).

The circuit court held a hearing on March 21, 2023, where Mr. Bartel was unrepresented by counsel. (27:3). Mr. Bartel agreed that it would be difficult for Franny to abruptly start seeing him, and that a gradual reunion was better, stating "I want to be in my daughter's life, but I do understand that it has been a long time since I've seen her and I don't expect her to see me and just everything's the same." (27:6). He stated, however, that "I don't want my rights taken away... I've always loved her and wanted to be in her life." (27:6). The court entered an order prohibiting Mr. Bartel from contacting or visiting Franny while the termination of parental rights action was pending. (19).

Both parties filed motions for summary judgment.[6] (37, 90). The facts alleged in each set of

[5] The jury found that Ms. Daniel failed to prove the failure to assume parental responsibility ground, and therefore, this appeal concerns the abandonment ground, Wis. Stat. § 48.415(1).

[6] More precisely, the parties moved for partial summary judgment. There are two phases in a termination of parental rights action. The "grounds" phase involves a fact-finding hearing on whether the petitioner has proven one or more of the statutory grounds of parental unfitness. Wis. Stat. § 48.424; Wis. Stat. § 48.415. During this phase, "the parent's rights are

motions and attachments were substantially the same, with the primary dispute being over the number of times Mr. Bartel called Ms. Daniel after she took Franny and moved away. (*See* 40:1, 76:2). Ms. Daniel claimed that she stopped receiving calls from Mr. Bartel in the Fall of 2018. (40:1). Mr. Bartel asserted that he kept calling, but his calls eventually decreased in frequency after Ms. Daniel blocked him and repeatedly failed to pick up his calls. (76:2, 90:2). Mr. Bartel argued that, as a matter of law, he established "good cause" for not visiting with or communicating with Franny because Ms. Daniel moved away with Franny and concealed her location from him. (90:4-5). *See* Wis. Stat. § 48.415(1)(c) (setting forth a good cause defense for abandonment ground).

The court denied both parties' motions for summary judgment on the basis that they were untimely. (71:5-6, 160:5-6). The court also noted that the pattern jury instruction on good cause does not state that failure to provide notice of relocation is a bar to the claim of abandonment. (160:5). Although the court agreed that Ms. Daniel had committed a felony nine times,[7] and the circumstances "trouble[d]" the court, it found that the jury could consider Mr. Bartel's efforts as well. (160:6).

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paramount." *Sheboygan County v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. If grounds are proven, the case moves to step two, the disposition phase, where the court determines whether termination is in the best interest of the child. Wis. Stat. § 48.427.

[7] *See* Wis. Stat. § 948.31(3), which is discussed in further detail below.

The case proceeded to a jury trial on November 8 and 9, 2023. (161, 162). The facts at trial mostly followed the facts alleged in the petition and summary judgment pleadings, as stated above.

In addition, Ms. Daniel presented cell phone records that she asserted proved that Mr. Bartel stopped calling her—because his phone number was not on the list of her missed or received calls. (161:106) (119:Ex. 1).[8] She admitted that she blocked his phone number during her pregnancy, but denied having done so after that. (161:81). She admitted she had blocked Mr. Bartel on social media, and he had remained blocked at all times thereafter. (161:81).

For his part, Mr. Bartel testified that he had repeatedly called Ms. Daniel, over and over again, and his call would go straight to voicemail. (161:229). His number changed a few times. (162:229). He would call from those numbers, but Ms. Daniel still did not pick up the phone. (161:229). He did not leave a message—after all, he had no reason to believe she would call him back, having already blocked his first number. (161:238, 230). After a couple of years, he called less frequently given the futility. (161:230). He would still call at times "where [he] couldn't stop thinking about [Franny] or just out of - - out of desperation." (161:230). He used various websites that compile public records information to try and find Franny, but the

[8] The probative value of the records is questionable given that the point of blocking a number is that the number does not show up on your phone.

information was always a little behind. (161:203). Ms. Daniel never stayed anywhere very long. (161:203).

Mr. Bartel testified that Ms. Daniel had pushed him away from Franny ever since her birth, not giving him input on her name, refusing to let him be present at her birth, and pressuring him to agree to give her primary placement. (161:112, 192-193, 194). Mr. Bartel testified that Ms. Daniel's sister asked him to relinquish his rights and he said no. (161:192). Mr. Bartel testified that he had visits with Franny every Tuesday for a year, and monthly other than that. (161:84, 197). When Ms. Daniel got married and moved away, she asked Mr. Bartel if she thought he was a good influence on Franny, and that was the last time that they spoke. (161:200). He told her he would take her to court for half custody. (161:200). She blocked him and told him she was leaving and getting married, and then moved almost immediately after that. (161:200).

Mr. Bartel testified that he had tried to obtain Ms. Daniel's address through the child support office, but they would not provide it to him. (161:240). He also went to the family court commissioner's office dozens of times asking for mediation, and they told him he needed Ms. Daniel's address in order to proceed with mediation. (161:240-241). He also tried to hire a lawyer, but the retainer was $3,800, which he could not even begin to afford. (161:213). When asked why he did not call the police, he responded that he did not know that what Ms. Daniel was doing was a crime.

(161:212). Unlike Ms. Daniel, Mr. Bartel had not moved residences. He lived in the same place since Franny was born. (161:188). He had full placement of his son and half placement of another child. (161:189).

Ms. Daniel admitted that she never told Mr. Bartel where she was moving or her address, nor the names of Franny's schools or medical providers. (161:102, 137). She knew that she was "supposed to update [her] address and get permission," but she decided not to. (161:102). Her explanation for not giving Mr. Bartel this information was, supposedly, that he did not text or call her to ask for it. (161:102, 108).

Additional fact witnesses included family and friends of Ms. Daniel and Mr. Bartel. Ms. Daniel's family members testified that they had not been confronted by Mr. Bartel or his family about Franny. (161:169-170, 174). Mr. Bartel's family and friends testified that they witnessed Mr. Bartel's broken heartedness, and his efforts to call Ms. Daniel and locate her on social media. (162:17, 28-30, 38, 58). On February 26, 2022, a friend of Mr. Bartel figured out Ms. Daniel's married name and sent a screen shot of her Facebook profile to Mr. Bartel. (162:29-30). He was "so happy." (162:29). However, the address on her profile turned out to be outdated. (88) (*See* 161:100-101).

The jury did not find the failure to assume parental responsibility ground, but did find the abandonment ground. (130, 131).

Mr. Bartel moved for judgment notwithstanding the verdict, arguing that the facts established that Mr. Bartel did not abandon Franny without good cause. (162:133-134; App.5-6). The court denied the motion, finding that it was "satisfied that the facts as presented, as a matter of law, do not allow the Court to override the jury's verdict." (162:135; App.7).

Mr. Bartel subsequently filed a motion and amended motion to vacate the jury verdict and dismiss the petition. He argued that Ms. Daniel came to the court with unclean hands. (147:4-5). Her own substantial misconduct undermined the equitable standing between the parties and gave rise to the allegations in the petition. (147:5). He further argued that the abandonment statute was unconstitutional as applied to Mr. Bartel, as it amounted to a violation of substantive due process. (139:1-5, 147:5-9).

On March 18, 2024, the court held a dispositional hearing, at which time it also addressed the motion to dismiss. (163). The court found that the issue of Ms. Daniel's unlawful relocations was addressed at trial, and the jury was instructed on the good cause defense. (163:8-9; App.17-18). The court found that, "I do believe there is unclean hands" here, but also found that both parties bore some form of responsibility. (163:15; App.24). The court further found that Ms. Daniel's conduct was part of the question asked of the jury, and that Mr. Bartel received fair procedures; therefore, it denied Mr. Bartel's motion to dismiss. (163:15; App.24).

The court proceeded to consider whether or not termination of Mr. Bartel's parental rights would be in Franny's best interest. *See* Wis. Stat. § 48.427. The court heard testimony from Ms. Daniel wherein she attempted to excuse her failure to provide her address to Mr. Bartel—an explanation the court found not "particularly credible." (163:46). The court found that the "compelling evidence" was that Ms. Daniel blocked Mr. Bartel, and therefore, he could not contact her directly. (163:47). The court stated, "[s]he chose to not want to have communication with him." (163:47). However, the court stated that Mr. Bartel did not have an explanation for not employing "law enforcement efforts," and opined that, "ignorance of the law is no defense." (163:47). The court acknowledged that Mr. Bartel may have come to the courthouse for help, but "no one here is your attorney" and could not fill out the forms for him. (163:48). Yet, the court stated that Mr. Bartel should have filed something on his own—even if it would have been rejected—because it would have showed effort. (163:48).

Ultimately, the court determined that termination of Mr. Bartel's parental rights was in Franny's best interest primarily due to the length of time since she had seen Mr. Bartel, and the fact that Ms. Daniel's husband intended to adopt her. (163:50). The court determined that it was a "tough decision" and "saddens the Court at many levels." (163:52). A written order of termination was entered on March 19, 2024. (150; App.1-2).

Mr. Bartel appeals.

ARGUMENT

I. As a matter of law, Mr. Bartel did not abandon his child, and therefore, the circuit court erred by denying his motion for judgment notwithstanding the verdict.

A. Abandonment statute.

The abandonment statute requires the petitioner to prove that:

> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

Wis. Stat. § 48.415(1)(a)3.

The abandonment statute also contains a good cause affirmative defense, that the respondent may prove by a preponderance of the evidence. Wis. Stat. § 48.415(1)(c); Wisconsin JI-Children 314, at 3.

> a. 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.

Wis. Stat. § 48.415(1)(c).[9]

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[9] Wisconsin JI-Children 314, which was provided in this case, instructs the jury that:

> In determining if good cause existed as stated in questions 4, 5, and 7, you may consider whether (child)'s age or condition would have rendered any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child); attempts to contact (child); whether the person(s) with physical custody of (child) prevented or

B. Legal standard and standard of review.

A circuit court has the authority to enter a judgment notwithstanding the verdict (JNOV) if the facts elicited at trial are insufficient to establish a claim as a matter of law. *Logterman v. Dawson*, 190 Wis. 2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994). In a motion for JNOV, the factual findings of the verdict are accepted as true. *See* Wis. Stat. § 805.14(5)(b).

A circuit court's decision on a motion for JNOV presents a question of law subject to de novo review. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). *See also, Logterman*, 190 Wis. 2d at 101 (the reviewing court, without deference, uses the same legal process as the trial court).

C. As a matter of law, Mr. Bartel did not abandon his child.

As a matter of law, Mr. Bartel did not abandon Franny because Mr. Bartel never "left" Franny with a relative or other person. *See* Wis. Stat. § 48.415(1)(a)3. Instead, Ms. Daniel absconded with Franny and

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> interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond the parents control which precluded or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

Wisconsin JI-Children 314, at 3.

withheld her location from Mr. Bartel. Under Wis. Stat. § 767.481, Ms. Daniel had a duty to notify Mr. Bartel of her intent to relocate, to give Mr. Bartel an opportunity to object, and to enable judicial review. Wis. Stat. § 767.481(1)(a), (1)(c), Wis. Stat. § 767.481(2)(b). She flagrantly and repeatedly violated this law. As discussed in additional detail below, Ms. Daniel's conduct was also criminal. *See* Wis. Stat. § 948.31(3)(c).

Mr. Bartel cannot be found to have "left" Franny with Ms. Daniel. *See* Wis. Stat. § 48.415(1)(a)3. A statute is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. The purpose of the statute is also relevant to interpretation. *Id*., ¶48. To interpret the phrase "left with" to encompass a situation where one parent absconds with the child would create an absurd and unreasonable result. *See Kalal*, 271 Wis. 2d 633, ¶44 (statutes are interpreted reasonably, to avoid absurd or unreasonable results). The Legislature enacted Wis. Stat. § 767.481(2)(b) and Wis. Stat. § 948.31(3) to protect parents like Mr. Bartel against conduct like Ms. Daniel's, and to protect children like Franny from being separated from their parent against court orders.

In considering the term "left with," the focus is on "the parent's conduct of allowing the child to

remain" with another party while failing to have contact with the child. *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 704, 530 N.W.2d 34 (Ct. App. 1995). In *Rhonda R.D.*, Franklin's parental rights were terminated on grounds of abandonment. He and the child's mother, Rhonda, got divorced, and through the divorce action, Rhonda was awarded sole custody and placement. *Id*. at 689-690. She then moved out of state with the child. During the following four years, Franklin did not see the child or attempt to see the child, and was thousands of dollars in arrears on child support. *Id*. at 689-690. Franklin argued that he had not "left" his child because Rhonda moved away with the child. *Id*. at 690. He asserted that the term "left by" refers "only to the initial circumstance that separated the parent from the child." *Id*. at 703.

This Court found that the term "left by" could mean the child "is allowed to remain" with the other person. *Id*. at 704. The Court determined that this interpretation would cover situations where the parent "knew where the child was and never again had contact with the child." *Id*. at 706-707. Franklin argued that this interpretation would mean that "a parent can be found to have abandoned a child simply because the other parent gets custody in a divorce action," but this Court disagreed because "[i]n addition to having 'left' a child with another person, the respondent parent must know where the child is and have failed to visit or communicate with the child…". *Id*. at 707.

Importantly, Rhonda did not conceal the child's address from Franklin. Franklin had her address and occasionally wrote letters. *Id*. at 690. As such, Mr. Bartel's case is distinguishable from *Rhonda R.D.* Unlike Franklin, he did not know where his child was because Ms. Daniel concealed her location from him. And unlike in *Rhonda R.D.*, Mr. Bartel's case involves unlawful and illegal conduct by Ms. Daniel. Mr. Bartel did not allow Franny to remain with Ms. Daniel. Instead, Ms. Daniel took Franny away from Mr. Bartel without permission, and then thwarted his ability to stay in contact with her by blocking him, changing her name, and moving no fewer than nine times without giving him notice or her new address. Mr. Bartel cannot be found to have "left" Franny with Ms. Daniel.

In *Portage County v. Shannon M*, No. 2014AP1260 unpublished slip op. (Oct. 2, 2014), this Court upheld a JNOV in a termination of parental rights case that, like the present case, involved the abandonment ground. (App.26-29).[10] In that case, the Department of Health Services filed a petition of abandonment against Shannon for not visiting or communicating with her child. The jury found grounds; however, the circuit court entered a JNOV because there had been an improper visitation order entered previously that violated Shannon's rights. The Department argued that deference was owed to the jury's finding that there was not good cause for the

[10] This authored, unpublished decisions is cited for its persuasive value under Wis. Stat. § 809.23(3)(b). A copy of the decision is included in the appendix. (App.26-29).

abandonment. The court disagreed because the "jury was not asked to decide what effect, if any, the [prior] order had on Shannon's conduct." On appeal, this Court agreed that the JNOV was warranted. *Shannon M.*, No. 2014AP1260, ¶11. (App.2).

Likewise, here, deference is not owed to the jury's finding on abandonment. The circuit court ruled that it could not overturn the jury's finding. (163:8-9; App.17-18). This was an erroneous application of the law. The ultimate question of whether Franny was "left by" Mr. Bartel with Ms. Daniel as a matter of law is decided by the court. Here, as a matter of law, Mr. Bartel cannot be found to have abandoned Franny.

II. The order finding that Mr. Bartel abandoned his child violates the "clean-hands" doctrine, and therefore, the circuit court should have granted his motion to dismiss.

A. Legal standard and standard of review.

Under the clean-hands doctrine, a party who "'has been guilty of substantial misconduct' of the matters in litigation such that the party 'has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction shall not be afforded relief when he [or she] comes into court.'" *State v. Kaczmarski*, 2009 WI App 117, ¶15, 320 Wis. 2d 811, 772 N.W.2d 702 (quoting *Timm v. Portage County Drainage Dist.*, 145 Wis. 2d 743, 753, 429 N.W.2d 512 (Ct. App. 1988)). For the clean-hands doctrine to apply, "it must clearly

appear that the things from which the plaintiff seeks relief are the fruit of [his or her] own wrongful or unlawful course of conduct." *S & M Rotogravure Serv. v. Baer*, 77 Wis.2d 454, 467, 252 N.W.2d 913 (1977).

Whether or not to grant relief under the clean-hands doctrine is within the trial court's discretion. *Timm*, 145 Wis. 2d at 752. This court will affirm a court's exercise of discretion "if it examined the relevant facts, applied the correct standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

B. Ms. Daniel cannot prevail on a claim that Mr. Bartel abandoned his child where her own wrongful and unlawful conduct prevented Mr. Bartel from having contact with his child.

Ms. Daniel cannot prevail on a petition to terminate Mr. Bartel's parental rights on grounds of abandonment when the lack of contact between Mr. Bartel and Franny was "fruit" of Ms. Daniel's own "wrongful or unlawful course of conduct." *See Baer*, 77 Wis. 2d at 467. Her deliberate violations of the law undermined the equitable standing of the parties. She cannot succeed on a claim of abandonment under these circumstances.

Ms. Daniel flagrantly violated her duty under Wis. Stat. § 767.481(1)(a), to apprise Mr. Bartel and the court of her relocations. This statute provides that,

"if the court grants any periods of physical placement with a child to both parents and one parent intends to relocate and reside with the child 100 miles or more from the other parent, the parent who intends to relocate and reside with the child shall file a motion with the court seeking permission for the child's relocation." Wis. Stat. § 767.481(1)(a).

The motion shall include specific information including:

> a. The date of the proposed relocation.
>
> b. The municipality and state of the proposed new residence.
>
> c. The reason for the relocation.
>
> d. If applicable, a proposed new placement schedule, including placement during the school year, summers, and holidays.
>
> e. The proposed responsibility and allocation of costs for each parent for transportation of the child between the parties under any proposed new placement schedule.

Wis. Stat. §767.481(1)(b).

The parent "shall serve a copy of the motion by mail on the other parent." Wis. Stat. § 767.481(1)(c). Upon the filing of the motion, the court shall hold a hearing and provide the parents notice of the hearing. The child may not be relocated prior to the hearing. Wis. Stat. § 767.481(2)(a). If the other parent objects to the relocation plan, the court shall require the objecting

parent to respond in writing, refer the parties to mediation, appoint a guardian ad litem, and set the case for a hearing. Wis. Stat. § 767.481(2)(c)1-4.

Ms. Daniel violated this statute at least nine times, depriving Mr. Bartel of his right to object to relocation; depriving the court of its duty to review the relocation plan and, if warranted refer the case for mediation; and depriving Franny of the opportunity to have the court consider whether relocation away from her father was in her best interest.

Ms. Daniel's conduct was also criminal. Under Wis. Stat. § 948.31(3)(c):

> (3) Any parent, or any person acting pursuant to directions from the parent, who does any of the following is guilty of a Class F felony:
>
> (a) *Intentionally conceals* a child from the child's other parent.
>
> …
>
> (c) After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, *takes a child from or causes a child to leave the other parent in violation of the order or withholds* a child for more than 12 hours beyond the court-approved period of physical placement or visitation period.

Wis. Stat. § 948.31(3)(a), (c). (emphasis added).

Ms. Daniel admitted under oath that she knew she was violating the family court order. (161:94, 101-

102). Mr. Bartel had legal placement of Franny. The circuit court found her excuses for violating the court order not "particularly credible." (163:46). The court found that the "compelling evidence" was that Ms. Daniel blocked Mr. Bartel and therefore, he could not contact her directly. (163:47). The court found, "[s]he chose to not want to have communication with him." (163:47).

The circuit court's exercise of discretion in denying Mr. Bartel's motion to dismiss was erroneous because the court did not apply the correct legal standard in a reasonable manner. *See Randall*, 235 Wis. 2d 1, ¶7. The court found that the issue of Ms. Daniel's unlawful moves was addressed at trial and the jury was instructed on the good cause defense. (163:8-9; App.17-18). However, the clean-hands doctrine is applied *by the court* in its exercise of discretion. *Timm*, 145 Wis. 2d at 752. Furthermore, the jury was not advised that Ms. Daniel violated the child relocation statute and committed felony offenses by doing so. Mr. Bartel requested that the jury be instructed on the pattern jury instruction for Wis. Stat. § 948.31(3)(c). (56, 162:73-73). *See* Wis. JI-Criminal 2168. However, the court denied his motion. (162:73-76). Arguendo, even if a jury should not be instructed on the civil and criminal statutes, this does not mean that the applicability of the statutes does not bear on the ultimate legal question of whether Ms. Daniel is prohibited under the clean-hands doctrine from prevailing on her claim.

Ms. Daniel's unlawful conduct deprived Mr. Bartel of the opportunity to have contact with Franny. She cannot now turn around and weaponize the lack of contact as a basis to obtain termination of Mr. Bartel's parental rights.

III. The order finding that Mr. Bartel abandoned his child violates substantive due process, and therefore, the circuit court should have granted his motion to dismiss.

A. Legal standard and standard of review.

Mr. Bartel has a fundamental liberty interest in the care and custody of his daughter. *See Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972). An involuntary termination of parental rights is a permanent dissolution of the parent-child relationship. It is "tantamount to imposition of a civil death penalty." *Matter of T.M.R.*, 487 P.3d 783, 787, 137 Nev. 262 (NV 2021).

The Fourteenth Amendment prohibits a state from depriving any person of liberty without due process of law. *Monroe County v. Kelli B.*, 2004 WI 48, ¶ 19 n. 7, 271 Wis.2d 51, 678 N.W.2d 831. *See also* Wis. Const. art. I §§1 and 8. Substantive due process protects a person against state action that is "arbitrary, wrong, or oppressive, regardless of whether the procedures applied to implement the action were fair." *Kelli B.*, 271 Wis. 2d 51, ¶19. A statute that impinges upon a fundamental liberty right must withstand strict scrutiny. *Kenosha County DHS v.*

Jodie W., 2006 WI 93, ¶41, 293 Wis. 2d 530, 716 N.W.2d 845. Strict scrutiny requires a showing that the statute, as applied, is narrowly tailored to advance a compelling state interest. *Kelli B.*, 271 Wis. 2d 51, ¶17.

This court reviews a constitutional challenge to a statute de novo. *State v. Wood*, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63. The party bringing the challenge has the burden to prove "beyond a reasonable doubt" that the statute is unconstitutional. *Id*. Likewise, whether a statute is unconstitutional as applied is a question of law, subject to independent appellate review. *Jodie W.*, 293 Wis. 2d 530, ¶22.

B. As applied to Mr. Bartel, the abandonment statute violates substantive due process.

It is fundamentally unfair to adjudicate Mr. Bartel an unfit parent where the mother of his child absconded with his daughter and cut him out of her life. Terminating Mr. Bartel's rights is not narrowly tailored to serve any compelling state interest. Instead, it effectively rewards Ms. Daniel for abducting Franny and taking her away to start a new family[11] elsewhere—flouting the family court order and violating both civil and criminal statutes. In reality, Mr. Bartel was a victim of Ms. Daniel's unlawful conduct. *See Kelli B.*, 271 Wis. 2d 51, ¶42

[11] Ms. Daniel's husband filed for adoption even prior to the conclusion of the termination of parental rights case. (163:29).

(terminating parental rights of mother who was a victim of the other parent's crime was a violation of substantive due process).

Compliance with due process requires an "individualized determination of unfitness" where the court will "evaluate the particular facts and circumstances relevant to the parent and child involved in the proceeding." *Jodie W.*, 293 Wis. 2d 530, ¶¶49-50. In *Jodie W.*, the Wisconsin Supreme Court found that the ground of unfitness based on a child being in continuing need of protection and services (CHIPS) violated substantive due process as applied to Jodie. The finding of unfitness was based on Jodie's failure to meet a condition of return requiring that she maintain a residence for her child. But this was "an impossible condition of return," given she was incarcerated. *Id.*, ¶¶6, 56.

As demonstrated by *Jodie W.*, the parent's actual ability to parent their child is an important factor in termination of parental rights cases. Here, it may not have been *literally* impossible for Mr. Bartel to find Ms. Daniel, but his efforts were beyond reasonable where Ms. Daniel intentionally erected barriers to his ability to parent Franny and he was responsible for parenting two other young children while maintaining a residence and job, while also paying Ms. Daniel thousands of dollars in child

support every year.[12] His lack of contact with Franny was out of his control.

Ms. Daniel is likely to argue that Mr. Bartel had her phone number and stopped calling her. First, the probative value of her cell records purportedly proving that Mr. Bartel did not call her is highly questionable given that the entire point of blocking a number is that the number does not connect to your phone. True, he did not call her every single day. But what good is it to have someone's phone number if they refuse to answer the phone? If they have taken your child and left the state? If they disobey clear court orders and flout the law? If you have no idea where your child even is and they could be across the world, for all you know?

Despite Ms. Daniel's actions, Mr. Bartel continued to pay child support (which Ms. Daniel readily accepted), and continued to search for Franny, even enlisting the help of his friends to find her social media accounts. He could not do so himself because, per her own admission Ms. Daniel had "blocked" him and his family on social media, and, at least for a period of time, had also blocked Mr. Bartel's phone number. (161:81, 163:25).

The circuit court's suggestion that Mr. Bartel was required to file a police report or have an "Amber Alert" issued in order to avoid losing his parental

[12] The child support ordered, commencing June 1, 2014, $155 monthly payments. (120:3). The order would continue until the termination of parental rights order on March 19, 2024, for a total obligation of $18,600.

rights is also unreasonable. (*See* 163:7; App.16). A layperson untrained in the law would not know that a co-parent with primary placement is committing a criminal offense by moving with the child. This cannot be presumed common knowledge. Moreover, it is highly implausible that police would issue an amber alert for a child who was moved by her mother, who had custody and primary placement. Nor is it reasonable to levy upon Mr. Bartel the responsibility to file formal motions to enforce his rights. He already fulfilled his legal obligations to obtain a paternity order and order for placement.[13] He continued to do what he could to support Franny by continuously paying child support.

Once a person has a lawful court order in place, it is incumbent on the other parent to obey the court order and obey the law. Mr. Bartel was a young parent of two other children, without an advanced degree, and without financial means to hire a private investigator or attorney—but who was nonetheless enlisting the support of his family and friends, using the internet to search for Franny, and asking the child support office and clerk's office for help. And when Ms. Daniel finally showed back up in Fond du Lac, Mr. Bartel immediately asked the family court for mediation so that he could see his daughter. (3:1). Ms. Daniel turned right around and filed a motion to terminate

[13] To the extent the circuit court relied on "procedural" due process to deny this claim, the court misapplied the law. (*See* 163:14). Substantive due process is distinct from procedural due process. *See Kelli B.*, 271 Wis. 2d 51, ¶19.

Mr. Bartel's parental rights, delivering a final blow to his relationship with his daughter.

The abandonment statute, Wis. Stat. § 48.415(1), is unconstitutional as applied to Mr. Bartel.

CONCLUSION

For the reasons stated above, G.R.B. asks the Court to reverse the order terminating his parental rights to his daughter, F.R.W.

Dated this 12th day of July, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,336 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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 one or more initials or other appropriate pseudonym or designation 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 12th day of July, 2024.

Signed:
Electronically signed by
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