STATE OF WISCONSIN

IN SUPREME COURT

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-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

Mr. Bartel's[1] parental rights to his daughter, Franny, were involuntarily terminated, on an allegation that he "abandoned" Franny. This was despite the fact that Franny's mother absconded with Franny, moving at least nine times without notifying Mr. Bartel, the family court, or the child support agency of her new addresses—while also changing her name and taking other evasive measures.

1. Did the circuit court err in denying Mr. Bartel's motion for judgment notwithstanding the verdict (JNOV) where, as a matter of law, he could not be found to have "left" Franny with Ms. Daniel, as required by the Abandonment statute, Wis. Stat. § 48.415(1)(a)3.?

   The circuit court denied the motion for JNOV.

The court of appeals affirmed. *A.M.D. v. G.R.B., Jr.*, No. 2024AP1071 unpublished slip op. ¶¶12-14 (Wis. App. Sept. 18, 2024) (App.3-15). It held that a person has "left" their child even if they do not know their child's whereabouts as long as they fail to persuade a jury that they had good cause for not finding the child. *Id.*, ¶14. (App.9-10).

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[1] G.L.B. is referred to by the pseudonym "Mr. Bartel," F.R.W. by "Franny," and A.M.D. by "Ms. Daniel," in order to preserve confidentiality. *See* Wis. Stat. § 809.19(1)(g).

This Court is asked to accept review and hold that a child cannot be found to have been "left by" a parent when the child was unlawfully taken away from the parent and the parent did not know the child's whereabouts.

2. 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 to dismiss.

The court of appeals affirmed. *G.R.B.*, No. 2024AP1071, ¶¶23-24. (App. 14-15). It held that Mr. Bartel could not prove a violation of substantive due process unless he proved that it was "impossible" for him to discover Franny's whereabouts, and he did not do so. *Id.*, ¶23. (App.14).

This Court is asked to grant review, and determine that, if the court of appeals' interpretation of the Abandonment statute is accepted, the statute is unconstitutional as applied to Mr. Bartel.

3. 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 to dismiss.

The court of appeals affirmed. *G.R.B.*, No. 2024AP1071, ¶21. (App.13-14). It held that the circuit court did not err in finding that it was not

Ms. Daniel's actions alone that caused the lack of contact between Mr. Bartel and Franny. *Id.* (App.13-14).

This Court is asked to grant review, and determine that Ms. Daniel cannot obtain full parental rights where Mr. Bartel's lack of contact with Franny was the fruit of her own misconduct.

CRITERIA FOR REVIEW

The Abandonment statute requires proof that, "[t]he 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.[2] (emphasis added). Mr. Bartel asks this Court to accept review to interpret the term "left by" in the statute, and clarify that a parent cannot be found to have "left" their child when they have had their child unlawfully taken away from them and they do not know their child's whereabouts. This Court has not yet had the occasion to construe the meaning of the phrase "left by the parent" within the statue.[3]

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[2] There are four other modes of abandonment, not alleged here, two of which also use the term "left." Wis. Stat. §§48.415(1)(a)1. and 1m.

[3] In *State v. James P.* 2005 WI 80, 281 Wis. 2d 685, 698 N.W.2d 95, this Court construed the term "parent," under Wis. Stat. §48.02(13) when addressing and rejecting a father's claim that he could not have his parental rights terminated based on

The court of appeals interpreted the phrase "left by" in *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 530 N.W.2d 34 (Ct. App. 1995). There, the court of appeals decided that "left by" included either: instances where the parent "placed" the child with another person; or instances where the child was "allowed to remain" with another person. *Id.* at 704.

The court of appeals spoke to whether or not the parent needed to have knowledge of the child's whereabouts—in two conflicting statements. The court of appeals stated, "[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 (emphasis added). But it also stated that "left by" would encompass situations where the parent "could discover" the whereabouts of the child. *Id.* at 706.

Here, Mr. Bartel argued that he could not have been found to have "left" Franny with Ms. Daniel where Ms. Daniel unlawfully moved with Franny and he did not know her whereabouts. The court of appeals admitted to giving "mixed signals" in *Rhonda R.D.*, but held that its "true holding" was that a person can be found to have left a child even if they do not know the child's whereabouts. *G.R.B.*, No. 2024AP1071, ¶13. (App.9). The court of appeals proceeded to conclude that because it was not impossible for Mr. Bartel to have discovered Franny's whereabouts, he

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periods of abandonment that occurred prior to his official adjudication as the child's biological father. *Id.*, ¶15.

had "left" Franny with Ms. Daniel. *Id.*, ¶14. (App.9-10). This interpretation conflicts with the plain and ordinary meaning of the word "left." It also negates element one of the Abandonment statute. Whether the parent "left" the child is the first element, and whether the parent knew or could have discovered the child's whereabouts is the second element. *See* Wis. Stat. §48.415(1)(a)3; Wis. JI-Children 314.[4]

Mr. Bartel asks the Court to grant review to clarify the meaning of "left by" in the Abandonment statute. Although Mr. Bartel's case is factually distinguishable from *Rhonda R.D.*, and may be decided without overturning *Rhonda R.D.*, the case law must at least be clarified to prevent erroneous holdings like the one in Mr. Bartel's case. In addition, as discussed below, the jury instruction on "left by" is erroneous, and this Court's guidance is required.

Alternatively, if the court of appeals' construction is upheld, the Court should accept review to determine whether or not the Abandonment statue, as applied to Mr. Bartel, is unconstitutional. A parent has a constitutional right to parent their child, and can only be deprived of this right if the statute survives strict scrutiny. *Monroe County v. Kelli B.*, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. Termination of

[4] *See* Wis. JI- Children 314, at 1 ("1. Was (child) left by (parent) with a relative or other person? 2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts? 3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer?").

Mr. Bartel's rights in this case is not "narrowly tailored to advance a compelling state interest." *See id.*

Multiple statutory criteria for review are satisfied. A decision by this Court will help develop, clarify, and harmonize the law, and will address a legal question that is likely to recur unless resolved by this Court. *See* Wis. Stat. § 809.62(1r)(c)3. In addition, the court of appeals decision in *Rhonda R.D.*, is "ripe for reexamination." *See* Wis. Stat. § 809.62(1r)(e). Finally, whether the Abandonment statute is unconstitutional as applied to a parent whose child is involuntarily taken away from them is a "real and significant question of federal or state constitutional law." *See* Wis. Stat. § 809.62(1r)(a). Mr. Bartel presents a third claim, that he is entitled to relief under the doctrine of unclean hands. This issue may not meet an enumerated criterion; however, the Court may choose to reach the issue if it grants review.

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. § 767.41(4)(a) (allocation of physical placement). The court ordered 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 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 order also stated, "[t]hat unless the parties agree otherwise, a parent with legal custody and physical placement rights shall notify the other parent before removing them from the primary residence for a period no less than 14 days." (77:2). Finally, the order required Ms. Daniel to notify the Child Support Agency and Clerk of Courts of "any change of address within 10 days," without geographical limitation. (77:7).

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). 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).

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

Finally, in January of 2023, Ms. Daniel moved back to Fond du Lac. (161:101). Very soon 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., (1)(c) and (6)(a) and (b). (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).

Both parties filed motions for summary judgment.[5] (37, 90). The facts alleged in each set of 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). The court denied both parties' motions for summary judgment on the basis that they were untimely. (71:5-6, 160:5-6). The court stated that Ms. Daniel had

[5] More precisely, the parties moved for partial summary judgment. There are two phases in a TPR 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 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.

committed a felony nine times, and the circumstances "trouble[d]" the court, but the jury could consider Mr. Bartel's efforts as well. (160:6).

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). 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—having 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]." (161:230). He used various public records websites to try and find Franny, but the information was always a little behind because Ms. Daniel never stayed in one place for long. (161:203).

Mr. Bartel testified that Ms. Daniel had kept 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 into agreeing to give her primary placement. (161:112, 192-193, 194). Mr. Bartel testified that Ms. Daniel's sister even asked him to relinquish his rights. (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). Then, she blocked him and told him she was leaving and getting married, and 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. (161:240-241). He also tried to hire a lawyer, but the retainer was $3,800, which he could not 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-time placement of another child. (161:189).

Ms. Daniel admitted that she never told Mr. Bartel where she was moving or her address, or the names of Franny's schools or doctors. (161:102, 137). She knew 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 that he did not 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 Ms. Daniel having taken Franny away. (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 determined Ms. Daniel's married name and sent Mr. Bartel a screen shot of her Facebook profile. (162:29-30). He was "so happy." (162:29). However, the address on her profile was outdated. (88). (*See* 161:100-101).

Consistent with Wis. JI-Children 314, the jury was instructed that, "[t]he phrase 'has been left by [Mr. Bartel] with another person' means any circumstance in which the child resides apart from [Mr. Bartel] and with the other person, including instances in which the child resides there pursuant to a court order." (162:88). *See* Wis. JI-Children 314 (citing *Rhonda R.D.*, 191 Wis. 2d 681).

The jury returned a verdict on the "abandonment" ground. (131). It rejected the "failure to assume parental responsibility" ground. (130).

Mr. Bartel moved for judgment notwithstanding the verdict (JNOV), arguing that as a matter of law he did not abandon Franny. (162:133-134; App.18-19). The court found 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.20).

Mr. Bartel subsequently filed a motion and amended motion to vacate the verdict and dismiss the petition. (139, 147). 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 him, 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.30-31). The court found that, "I do believe there is unclean hands" here, but also found that both parties bore some form of responsibility because Mr. Bartel did not go to the police or file a contempt motion. (163:7, 15; App.29, 37). 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.37).

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 was *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).[6] 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." (163:47).

The court determined that termination of Mr. Bartel's parental rights was in Franny's best interest due to the length of time since she had seen Mr. Bartel, and the fact that Ms. Daniel's husband wanted to adopt her. (163:50). The court found that it was a "tough decision" and "saddens the Court at

[6] The court explained, "[t]here's question as to whether or not she blocked him. I think the compelling evidence is she did. She chose to not want to have communication with him. She wasn't following the family court order as to facilitate communication. She maintains that 'I was a phone call away' and the phone records show that, no, he did not call. So is it consistent that he stopped calling? Yes, it is." (164:46).

many levels." (163:52). A written order of termination was entered on March 19, 2024. (150; App. 16).

Mr. Bartel appealed. He argued that the circuit court erred in denying his motion for JNOV and motion to dismiss. The court of appeals affirmed. As to the motion for JNOV, it acknowledged its statement in *Rhonda R.D.*, that the parent "must know where the child is" in order to have "left" the child; however, it concluded that this statement was not reflective of the "true holding" of the case, which was that a person can also be found to have "left" the child if they could have discovered the child's whereabouts. *G.R.B.*, No. 2024AP1071, ¶13. (App.9). The court of appeals proceeded to conclude that Mr. Bartel could have discovered Franny's whereabouts. *Id.*

The court of appeals then held that the circuit court properly denied Mr. Bartel's motion to dismiss. It observed that the jury did not accept Mr. Bartel's good cause defense, and that the court found that both parties had unclean hands. *G.R.B.*, No. 2024AP1071, ¶20-21. (App.13-14).

Finally, the court of appeals rejected Mr. Bartel's substantive due process claim, relying on *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶41, 293 Wis. 2d 530, 716 N.W.2d 845. In *Jodie W.*, this Court held that it was a violation of due process to terminate the mother's parental rights on grounds that she failed to meet a condition for safe return of her child where she was incarcerated, and her incarceration prevented her from being able to satisfy

this condition. *Id.*, ¶¶6, 56. The court of appeals stated that "Bartel was not incarcerated, and while Daniel may have made it more difficult for Bartel to connect with Franny, the circuit court correctly observed—and the jury apparently also found—it was certainly not impossible." *G.R.B.*, No. 2024AP1071, ¶23. (App.14-15).

Mr. Bartel petitions for review.

ARGUMENT

I. This Court should accept review to interpret the Termination of Parental Rights "Abandonment" statute, and hold that the term "left by" does not include circumstances where a child is unlawfully taken away from the parent and the parent does not know the child's whereabouts.

A. Abandonment statute.

The abandonment statute requires the petitioner to prove by clear and convincing evidence that:

> 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. *See Evelyn C.R. v. Tykila S.*, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768 (the burden of proof is clear and convincing evidence).

If the petitioner meets its burden, the burden shifts to the parent to establish a good cause defense. Wis. Stat. § 48.415(1)(c); Wis. JI-Children 314, at 3. The parent may prove by a preponderance of the evidence that they had "good cause" for having failed to visit or communicate with the child, "including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless." Wis. Stat. § 48.415(1)(c)3.

B. Principles of statutory construction.

Statutory interpretation begins with the language of the statute, and if the meaning is plain, the inquiry ordinarily stops. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning" unless the words are technical or specially defined. *Id.* Language 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." *Id.* "Statutes are read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* If a statute's meaning is plain, there is no ambiguity, and no cause to consult extrinsic sources such as legislative history. *Id.* The test for ambiguity is where a statute "is capable of

being understood by reasonably well-informed persons in two or more senses." *Id.*, ¶47.

Statutory interpretation is a question of law, reviewed de novo. *State v. Gramza*, 2020 WI App 81, ¶15, 395 Wis. 2d 215, 952 N.W.2d 836.

C. The term "left by" does not include circumstances where a child is unlawfully taken away from the parent and the parent does not know the child's whereabouts.

The meaning of the phrase "left by" Wis. Stat. §48.415(1)(a)3. is plain and unambiguous. The phrase is not specially defined. *See* Wis. Stat. §§ 48.02 (definitions), 48.40 (definitions). Therefore, the Court should apply the ordinary meaning of the words. The verb "leave" means "to go away from," to "abandon," to "fail to take along," or "to permit to be or remain subject to another's action or control."[7]

The court of appeals in *Rhonda R.D.* concluded that the phrase "left by" was ambiguous, and proceeded to render a confusing and internally inconsistent interpretation of the phrase. In *Rhonda R.D.*, Franklin's parental rights were terminated on grounds of abandonment. He and the child's mother, Rhonda, divorced, and through the divorce action, Rhonda was awarded sole custody and

[7] "Leave," Merriam-Webster online edition, *available at*, https://www.merriam-webster.com/dictionary/leave#:~:text=3-,a,%3A%20desert%2C%20abandon (visited 10.17.24).

placement. *Rhonda R.D.*, 191 Wis. 2d at 689-690. She then moved out of state with the child. However, Franklin had her address and occasionally wrote letters. *Id*. at 690. Yet, during the following four years, Franklin did not see or attempt to see his 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 the court gave Rhonda placement, and 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. The court of appeals disagreed.

The court of appeals began by citing two dictionary definitions of "leave."

> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) lists the following definitions of "leave":
>
> 1b (3): to cause to be or remain in some specified condition ...
>
> 2a (1): to permit to remain undisturbed or in the same position....

Id. at 704.

The court of appeals found that, based on these definitions, the phrase "left by the parent with a relative or other person" was ambiguous because it "could mean the child is allowed to remain with the relative or other person by the parent, or it could mean the child is placed there by the parent." *Id.*

The court of appeals proceeded to apply the first definition ("permit to remain"), and in doing so, made two statements—one of which would be consistent with the plain statutory meaning—and one that would not. First, the court concluded that the term "left by" would cover a situation where the parent "*knew* where the child was and never again had contact with the child." *Id*. at 706-707 (emphasis added).

However, the Court then stated that, "left by" would also encompass situations where the parent "could discover" the whereabouts of the child. *Id*. at 706. This second statement is wrong insofar as it does not require the parent's actual knowledge. When considering the definition "permit to remain," the Court must also consider the meaning of the word "permit." To "permit" means to "consent" or "authorize."[8] One cannot consent to a matter without having knowledge of the matter.

Moreover, this construction renders the first part of the Abandonment statute superfluous. Whether the "child has been left by the parent with any person" is the first element. Wis. Stat. 48.415(1)(a)3, Wis. JI-Children 314, at 1. Whether "the parent knows or could discover the whereabouts of the child" is the second element. *Id*. "Statutes are read where possible to give reasonable effect to every word.. . ." *Kalal*, 271 Wis. 2d 633, ¶44. The Legislature could

[8] "Permit," Merriam-Webster online edition, *available at*, https://www.merriam-webster.com/dictionary/permit (visited 10.17.24),

have enacted a statute with only two elements—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—but it chose not to.

In Mr. Bartel's case, the court of appeals decided that its "true holding" in *Rhonda R.D.* was its second statement, "knows or could discover." *G.R.B.*, No. 2024AP1071, ¶13 (App.9) ("even if the respondent parent did not know the whereabouts of the child, abandonment can still be shown if the parent could have discovered the child's whereabouts"). This holding was erroneous and must be reversed. [9]

The jury instruction will also need to be corrected. It erroneously states that, "[t]he phrase 'has been left by (parent) with another person' means any circumstance in which the child resides apart from (parent) and with the other person, (including instances in which the child resides there pursuant to a court order)." Wis. JI-Children 314, at 1.

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[9] In *Brown County v. T.F.*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560, the court of appeals reversed the mother's TPR order on grounds that summary judgment was improper, but also addressed her argument that she could not be found to have "left" her child when the child was placed out of home under a CHIPS order. Relying *on Rhonda R.D.*, the court state that the "left by" element is met "where a child remains with a foster parent as a result of an out-of-home CHIPS order.'" *Id.*, ¶23 (citing *Rhonda R.D.*, 191 Wis. 2d at 706). *T.F.* is distinguishable from Mr. Bartel's case, because when there is a CHIPS order, the parent knows the child's whereabouts.

Mr. Bartel asks this Court to either overturn *Rhonda R.D.* or to clarify that in order to be found to have "left" the child, the parent must have either departed from the child, or have knowingly permitted the child to remain with another person.[10]

D. 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.

1. Standard of review.

Judgment notwithstanding the verdict (JNOV) is appropriate 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).

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[10] This is not to say that a parent could not have their rights terminated under a different standard in circumstances where they could have discovered the child's whereabouts, such as "failure to assume parental responsibility." *See* Wis. Stat. § 48.415(1)(a)3.

2. As a matter of law, Mr. Bartel's child was not "left by" Mr. Bartel.

Franny was not "left by" Mr. Bartel with a relative or other person. *See* Wis. Stat. § 48.415(1)(a)3. Instead, Ms. Daniel took Franny away from Mr. Bartel and moved numerous times without telling him, the court, or the child support agency.[11] The uncontested evidence showed that Mr. Bartel did not know Franny's whereabouts.

The fact that Mr. Bartel had a right to put on a good cause defense is a red herring. *See G.R.B.*, No. 2024AP1071, ¶14. (App.9-10). The burden of proof on all of the elements of Abandonment is on the *petitioner*, by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring clear and convincing proof). The good cause defense only comes into play if the petitioner proves that the child was left by the person and the person seeks to show good cause for not visiting or communicating with the child. *See* Wis. Stat. § 48.415(1)(a)(c). Ms. Daniel first had to prove that Mr. Bartel left Franny. Mr. Bartel did not have any burden to disprove this element.

To the extent that *Rhonda R.D.* is upheld, it is important to note the clear differences between *Rhonda R.D.* and Mr. Bartel's case. Rhonda did not

[11] 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), (2)(b). Ms. Daniel's conduct was also a felony offense. *See* Wis. Stat. § 948.31(3)(c).

conceal the child's address from Franklin. Franklin had her address and occasionally wrote letters. *Rhonda R.D.*, 191 Wis. 2d at 690. Mr. Bartel did not know where his child was because Ms. Daniel moved numerous times all across the country without telling the court or Mr. Bartel where she was going. Furthermore, unlike *Rhonda R.D.*, Mr. Bartel's case involves unlawful conduct by Ms. Daniel.

Mr. Bartel did not permit Franny to remain with Ms. Daniel. Instead, Ms. Daniel took Franny away from Mr. Bartel, and then moved no fewer than nine times without providing him with her new address.

II. The Court should grant review to determine whether the Abandonment statute, as applied to Mr. Bartel, violates substantive due process.

A. Standard of review.

Parental rights are constitutionally protected under the Fourteenth Amendment. *See Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972). Termination of parental rights affect some of parents' most fundamental human rights. *Evelyn C.R.*, 246 Wis. 2d 1, ¶20.

The state may not revoke a person's parental rights without affording them due process of law. *Kelli B.*, 271 Wis. 2d 51, ¶ 19 n. 7. This includes both procedural and substantive due process. 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." *Id.*, ¶19. A statute that impinges upon a fundamental liberty right must withstand strict scrutiny. *Jodie W.*, 293 Wis. 2d 530, ¶41. Strict scrutiny requires a showing that the statute is narrowly tailored to advance a compelling state interest. *Kelli B.*, 271 Wis. 2d 51, ¶17.

Whether a statute is unconstitutional as applied is a question of law, subject to independent appellate review. *Jodie W.*, 293 Wis. 2d 530, ¶22. In an as-applied challenge, the Court will presume a statute is constitutional, but will not presume that the state applied the statute in a constitutional manner. *Tammy W-G v. Jacob T.*, 2011 WI 30, ¶48, 333 Wis. 2d 273, 797 N.W. 2d 854. Instead, the analysis "is determined by the constitutional right that is alleged to have been affected by the application of the statute" and "differs from case to case, depending on the constitutional right at issue." *Id.*, ¶49. Courts make "every effort to construe a statute consistent with the constitution." *Vincent v. Voight*, 2000 WI 93, ¶54, 236 Wis. 2d 588, 614 N.W.2d 388.

B. If the court of appeals' construction of the Abandonment statute is upheld, the statute is unconstitutional as applied to Mr. Bartel.

As argued above, the statute, properly construed, precludes a finding of Abandonment in this case because under the undisputed facts, Franny was

not "left by" Mr. Bartel. However, if the court of appeals' construction is accepted, the statute is unconstitutional as applied to Mr. Bartel. His separation from Franny was not his fault.

Terminating Mr. Bartel's rights is not narrowly tailored to serve a compelling state interest. The legislative purposes of the children's code are set forth in Wis. Stat. § 48.01. The goals include, among others: "to protect children and unborn children," as well as "preserve the unity of the family, whenever appropriate," to ensure the parties "constitutional and other legal rights are recognized and enforced, while protecting the public safety," and "[t]o ensure that children are protected against the harmful effects resulting from the absence of parents…" Wis. Stat. §§ 48.01(1)(a), (ad), and (bg). This Court has also held that, in regard to Wis. Stat. § 48.415 specifically, "[t]he compelling interest underlying the statute is to protect children from unfit parents." *Kelli B.*, 271 Wis. 2d 51, ¶ 25.

None of the legislative goals is served by severing Mr. Bartel's relationship with his daughter. Mr. Bartel did not neglect Franny. He did not abuse Franny. He did not endanger her safety. And he was not responsible for the interruption of his relationship with her. Instead, Ms. Daniel took Franny away from him. When Ms. Daniel finally moved back to Fond du Lac, Mr. Bartel promptly moved for mediation. (3:1). The harm to Franny caused by the "absence" of her father was in the process of being

rectified when Ms. Daniel filed the petition to terminate Mr. Bartel's parental rights.

Furthermore, it is fundamentally unfair to find Mr. Bartel unfit under the circumstances of this case. *See Kelli B.*, 271 Wis. 2d 51, ¶27 (applying standard of fundamental unfairness). Mr. Bartel and Franny were victims of Ms. Daniel's unlawful conduct. *See id.*, ¶42 (terminating parental rights of mother who was a victim of the other parent's crime was a violation of substantive due process).[12]

Mr. Bartel cited *Jodie W.* in the court of appeals as an instructive example of a case where a parent's ability to parent their child was an important factor. *See Jodie W.*, 293 Wis. 2d 530. In *Jodie W.*, this Court found that the ground of unfitness based on a child being in continuing need of protection and services violated substantive due process as applied to Jodie W. The finding of unfitness was based on Jodie W.'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 that she was incarcerated. *Id.*, ¶¶6, 56.

The court of appeals misconstrued Mr. Bartel's argument by implying that he relied solely on *Jodie W.* and dispatching with his due process claim because,

[12] Consistent with the parties' arguments in the circuit court, Mr. Bartel has numbered her relocations as nine, which is the number reflected in her sworn affidavit. (4:3). However, her sworn testimony actually revealed thirteen different relocations. (161:86-87, 93-101).

unlike *Jodie W.*, Mr. Bartel was not incarcerated, and therefore it was not impossible for him to visit or communicate with Franny. *G.R.B.*, No. 2024AP1071, ¶23. (App.14-15). However, Mr. Bartel did not hinge his case on *Jodie W.* Instead, he argued that severing his parental rights was not "narrowly tailored to advance a compelling state interest." *See Kelli B.*, 271 Wis. 2d 51, ¶17.

This Court's use of the word "impossible" in *Jodie W.* should also not be overstated. This Court undertook a detailed analysis of the continuing CHIPS ground and the facts of the case. It did not create any categorical test that a substantive due process claim requires proof that it was impossible for a parent to do what they needed to do to avoid a finding of unfitness. *See Jodie W.*, 293 Wis. 2d 530, ¶¶49-56.

It would be unreasonable to require proof of impossibility to prove a substantive due process claim. How would a court draw the line? Must a person be incarcerated? Must they request an Amber Alert? Is one Amber Alert request enough? Is hiring an investigator enough? Is filing one motion sufficient? If not, how many motions must be filed? What if a person is impoverished and cannot afford a lawyer or investigator? *See M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (in TPR proceedings, a parent's access to the judicial system cannot "turn on [one's] ability to pay"). Mr. Bartel tried hard to find Franny. He 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 public records websites to search for Franny, and imploring the child support office and clerk's office for help. And when Ms. Daniel 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).

If the court of appeals construction of the Abandonment statute is accepted, the statute is unconstitutional as applied to Mr. Bartel.

III. 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)).

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 his lack of contact with his child was due to Ms. Daniel's own misconduct.

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.

Ms. Daniel violated the family court order, the relocation statute and the criminal code by failing to apprise Mr. Bartel and the court of her relocations.[13] Ms. Daniel admitted under oath that she knew she was violating the family court order. (161:94, 101-102). The circuit court found her excuses for violating the court order *not* "particularly credible." (163:46).

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[13] *See* Wis. Stat. § 767.481(2)(c)1-4 (relocation statute), Wis. Stat. § 948.31(3)(c) (making it a felony to take a child in violation of an order specifying custody rights and periods of physical placement for more than 12 hours beyond the court-approved period of physical placement or visitation period).

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 relocations was addressed at trial and the jury was instructed on the good cause defense. (163:8-9; App.30-31). The court essentially deferred to the jury on this issue. As an initial matter, the jury did not have all of the essential information because it was not informed that Ms. Daniel violated the relocation statute and criminal law.

Furthermore, placing the burden on Mr. Bartel to prove good cause is improper where the constitution requires the petitioner to prove unfitness by clear and convincing evidence. The focus is properly on *Ms. Daniel's* illegal actions. *She* intentionally erected barriers to Mr. Bartel's ability to parent Franny. *She* moved without a court order. *She* withheld her address from the court, child support agency, and Mr. Bartel. *She* blocked Mr. Bartel on social media, and—as the circuit court found—also blocked his phone number. (163:47) (finding that the "compelling evidence" was that Ms. Daniel blocked Mr. Bartel and therefore, he could not contact her directly). "She chose to not want to have communication with him." (163:47).

The lack of contact between Mr. Bartel and Franny is fruit of Ms. Daniel's misconduct. She cannot exploit the lack of contact as a basis to obtain full parental rights over Franny.

CONCLUSION

G.R.B. respectfully asks the Court to grant his petition for review.

Dated this 18th day of October, 2024.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 7,533 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 18th day of October, 2024.

Signed:
Electronically signed by
Colleen Marion
COLLEEN MARION
Assistant State Public Defender

SIGNATURE OF RESPONDENT-APPELLANT-PETITIONER IN SUPPORT OF PETITION FOR REVIEW[1]

Name: G[redacted] B[redacted] Jr.

Signed:

[1] The signature has been redacted in order to comply with the confidentiality requirements of cases involving children.