STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP002629-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADDISON F. STEINER,

Defendant-Appellant.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

The court has ordered the parties to file supplemental briefs which address the following question: "How, if at all, do Wis. Stat. §§ 938.355(2d) and 48.415(1)(a)1r. support that party's interpretation of Wis. Stat. § 948.20 as requiring or not requiring intent to permanently leave the child?" As developed below, these statutes and their legislative history support Steiner's definition of abandonment, meaning that abandon means an intent to permanently leave a child, not temporarily leave a child. These statutes aim to impose consequences for particularly egregious conduct on a parent's part—conduct so aggravated that the government is relieved of the burden of making reasonable efforts to work with the family towards

reunification. That is, the statutes relieve the government of making reasonable efforts to reunify a family if "aggravated circumstances" exist, and create a specific ground for terminating that parent's rights as well, without first seeking to reunify the family through court-ordered conditions of return and services. Because "abandonment" is listed as an aggravated circumstance, and because the statutes are designed to address only the most serious types of abuse, abandonment should be construed as an intent to permanently leave the child, not leave the child alone temporarily. Further, as shown below, excusing the government from making reasonable efforts to reunite a family makes the most sense when the parent has evidenced an intent to permanently relinquish any parental interest in the child, rather than temporarily leave the child.

A. THE STATUTES IDENTIFIED BY THE COURT WERE CREATED IN RESPONSE TO FEDERAL LAW.

Wisconsin legislative history demonstrates that Wis. Stats. §§ 938.355(2d), 48.355(2)(d) and 48.415(1)(a)1r were all created to conform to the Federal Adoption and Safe Families Act of 1997 (ASFA). ASFA, effective on November 19, 1997, amended and largely replaced the Adoption Assistance and Child Welfare Act of 1980. Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 Wisconsin Women's Law Journal 217, Fall 2005, at 221. As Day explains, the main thrust of ASFA was to "facilitat[e] termination of parental rights and adoption to achieve permanency for children in foster care." *Id.*

> (ASFA) was enacted to promote the adoption of children who have been placed in foster care, to ensure their health and safety, and to encourage permanent living arrangements for such children as early as possible. In order to receive federal funds, states are required under ASFA to implement plans which, among other things, limit the obligation to provide reasonable efforts to reunify parents with children in foster care...and require the state to file or join a petition to terminate parental rights, subject to certain exceptions, when a child has been in foster care for 15 of the most recent 22 months or when a parent has committed certain serious crimes.

Kurtis A. Kemper, J.D., Annotation, *Construction and Application By State Courts of the Federal Adoption and Safe Families Act and its Implementing State Statutes*, 10 A.L.R.6th 173 (2006).

ASFA is codified in 42 U.S.C. §671. 42 U.S.C. §671(15)(D) provides that reasonable efforts shall be made to preserve and reunify families except as follows:

> reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that—
>
> (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);....

This language from 42 U.S.C. § 671 mirrors the language in the statutes identified by this court in its order. Beginning with Wis. Stat. § 48.415(1)(a)1r, the termination of parental rights ground, Paper #1025 prepared by the Legislative Fiscal Bureau, dated April of 1998,

(copy attached), shows that Wis. Stat. § 48.415(1)(a)1r was created in order to comply with ASFA. As the discussion point on pages 5-6 shows, the Legislative Fiscal Bureau determined that, in order to comply with ASFA, the state was required to establish a process such that a termination of parental rights petition would be filed in those cases where "a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under state law)...." The paper notes there are three types of legal proceedings in which a court can determine that a child has been abandoned: a criminal proceeding under Chapter 948; a CHIPS disposition; and a TPR order.

Wisconsin Statutes §§ 938.355(2d) and 48.355(2d) were also created in response to ASFA. As noted in the text of 42 U.S.C. 671 above, reasonable efforts to reunify families are not required when the parent has subjected the child to "aggravated circumstances" such as "abandonment, torture, chronic abuse and sexual abuse." Introduced in 1997, AB 768 created the "reasonable efforts not required" language in these statutes.

B. THESE STATUTES WERE DIRECTED TO PARTICULARLY EGREGIOUS CONDUCT NOT INVOLVED IN THIS CASE.

With ASFA in mind, the statutes identified by this court in its order mean that the state has different obligations when a parent subjects a child to such egregious abuse that reunification is no longer a goal. Put differently, reasonable efforts to reunify a family *must* be made, for example through CHIPS proceedings, *unless* the parent has subjected the child to aggravated circumstances such as torture and sexual abuse. As this

court notes, among the items listed in the "aggravated circumstances" in the statutes is "abandonment."

The question then is whether Steiner's conduct in this case would constitute such an aggravated circumstance that the state would not need to make reasonable efforts to reunify him with his children. The answer is no. Steiner's crime was locking his toddler in his room, unattended, without proper supervision or care. Had the County intervened, the child would have properly been found to be in need of protection and services, and a CHIPS order with services would have been warranted. However, Steiner's conduct was not so egregious that the County should have moved directly to a termination of parental rights. While the conduct was serious, it was not akin to torture or sexual abuse.

As such, "abandonment" in the context of Wis. Stats. §§ 938.355(2d) and 48.455(2d) support Steiner's interpretation of the meaning of abandonment within the criminal statute, Wis. Stat. § 948.20. If ASFA and the resulting Wisconsin Statutes mean that the County need not take any steps to reunite the family if the child has been abandoned, the reasonable interpretation of abandon is an intent to permanently leave the child, not temporarily leave the child. Temporarily leaving a child as Steiner did simply would not meet the definition of an "aggravated circumstance." This is not a situation where the family was beyond hope, and the child could not safely be with his father. This was a family in need of services. Keeping the statutes consistent with each other, the "court of competent jurisdiction" language should link up with the criminal definition of

abandonment within Wis. Stat. § 948.20. As such, abandonment of a child under the criminal law, Wis. Stat. § 948.20, must be more egregious than a temporary leaving of the child; it must mean an intent to permanently leave the child.

Of note in Wis. Stat. § 48.415(1)(a)1r is that that section refers to abandonment of a child under the age of one year. The Legislative Fiscal Bureau's paper suggested that ASFA required a petition to terminate parental rights "if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under state law.)" *See* Paper #1025, p. 5, attached. Counsel could not find in the text of 42 U.S.C. §671 a reference to abandonment specifically of an infant. Rather, 42 U.S.C. §671(15)(D) simply uses the word "abandonment." It is reasonable to conclude that when our legislature looked to amend the termination of parental rights statute to conform to the federal requirements of ASFA, it concluded that "abandonment" sensibly referred to the abandonment of an infant. One might imagine a character in fiction abandoning a baby by leaving her on the doorstep of the orphanage. Indeed, in the criminal context, abandonment of a child previously had an age limitation. In 1977, the crime of abandonment of a child was found in Wis. Stat. § 940.28, and was limited to the abandonment of a child under the age of six years. In 1987 Act 332, that six-year age limit was deleted, with the special committee determining that there was no substantial reason for distinguishing between children under the age of six, and older children. At the same time, the crime was renumbered to 948.20.

Steiner's position that his conduct would not constitute "aggravated circumstances" is consistent with the definition of aggravated circumstances used in New Jersey and Nebraska. The Supreme Court of Nebraska had occasion to consider whether the particular facts presented would constitute "aggravated circumstances" such that the state could pursue termination of parental rights without making reasonable efforts to keep the child with the parents. In ***In re Interest of Jac'Quez N.***, 266 Neb. 782, 784, 669 N.W.2d 429 (Neb. 2003), the child was taken to the emergency room with severe injuries consistent with child abuse, specifically, "shaken baby syndrome." Treating physicians stated there had been an unnecessary delay in getting medical treatment for the child, and that the delay contributed to the child's injuries. ***Id.*** Because of the abuse, the child would likely suffer moderately severe to severe developmental impairment and would likely be blind and possibly deaf as well. ***Id.*** at 785.

In considering whether the mother's conduct constituted an "aggravated circumstance" such that no reasonable efforts were required to reunite her with her child, the court observed that the Nebraska statute had been enacted in response to ASFA, and looked to see how other states had interpreted the "aggravated circumstances" standard. The court adopted the standard articulated by the Superior Court of New Jersey, which concluded that:

> the term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.

Id. at 791, *quoting* ***New Jersey Div. v. A.R.G.***, 361 N.J.Super. 46, 76, 824 A.2d 213, 233 (2003).

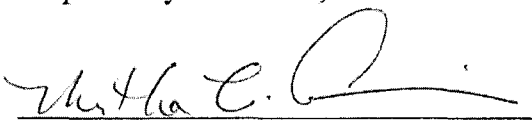
Thus, when §§ 48.355 and 938.355 use the word "abandonment" with respect to a child, the legislature must have intended to encompass the most egregious type of conduct because the conduct would essentially void the parent's rights to his or her child. The only way "abandon" would constitute such egregious conduct is to interpret it as an intent to permanently leave the child. Otherwise, the parent who visits a neighbor, leaving a child home alone, could be deemed to have abandoned her child, and by extension, forfeited her parental rights. Such a construction of "abandon" would be absurd.

In sum, Wis. Stats. §§ 938.355(2d) and 48.355(2d) list abandonment of a child as an aggravated circumstance that excuses the government from making reasonable efforts to reunify the family. The only way to construe child abandonment as an aggravated circumstance is to consider it in extreme form, and that must be an intent to permanently leave the child, as opposed to a temporary leaving of the child. Similarly, the legislature's creation of abandonment in Wis. Stat. § 48.415(1)(a)1r makes sense as abandonment of an infant being an extreme and egregious act evidencing an

intent to relinquish all control over that infant. It would not make sense to require reasonable efforts to reunify a family if the parent has shown an intent to relinquish any parental right to that child.

Dated this 17th day of September, 2014.

Respectfully submitted,



MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant

cc: Mr. Donald V. Latorraca
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mr. Addison F. Steiner, # 593954
Prairie du Chien Correctional Institution
P.O. Box 9900
Prairie du Chien, WI 53821-9900

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