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CLERK OF COURT OF APPEALS
OF WISCONSIN

Re: **State of Wisconsin v. Addison F. Steiner**
Appeal No. 2013AP2629-CR
District IV

Dear Ms. Fremgen:

In an order dated September 2, 2014, this court directed the parties to address the following question in simultaneously submitted letter briefs:

How, if at all, do Wis. Stat. §§ 938.355(2d)¹ 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?

Summary of Argument

A parent's conviction for child abandonment, contrary to Wis. Stat. § 948.20, may implicate a parent's interests in certain actions intended to protect a child's welfare. These actions include petitions filed to protect children in need of protections or services ("CHIPS") or terminate parental rights ("TPR") under Chapter 48. They also include petitions in proceedings under Chapter 939 alleging that a juvenile is delinquent or in need of protections or services (JIPS). As the State will explain, a conviction for child abandonment does not preclude a court from placing a child with the parent at the conclusion of a CHIPS, TPR, delinquency, or JIPS proceeding.

¹ Unless otherwise noted, statutory references are to the 2011-12 version of the statutes.

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Further, nothing within these statutory schemes intended to protect a child's welfare suggest that the phrase "with intent to abandon" as used in Wis. Stat. § 948.20 requires proof of intent to "permanently" abandon the child. Instead, when Wis. Stat. § 948.20 is considered in conjunction with the language of these provisions and its legislative history, Wis. Stat. § 948.20's purpose is to protect a child from being left in a place where the child may suffer from neglect, without regard to whether the person intended to "permanently" abandon the child.

Discussion

In raising this question, this court noted that Wis. Stat. §§ 938.355(2d) and 48.415(1)(a)1r. "appear to impose potential civil consequences on parents convicted of abandonment under WIS. STAT. § 948.20 but not on parents convicted of child neglect or certain forms of child abuse." In addition to the statutes this court identified, Wis. Stat. § 48.355(2d) also recognizes that a conviction for child abandonment, contrary to Wis. Stat. § 948.20, has potential implications in CHIPS proceeding. The State will discuss each of these statutes and identify why a parent's conviction for child abandonment, contrary to Wis. Stat. § 948.20, is not fatal to the parent's interest in these proceedings. In addition, the State will make additional statutory interpretation arguments that support its position.

TPR Proceedings: In a TPR proceeding, "abandonment" may constitute grounds for termination of parental rights. Wis. Stat. § 48.415(1)(a). The legislature defined several circumstances that constitute abandonment. A conviction for child abandonment, contrary to Wis. Stat. § 948.20 is one such circumstance. Wis. Stat. § 48.415(1)(a)1r. The legislature identified several other circumstances constituting abandonment, including several that incorporate a temporal element into the definition. Wisconsin Stat. § 48.415(1)(a) provides in relevant part:

1. That the child has been left without provision for the child's care or support, the petitioner has investigated the circumstances surrounding the matter and *for 60 days* the petitioner has been unable to find either parent.
2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a *period of 3 months or longer*.

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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*.

Id. While these provisions describe circumstances that may support an inference that a parent intended to permanently abandon his or her child based upon the duration of a parent's absence, none constitute actual proof of a parent's intent to permanently abandon the child. Further, even if a parent's extended absence from a child's life under Wis. Stat. § 48.415(1)(a)1.-3. constitutes abandonment for TPR purposes, that absence would not automatically trigger criminal liability under Wis. Stat. § 948.20. For example, if a parent leaves a child with another responsible person or at a hospital, the parent would not be leaving a child in a place where a child may suffer because of neglect.

More importantly, in another subsection, the legislature demonstrated its ability to define abandonment without reference to any time periods from which a permanent intent to abandon could be inferred. Wisconsin Stat. § 48.415(1)(a)1m. provides:

1m. That the child has been left by the parent without provision for the child's care or support in a place or manner that exposes the child to substantial risk of great bodily harm, as defined in s. 939.22 (14), or death.

Id. This section most closely resembles the type of conduct proscribed in Wis. Stat. § 948.20. Like Wis. Stat. § 948.20, Wis. Stat. § 48.415(1)(a)1m. focuses on the potential harm to a child whose parents leave the child in a place without providing for appropriate care or support. This potential for a substantial risk of great bodily harm may occur whether or not the parent intends to permanently abandon the child.

While a conviction for child abandonment in violation of Wis. Stat. § 948.20 constitutes abandonment and grounds for termination of parental rights, it does not mandate the termination of parental rights. Rather, the court must conduct a fact-finding hearing at which "[t]he court shall decide what disposition is in the best interest of the child." Wis. Stat. § 48.424(3); *see also* Wis. Stat. § 48.426(2) ("The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter."). Simply put, a conviction under § 948.20 does not require a court to terminate parental rights. In a dispositional hearing, a court would certainly consider the circumstances of the underlying conviction in assessing whether it should terminate a parent's rights. And a court could reasonably conclude that termination of parental rights is not warranted if the conviction involved conduct that does not demonstrate parental intent to permanently abandon the child.

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CHIPS Proceedings: In a CHIPS proceeding, a court must determine whether a department primarily responsible for providing services to the child has made “reasonable efforts” to prevent the removal of the child from the home. Wis. Stat. § 48.355(2c). If a person is found guilty of child abandonment contrary to Wis. Stat. § 948.20, the court is not required to include a “reasonable efforts” finding in the dispositional order. Wis. Stat. § 48.355(2d)(b)1. However, in entering its dispositional order, Wis. Stat. § 48.355(1) guides the court’s decision making. It requires the court to maintain and protect the child’s well being in a manner least restrictive of the rights of the parent and the child. Further, this section directs the court to preserve the family unit when it is consistent with the child’s best interest. *Id.*

Once the court finds that the defendant has been convicted of child abandonment and the court enters its dispositional order, the department must prepare a permanency plan. Wis. Stat. § 48.355(2e). A permanency plan is “a plan designed to ensure that a child is reunified with his or her family whenever appropriate, or that the child quickly attains a placement or home providing long-term stability.” Wis. Stat. § 48.38(1)(b). The court must then conduct a hearing regarding permanency goals. Wis. Stat. § 48.355(2d)(c).

A conviction for abandonment of a child only removes a step in the CHIPS process. The facts underlying the conviction, including whether the parent intended to permanently or merely temporarily abandon the child, will guide the court’s exercise of discretion as it addresses other aspects of the dispositional order and permanency plan order. Nothing within this process precludes the court from providing protective services to the child while the child remains with a parent convicted of child abandonment. In sum, nothing within the statutory scheme related to CHIPS proceedings suggests that this court should interpret Wis. Stat. § 948.20 to require the State to demonstrate that the person intended to “permanently” abandon the child.

Juvenile Delinquency & JIPS Proceedings: Following an adjudication that a juvenile is delinquent or the juvenile needs protection or services, a circuit court must enter a dispositional order under Wis. Stat. § 938.355. *See* Wis. Stat. §§ 938.34(1) and 938.345(1). In entering its dispositional order, the court must make findings that the department or agency providing services to the child has made “reasonable efforts” to prevent the juvenile’s removal from his or her home. Wis. Stat. § 938.355(2c). However, the court is not required to make a “reasonable efforts” finding “with respect to a parent of a juvenile to prevent the removal of the juvenile from the home” if the parent has been convicted of child abandonment contrary to Wis. Stat. § 948.20. Wis. Stat. § 938.355(2d).

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While a child abandonment conviction eliminates the requirement for a court to make a “reasonable efforts” finding, the court must still conduct a hearing to determine permanency goals. Wis. Stat. § 938.355(2d)(c). The permanency plan is “a plan designed to ensure that a juvenile is reunified with his or her family whenever appropriate, or that the juvenile quickly attains a placement or home providing long-term stability.” Wis. Stat. § 938.38(1)(b). Under this scheme, a parent’s conviction for child abandonment does not foreclose the court from ordering a disposition that ultimately leads to placement of the child with the parent.

Nothing within Chapter 938 suggests that the “intent to abandon” as used in Wis. Stat. § 948.20 means that a parent has intended to permanently abandon his or her child. The statutes guiding juvenile delinquency or JIPS proceedings provide little guidance to this court as it interprets the scope of the “intent to abandon” requirement in Wis. Stat. § 948.20.²

“Abandoned” as Defined in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). This court may also wish to consider how the term “abandoned” is defined in the UCCJEA. *See* Wis. Stat. ch. 822. Under Wis. Stat. § 822.02(1), “abandoned” means “left without provision for reasonable and necessary care or supervision.” Nothing within the UCCJEA’s definition of abandon turns on whether a parent intended to “permanently” abandon the child. Instead, Wis. Stat. § 822.02(1) focuses upon whether a parent has left a child without providing reasonable or necessary care or supervision. Similarly, Wis. Stat. § 948.20 concerns itself with leaving a child where the child may suffer from neglect, which the jury instruction defines as “to seriously endanger the health or safety of a child by failing to provide necessary care, food, clothing, medical or dental care, or shelter.” Wis. JI-Criminal 2148 (2003). The potential for harm to the child through neglect flows from the person’s abandonment of the child itself, and not from whether the person intended to abandon the child permanently.

² In its order requesting supplemental briefing, this court noted that certain Chapter 48 and 938 proceedings “appear to impose potential civil consequences on parents convicted of abandonment under WIS. STAT. § 948.20 but not on parents convicted of child neglect or certain forms of child abuse.” Order at 2. Absent a clearly articulated legislative purpose for differentiating between the impact of convictions for certain crimes against children and not others in Chapter 48 or 938 proceedings, this court should not base its interpretation of the phrase “intent to abandon” in Wis. Stat. § 948.20 on these legislative choices. *See Eau Claire County v. General Teamsters Union Local No. 662*, 2000 WI 57, ¶ 24 n.12, 235 Wis. 2d 385, 611 N.W.2d 744 (quoting *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922)) (“It is a delicate business to base speculations about the purposes or construction of a statute on the vicissitudes of its passage.”).

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The legislative history of Wis. Stat. § 948.20 confirms the State's position that the State is not required to demonstrate that a parent intended to "permanently" abandon the child. The State does not concede that Wis. Stat. § 948.20 is ambiguous. "It is not enough that there is a disagreement about the statutory meaning . . . 'Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.'" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110. "[A]s a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Kalal*, 271 Wis. 2d 633, ¶ 51. A review of Wis. Stat. § 948.20's legislative history confirms the State's interpretation that Wis. Stat. § 948.20 does not require proof of intent to permanently abandon a child.

Through 1987 Wisconsin Act 332,³ the legislature consolidated various crimes against children in Chapter 948, renumbering the offense of abandonment of a child from Wis. Stat. § 940.28 to Wis. Stat. § 948.20. In the process, it removed the prior requirement that the child had to be under age 6. *See* 1987 Wisconsin Act 332, Note ("The special committee determined that there is no substantial reason for distinguishing between children under the age of 6 and other children for purposes of this crime.") Wis. Stat. § 940.28 (1955-56) read as follows:

940.28 Abandonment of young child. Whoever, with intent to abandon him, leaves any child under the age of 6 years in a place where he may suffer because of neglect may be imprisoned not more than 3 years.

When the legislature adopted Wis. Stat. § 940.28 (1955-56) as part of the rewrite of the criminal code in the 1950's, it modified the prior child abandonment statute, Wis. Stat. § 351.27 (1953-54). Wisconsin Stat. § 351.27 (1953-54) read in relevant part as follows:

351.27 Abandonment of young child. Any person having the custody of any child under the age of six years who shall expose such child in any highway or in any other place, with intent to abandon it, shall be punished by imprisonment . . .

In adopting the language that would eventually become Wis. Stat. § 940.28 (1955-56), the 1953 Legislative Council Report comment states:

COMMENT. This section covers a very special type of conduct—the abandonment of children who are so young that they are unable to care for themselves. It covers cases such as the abandonment of a baby on a doorstep.

³ <http://docs.legis.wisconsin.gov/1987/related/acts/332.pdf>

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Section covered. 351.27 *Abandonment of young child* was the same as the new one except that it provided that the child be “expose(d) . . . in any highway or in any other place.” The new section substitutes “in a place where he (the child) may suffer because of neglect.” This was apparently the intent of the ambiguous provision in the old section.

V Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code, at 70-71 (1953).

Nothing within this legislative history suggests that the legislature intended to incorporate a requirement that a parent intend to “permanently” leave a child to sustain a conviction for abandonment of a child. Like Wis. Stat. § 948.20, the prior child abandonment statutes focused upon the act of leaving a child in a place where the child may suffer harm, such as a roadway, and not on whether the parent intended to “permanently” abandon his or her child.

This court should not interpret the phrase “intent to abandon” in a manner that requires the State to demonstrate that the parent had the intent to permanently abandon the child. Steiner would effectively rewrite Wis. Stat. § 948.20 as follows:

Whoever, with intent to permanently abandon the child, leaves any child in a place where the child may suffer because of neglect is guilty of a Class G felony.

(emphasis added). This court should decline to narrow Wis. Stat. § 948.20’s scope by qualifying the word “abandon” through the insertion of the adverb “permanently.” See *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991) (“[W]e will not read extra words into a statute to achieve a specific result.”). To read the word “permanently” into Wis. Stat. § 948.20 would undermine its very purpose to protect a child from being left “in a place where the child may suffer because of neglect.” *Id.* This potential for harm to the child through neglect arises whether or not the person has the intent to “permanently” abandon the child.

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Conclusion

For the above reasons and those previously articulated in the State's response brief, the State asks this court to find that Wis. Stat. § 948.20 does not require the State to prove that a person intended to "permanently" abandon the child. As such, the State respectfully requests this court to affirm the judgment of conviction and order denying post-conviction relief.

Sincerely,



Donald V. Latorraca
Assistant Attorney General

DVL:jls

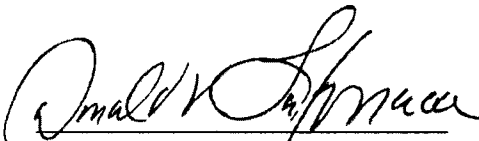
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Tim Gruenke
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CERTIFICATION

I hereby certify that this brief is less than 3,000 words permitted in this court's order dated September 2, 2014. The length of this brief is 2,791 words.

Dated this 17th day of September, 2014.



Donald V. Latorraca
Assistant Attorney General