COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1837 **Cir. Ct. No. 2007TP5**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO LYDIA J. R., A PERSON UNDER THE AGE OF 18:

TRICIA L. B.,

PETITIONER-RESPONDENT,

V.

CHAD K. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded with directions*.

¶1 VERGERONT, J.[1] Chad K. R. appeals the order terminating his parental rights to Lydia J. R., d/o/b January 2, 2002. He contends the circuit court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

erroneously granted the guardian ad litem's motion for partial summary judgment on the ground of failure to assume parental responsibility under WIS. STAT. § 48.415(6). We conclude there are genuine issues of material fact that entitle Chad to a trial and therefore reverse.

BACKGROUND

¶2 Tricia L. B., the mother of Lydia, filed this petition for termination of Chad's parental rights in April 2007. The grounds alleged are abandonment under WIS. STAT. § 48.415(1) and failure to assume parental responsibility under § 48.415(6). The petition alleges that Chad had "failed to visit or communicate with the child for more than one year and has failed to communicate about the child with the petitioner, who has had custody and placement of the child for more than one year."

¶3 The guardian ad litem moved for partial summary judgment on both grounds. Tricia's accompanying affidavit stated the following. She was Chad's girlfriend from 2001 until October 12, 2004. She is Lydia's custodial parent and has lived with Lydia all her life. During the first part of Lydia's life, Lydia lived with both Tricia and Chad. Chad has had no contact with Lydia since October 12, 2004, and has never called Lydia at Tricia's home. Tricia has never received any cards, letters, presents, pictures, or other communication from Chad to Lydia, and was never contacted by anyone from social services regarding Chad's wish to see or otherwise contact Lydia. Tricia has not been served with any papers saying Chad wants to see Lydia or have contact with her. She receives no child support from Chad, only $93 a month in SSI.

¶4 Tricia's affidavit further stated that on November 30, 2004, the Grant County court granted her a harassment injunction against Chad, which

expired on November 30, 2006. Even after the expiration of the injunction, Chad did not contact her to see or communicate with Lydia, or for any other purpose. There was a bail condition in Grant County case no. 04-CF-157 that Chad was not to have any direct contract with Tricia and that third-party contact was allowed only on issues directly relating to Lydia, but no person contacted her with any sort of communication to the effect that Chad wanted to see or communicate with Lydia. At sentencing in that case, which occurred on February 10, 2006, Chad was placed on probation and a condition was that he not have any contact with Tricia, but visitation was to be arranged through social services or someone approved by social services until Chad and Tricia could agree upon a mutual person to arrange visitation. Chad's probation was almost immediately revoked, but even when he was no longer under that condition of probation, he did not contact Tricia to see or communicate with Lydia or "for any other purpose."

¶5 Chad, with appointed counsel, opposed the motion for partial summary judgment. He also filed an affidavit, which states as follows. From the date of Lydia's birth until he was incarcerated, he was Lydia's primary caretaker. Tricia worked long hours and while she worked, and even when she was not working, he fed, bathed, changed diapers, and otherwise nurtured Lydia and took primary responsibility for her care. Lydia received social security benefits because he applied for the benefits for her and for himself due to his disability. He has never stopped loving and caring for Lydia and since his physical separation, he has maintained an interest in her well-being and has regularly contacted his family members who have contact with Lydia's mother or grandparents to "monitor [Lydia's] health and well-being." Since his separation from Lydia, when he has been able to, he has forwarded sums of money to his mother to buy gifts or clothing for Lydia.

¶6 The circuit court granted the motion for partial summary judgment. With respect to failure to assume parental responsibility, the court concluded that, while Chad's affidavit established that he had a substantial parental relationship with Lydia while he lived with Tricia and Lydia, in the two years and eleven months since then the affidavit did not show a substantial parental relationship. With respect to abandonment, the court concluded that Chad's affidavit did not establish any material dispute of fact.

¶7 After a dispositional hearing, the court determined that termination of Chad's parental rights was in Lydia's best interests. The court ordered termination with a finding that grounds for both abandonment and failure to assume parental responsibility existed.

¶8 After Chad filed a notice of intent to pursue post-disposition relief and a notice of appeal, we remanded to the circuit court so that Chad could file a post-disposition motion. Chad moved in the circuit court for an order vacating the order terminating his parental rights and for a new trial on the ground that his trial counsel had been ineffective. He asserted that trial counsel was ineffective for failure to present any counter affidavits to the motion for summary judgment "setting forth evidentiary facts to show there was a genuine issue for trial on the abandonment claim." At an evidentiary hearing Chad testified concerning letters that he wrote to Lydia after he stopped living with her, telephone contacts with Tricia in which he discussed Lydia and asked to speak to her and was able to do so on one occasion in approximately March 2005, and a visit with Lydia in December 2005. He also testified concerning his periods of incarceration after October 24, 2004, and the two-year injunction Tricia obtained against him.

¶9 The circuit court granted Chad's motion to vacate the order terminating his parental rights on the grounds of abandonment and ordered a new trial. It determined that the telephone contact with Lydia in March 2005 and the in-person contact in December 2005 were not relevant to the abandonment claim, which under WIS. STAT. § 48.415(1)(a)3. requires that "the child [be] left … 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." However, the court concluded Chad's testimony was evidence of letters to Lydia within six months of the filing of the petition. As for Chad's attorney's knowledge of the letters, the court determined that in Chad's deposition, taken after his affidavit was submitted and before the hearing on the partial summary judgment motion, he mentioned the letters and his attorney should have brought this to the court's attention in opposing the motion.

¶10 Although the court granted Chad's motion, the order terminating his parental rights on the ground of failure to assume parental responsibility remained in effect. Chad filed a notice of appeal from that order. We concluded that we had appellate jurisdiction of the appeal, notwithstanding the circuit court's order of a new trial on the abandonment ground. We explained in our order that the necessity of a new trial on the abandonment ground was conditional in that it was not necessary unless something happened on appeal to render the termination order infirm. We therefore ordered a stay of the new trial on the abandonment ground pending this appeal. This appeal concerns only the court's partial summary judgment on the ground of failure to assume parental responsibility.

DISCUSSION

¶11 Chad contends on appeal that the circuit court erred in granting partial summary judgment on the ground of failure to assume parental responsibility because there are material issues of fact that entitle him to a trial. He emphasizes that the statutory language requires that the parent "[*has*] *not had* a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a) (emphasis added). He contends there is no dispute that he had such a relationship with Lydia from the time she was born until October 12, 2004, pointing out that the guardian ad litem conceded that Chad did provide substantial care to Lydia, along with her grandparents, in that time period. His affidavit shows, he asserts, that he continued to be interested in her well-being, regularly had family members to monitor her welfare, and provided some support through his social security benefits.

¶12 The guardian ad litem concedes in response that for the first two years and nine months of Lydia's life, Chad did have a substantial parental relationship with her. However, the guardian ad litem contends that the "few efforts" set forth in his affidavit during the next two years and eleven months of her life do not, as a matter of law, "constitute the assumption of parental responsibility" because they did not involve direct contact and/or communication with the child.

¶13 In reply, Chad asserts that, to the extent communication with his daughter is one of the considerations under WIS. STAT. § 48.415(6), the court's decision vacating the judgment of termination on the abandonment ground because of his evidence of communications with his daughter shows that there are material issues of fact regarding his communication with his daughter. Chad also

replies that under § 48.415(6), if a parent has had a substantial parental relationship with his child but then no longer provides daily care, the parent's expressions of concern and interest in the child's support, care, or well-being are sufficient to at least create a material issue of fact whether the parent has "forfeited" a substantial parental relationship. Chad emphasizes again that § 48.415(6) contains the language "[*has*] *not had* a substantial parental relationship" (emphasis added) and is not directed at "whether that relationship now exists as defined in the statute or [whether] for some period its nature had changed." Chad also asserts that the argument that a substantial parental relationship "is for some reason forfeited may present a genuine issue of fact in this case," but does not show that Tricia is entitled to judgment as a matter of law.

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

¶15 With respect to summary judgment in a proceeding for termination of parental rights (TPR), the court in ***Bobby G.*** explains:

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

> The court has cautioned that "[i]n many [termination of parental rights] cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child." The court has further explained that "summary judgment will ordinarily be inappropriate in [termination of parental rights] cases premised on these fact-intensive grounds for parental unfitness. The court has identified WIS. STAT. § 48.415(6) as a fact-intensive ground probably not suited for partial summary judgment, but the court has not held that this ground could never form the basis for partial summary judgment. The court has instead stressed that "[t]he propriety of summary judgment is determined case-by-case."

Id. at ¶¶39-40 (footnotes omitted, emphasis omitted).

¶16 In this case the analysis of whether summary judgment is appropriate must begin with the interpretation of WIS. STAT. § 48.415(6), because that is the legal standard against which the submissions are measured to determine if there are genuine issues of material fact. This section provides:

> (6) Failure to assume parental responsibility.
>
> (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶17 When we construe a statute we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language 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 we interpret it reasonably to avoid absurd or unreasonable results. ***Id.***, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *See* ***id.***, ¶48. If, employing these principles, statutory language is ambiguous—that is, capable of being understood by reasonably well-informed persons in two or more senses—then we may employ sources extrinsic to the statutory text. ***Id.***, ¶¶47, 50. These extrinsic sources are typically items of legislative history. ***Id.***, ¶50

¶18 WISCONSIN STAT. § 48.415(6)(a) requires proof that the parent "[has] not had a substantial parental relationship." The words "[has] … had" are repeated in para. (b), which defines a substantial parental relationship and factors the court may consider in determining whether the parent "*has had* a substantial parental relationship with the child." (Emphasis added.) Chad's position is that this language means that the court must consider the early years of Lydia's life when he was living with her, as well as the time period after he stopped living with her.[2]

[2] We do not understand Chad to argue that, if the facts show that a parent did at one time have a substantial parental relationship with a child, the petitioner can never establish grounds for termination under WIS. STAT. § 48.415(6) regardless of what occurs later. We therefore do not address this as a possible meaning of the statute.

¶19 The guardian ad litem does not explain why Chad's proposed interpretation of the statute is unreasonable, nor does the guardian ad litem offer an alternative interpretation that is grounded in the language of the statute. The interpretation of the statute that is implicit in the guardian ad litem's argument, as we understand it, is that if a parent has not had a substantial parental relationship with the child for some significant period of time before the petition, then it is irrelevant whether the parent previously had a substantial parental relationship with the child.

¶20 We conclude Chad's proposed interpretation of the statute is a reasonable one. With respect to the interpretation we understand the guardian ad litem to be implicitly proposing, we have significant questions. The guardian ad litem does not explain why it is reasonable to read the statutory language to permit disregarding evidence that the parent has had a substantial parental relationship with the child at one time, nor is there an explanation of the basis on which the court is to decide that a sufficient time has passed so that that evidence can be disregarded. In the absence of a developed argument on these points, we cannot conclude that the guardian ad litem's proposed construction is reasonable. Even if we were to assume it is reasonable, we cannot conclude it is more reasonable than Chad's.

¶21 Accordingly, based on the arguments presented to us, we conclude that Chad is correct that, in deciding whether the petitioner has proved that he "[has] not had a substantial parental relationship" with Lydia under WIS. STAT.

§ 48.415(6), evidence of his relationship with Lydia both when he lived with her and after he stopped living with her is relevant.[3]

¶22 We now turn to the evidence before the court, bearing in mind that the ground of failure to assume parental responsibility under WIS. STAT. § 48.415(6) is fact-intensive and one not ordinarily suited for summary judgment. ***Bobby G.***, 301 Wis. 2d 531, ¶40. We also keep in mind that the petitioner has the burden of proving this ground is met by clear and convincing evidence. *See* WIS. STAT. § 48.31(1). Although Chad's affidavit is brief and general, it does present evidence that he was providing some financial support to Lydia, sent money to his mother to buy gifts and clothing for her, and kept in touch with people on how Lydia was doing. Taking those averments together with his averment that from Lydia's birth until his incarceration he was her primary caretaker and had primary responsibility for her care, we conclude Chad is entitled to a jury trial on whether the petitioner has proved by clear and convincing evidence that Chad "[has] not had a substantial parental relationship" with Lydia. Section 48.415(6).

¶23 We also note that, at the time of the summary judgment motion, Chad's deposition, which was not then submitted to the court, referred to letters he wrote to Lydia that were not mentioned in his affidavit. In addition, Chad's testimony at the post-disposition hearing added more details to the letters, their timing, and his circumstances after he stopped living with Lydia. He also testified

[3] We recognize that this conclusion does not resolve a number of questions on the interpretation and application of WIS. STAT. § 48.415(6) that may be relevant to this case. However, we decline to discuss the statute further than the arguments with which we have been presented. Nothing in our opinion prevents the circuit court on remand from taking up and deciding, in a manner consistent with this opinion, additional arguments on the meaning of the statute as necessary for further proceedings in this case.

on phone calls to Tricia in which he discussed Lydia and asked to speak to her, one phone call in which he did speak to Lydia, and an in-person visit. We conclude this additional evidence is relevant to whether Chad "expressed concern for or interest in the support or well-being of the child," a factor that the fact finder may take into account in deciding if the parent "has had a substantial parental relationship with the child." *See* WIS. STAT. § 48.415(6). We recognize this evidence was not brought to the court's attention before it ruled on the partial summary judgment motion. However, we refer to it as an illustration of the reason why there is a particular need for the circuit court, in TPR cases involving fact-intensive grounds such as § 48.415(6), to probe the submissions offered on partial summary judgment to make sure there are no disputed issues of fact. *See* ***Bobby G.***, 305 Wis. 2d 531, ¶¶4 n.5, 90-93.

CONCLUSION

¶24 We reverse the partial summary judgment entered under WIS. STAT. § 48.415(6) on the ground that there are material issues of fact that entitle Chad to a trial. As a result, we reverse the order terminating Chad's parental rights and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.