COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2351 **Cir. Ct. No. 2009TP24**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KODY O., A PERSON UNDER THE AGE OF 18:

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LORIE O.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Judgment and order reversed and cause remanded with directions.*

¶1 HOOVER, P.J.[1] Lorie O. appeals a partial summary judgment finding her unfit, and an order terminating her parental rights to Kody O. The circuit court found Lorie unfit under WIS. STAT. § 48.415(4) based on a continuing denial of visitation. Lorie primarily argues § 48.415(4) is unconstitutional as applied to her because the CHIPS order prohibiting visitation or contact was based solely on her unavailability to Kody due to incarceration.[2] We do not decide the constitutional issue. Rather, we conclude the circuit court improperly granted partial summary judgment under § 48.415(4) because there was no order containing the required notice of WIS. STAT. § 48.356 conditions for Lorie to re-establish contact with Kody. On remand, we direct the circuit court to enter summary judgment in Lorie's favor, dismissing the § 48.415(4) ground for termination.

BACKGROUND

¶2 Lorie moved from California to Wisconsin shortly before giving birth to Kody in September 2000. Kody lived with Lorie and her friend, Leslie O., for several months before Lorie was arrested on a fugitive warrant and returned to California. Leslie became Kody's guardian in January 2001. In July 2006, Kody was removed from Leslie's care due to unsafe living conditions. Leslie's guardianship was terminated in March 2007. A November 30, 2007 CHIPS dispositional order placed Kody in foster care.[3]

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Lorie presented three distinct, but related, arguments in the circuit court. On appeal, the distinctions are blurred.

[3] Judge Thomas Cane presided over the CHIPS proceedings.

¶3 At the November 30 disposition hearing, Marathon County noted Lorie would remain incarcerated for an additional seven years and, pursuant to a psychologist's recommendation, requested that Lorie have no visitation or contact with Kody. Further, due to the psychologist's recommendation, the County indicated it was not requesting any conditions for return. The psychologist, Connie O'Heron, was available at the hearing but did not testify. The County represented it was O'Heron's opinion that contact with Lorie would be harmful because Kody did not understand what a birth mother was or who Lorie was. Further, the County stated:

> The condition under which she would recommend contact would be if the child begins to show interest and request information about his birth mother or that the child's development gets to the stage where he needs to and wants to know about his birth mother and then at that stage we would be asking the psychologist to re-evaluate the situation and make a recommendation concerning the best interests of the child at that time.

¶4 Lorie's counsel requested, and the County agreed, that Lorie would receive monthly updates about Kody's progress, including samples of his school work, and updated pictures every three to four months.[4] Lorie's counsel also requested a review of the no-contact recommendation by O'Heron after one year. Ultimately, the court ordered that Lorie have no visitation or contact with Kody until further court order, that she receive the requested monthly updates, and that there be an annual evaluation and a hearing.

[4] Lorie's counsel indicated Lorie had initially requested one to two updates per month, but that the County had agreed to one.

¶5 The court then advised Lorie that a continuing denial of physical placement or visitation could later be used as grounds to terminate her parental rights. The following exchange occurred:[5]

> A. I understand that but I have an issue with that.
>
> ….
>
> A. I was explaining to them before you came in that this could be grounds for Kody's being taken away from me with no contact or even, you know, I was trying to explain to them that how is Kody even going to know me if I don't, you know – if there isn't [any] speak of contact with me.
>
> So this is like a catch twenty-two, either it is like no matter what it is going to be denied.
>
> THE COURT: Well, I understand your dilemma but I don't know how to answer that at this point.
>
> ….
>
> A. … But what I'm saying is is that Kody is not – if I'm not spoke of about Kody or he doesn't know any knowledge of me, then it is going to – biologically he is going to deny any rights of me to talk to him in a year and then my rights will be terminated.
>
> THE COURT: That could happen.
>
> A. That's what I'm trying to explain. So, how is he going to know anything about me if they don't talk about me?
>
> THE COURT: I assume there is a reason for the no contact and no visitation at this time.
>
> A. I understand the no – but, you know, when they talk to him and – it's like a learning process. He learns about me. He don't have contact with me but he learns about me.
>
> THE COURT: Well, … there will be a psychologist who will be reviewing this and they will be looking out for the best interests of the child at that point.

[5] Lorie participated in the hearing by telephone.

> Now, if that means further contact with you, it will be that way and if it means there be no further contact with you, then it will be that way.
>
> But I think what it means, [Lorie], is that whatever way you can cooperate from California, you are going to have to do your best.

¶6 Although the court did not set any conditions for Lorie to satisfy, she completed various prison programs and promptly signed all medical releases for Kody.[6]

¶7 The court conducted a permanency plan and no-contact review hearing on June 11, 2009. O'Heron recommended continuation of the no-contact order, stating:

> I continue to believe that it's not something in his best interest. I would ask the court, what need would that meet of Kody's? The needs he has are for a secure, stable, predictable environment where he can form a good secure attachment.
>
> In order to do that, he needs caregivers, one that can provide a safe haven for him so that when he's in distress or having difficulties or needs to express feelings, he can go to that adult caregiver that he has the attachment with. And he also needs a secure base from which to feel that he can feel safe here, and then go out and explore his world like children need to do.
>
> Can his biological mother play a role of being either a secure base or safe haven for him? In her situation, I don't believe that's possible for her.

[6] In the circuit court, Lorie asserted in a brief that she had attended the following courses: "Parenting Education Program, Conflict Resolution, Conflict & Anger Management, Alternatives to Violence, Parenting Class, Family Wellness, 12 Step AODA Program, Adult High School and others." The history section of a June 2010 post-termination permanency plan confirms that she provided "certificates of classes she has completed in prison" to the social worker.

On cross-examination, O'Heron observed, "We're having this go on today, you know, her attempt to try to form a relationship for him sounds more like for her need than for him." The following exchange also took place:

> Q. It seems to me, correct me if I'm wrong, that once you reached the conclusion that Kody needs a new attachment figure, termination of parental rights is all but a foregone conclusion. Is that your position?
>
> A. In this case.
>
> Q. So once he's placed … in an out-of-home placement that may become a permanent placement, we're on the path to termination of parental rights and you see no turning back?
>
> A. I think it would not be in his best interest … for us to turn back right now.

After observing that Lorie would be in prison until at least 2017 and that Kody was a child with special needs, the court held:

> I'm satisfied from the doctor's testimony that if there's to be any contact by the mother with the child, it would not be in the child's best interest. It would be harmful to the child, in fact, and detrimental to the child's development. So based on the testimony presented here, I'm satisfied that the no-contact provision should be continued.

¶8 The County then petitioned to terminate Lorie's parental rights, alleging both abandonment and a continuing denial of physical placement or visitation. It subsequently moved for partial summary judgment on the denial of placement or visitation ground. Lorie, in turn, moved to dismiss because the CHIPS order denying visitation failed to set forth any conditions for return or visitation, the order was based solely on her unavailability due to incarceration, and the implied condition of availability created an impossibility.

¶9 The circuit court granted the County's motion and denied Lorie's. Applying the multi-factor analysis outlined in ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶50, 293 Wis. 2d 530, 716 N.W.2d 845, the court determined that the order denying visitation was not based solely on Lorie's incarceration. Although acknowledging Lorie's argument that the no-contact order lacked any conditions, the court did not otherwise address her two remaining arguments. Lorie now appeals.

DISCUSSION

¶10 Lorie presents the following issue(s) on appeal: "[W]hether terminating Lorie's parental rights because of her inability due to incarceration to meet conditions that might provide a basis for a no contact provision in a CHIP[S] order violated Lorie's right to substantive due process." As a whole, Lorie's arguments in her brief-in-chief are inconsistent, poorly developed, and difficult to follow.[7] Additionally, her counsel opted not to file a reply brief. Nonetheless, application of the summary judgment standard of review requires that we reverse the order terminating Lorie's parental rights to Kody.

¶11 We independently review a grant of summary judgment, employing the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***,

[7] For example, the fact section of the brief notes: "Unlike most CHIPS cases, the record and dispositional order did not contain any conditions of return for Kody to Lorie." But, the argument commences by conceding that summary judgment was available and that: "Clearly a dispositional order denying placement and visitation (and all contact) was entered .... Further, it contained both oral and written TPR warnings and remained in effect for over a year." The argument concludes, however, by emphasizing that: "No conditions were ever set for the return of Kody to Lorie nor were any objective requirements set that Lorie could accomplish in prison to provide her a way to re-establish contact with Kody." While the foregoing scattered statements are not necessarily inconsistent, they constitute the extent of Lorie's discussion of the elements the County was required to prove.

136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). When deciding a summary judgment motion, we must examine the submissions of the moving party to determine if they make a prima facie showing that the party is entitled to the relief sought. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17.

> [P]artial summary judgment may be granted in the unfitness phase of a TPR case where the moving party establishes that there is no genuine issue as to any material fact regarding the asserted grounds for unfitness under WIS. STAT. § 48.415, and, taking into consideration the heightened burden of proof specified in WIS. STAT. § 48.31(1) and required by due process, the moving party is entitled to judgment as a matter of law.

Steven V. v. Kelley H., 2004 WI 47, ¶6, 271 Wis. 2d 1, 678 N.W.2d 856. WISCONSIN STAT. § 48.31(1) requires that grounds for unfitness be proved by "clear and convincing evidence." Further, during the grounds phase of termination of parental rights proceedings, the parent's rights are paramount and the burden is on the government. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402.

¶12 Like here, the ground for termination in ***Steven V.*** was a continuing denial of physical placement or visitation under WIS. STAT. § 48.415(4). *See* ***Steven V.***, 271 Wis. 2d 1, ¶8. Section 48.415(4) provides:

> Continuing denial of periods of physical placement or visitation, which shall be established by proving *all* of the following:
>
> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 *containing the notice required by s. 48.356(2)* or 938.356(2).

> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation. (Emphasis added.)

As the circuit court here recognized in its partial summary judgment decision, this ground is "expressly provable by official documentary evidence," specifically, a court order. ***Steven V.***, 271 Wis. 2d 1, ¶¶37, 39.

¶13 In ***Steven V.***, the petition to terminate parental rights did not contain the order to which it referred, but the motion for summary judgment did. ***Id.***, ¶¶9, 45. Thus, the "documentary record reflect[ed] that … [t]he court … imposed a number of conditions that Kelley would need to satisfy before any modification of the ban on visitation would be considered." ***Id.***, ¶9; *accord* ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶¶8-10, 279 Wis. 2d 169, 694 N.W.2d 344. Here, on the other hand, neither the petition nor the summary judgment motion included a copy of the CHIPS order denying Lorie visitation or contact. Indeed, that order is absent from the appellate record.

¶14 Instead, at the summary judgment motion hearing, the circuit court indicated it had retrieved the file from the CHIPS case and would take judicial notice of the entire file. Directing the court to the November 30, 2007 CHIPS dispositional order and June 11, 2009 permanency plan review order, the County acknowledged there were no conditions set forth that Lorie could satisfy to regain contact with Kody:

> I think that they show that … the condition that was set up in … this case for re-establishment of contact between the mother of the child and the child was the need for a finding that the … child's psychologist had made a determination that it would be in the best interests for Kody to have contact with his birth mother, Lorie [O.], and that was the only condition that was established … by the Court for

> re-establishment of contact for physical placement with the … mother.
>
> So … I want everybody – I want the Court to be sure – and I told [Lorie's counsel] before we went on the record that we acknowledge that was the condition in this case. There were not … things like a parenting class. There were not things like counseling for the mother for her to go through.

¶15 The CHIPS court's failure to set forth in the orders the WIS. STAT. § 48.356(1) "conditions necessary for … the parent to be granted visitation" should have precluded the summary judgment finding of unfitness under WIS. STAT. § 48.415(4). Section 48.415(4)(a) requires proof of an order containing "the notice required by [WIS. STAT.] § 48.356(2)," which, in turn, requires written notice of both the TPR warnings and the conditions required by § 48.356(1). *See* ***Ponn P.***, 279 Wis. 2d 169, ¶23.

¶16 The requirement that parents be provided with conditions to satisfy for return of their child is critical to the constitutionality of WIS. STAT. § 48.415(4). In ***Ponn P.***, 279 Wis. 2d 169, ¶24, our supreme court rejected a facial challenge to the statute premised on the argument that "§ 48.415(4) violates substantive due process because 'it does not require any evidence of parental unfitness.'" The court instead accepted the argument that "there are required steps that must be taken before reaching the application of WIS. STAT. § 48.415(4) in a termination of parental rights case and those steps form the foundation for the ultimate finding in subsection (4)." ***Ponn P.***, 279 Wis. 2d 169, ¶26. Thus, the court concluded, "the statutory step-by-step process that underlies § 48.415(4) is sufficient to show that subsection (4) is narrowly tailored to advance the State's compelling interest of protecting children against unfit parents." ***Id.***

¶17 Here, however, the CHIPS court missed the final step of the process, that: "[I]f an order denying visitation and physical placement is entered, it must

contain conditions that when met will permit the parent to request a revision of the order to afford visitation or periods of physical placement." ***Id.***

¶18 Plainly, the requisite condition or conditions are to be established for *the parent* to satisfy. *See, e.g.*, ***id.***, ¶10 (listing the four conditions the parents were to satisfy before they could be granted visitation); ***Steven V.***, 271 Wis. 2d 1, ¶9 (the circuit court "imposed a number of conditions that [the mother] would need to satisfy before any modification of the ban on visitation would be considered"). "The notice required by [WIS. STAT. §] 48.356(2) ... is meant to ensure that a parent has adequate notice of *the conditions with which the parent must comply* for a child to be returned to the home." ***Waukesha County v. Steven H.***, 2000 WI 28, ¶37, 233 Wis. 2d 344, 607 N.W.2d 607 (emphasis added). The single condition imposed here was insufficient; that condition was imposed on either Kody or his psychologist.[8] Lorie was not provided any conditions to satisfy.

¶19 The circuit court's summary judgment decision recognizes Lorie "ask[ed] this court to find the CHIPS process was flawed because of the failure to include conditions for return of Kody to her and, as a result, the TPR action must be dismissed." However, the court's two recitations of the elements to be proven under WIS. STAT. § 48.415(4) both exclude the § 48.415(4)(a) notice requirement. Accordingly, the circuit court's decision does not analyze that element, much less determine it was satisfied.

> Summary judgment is a legal conclusion by the court, and, if carefully administered with due regard for the importance

[8] The County simply contends Lorie's assertion that there were no conditions set forth for re-establishing contact is inaccurate, directing us to the oral discussion of the condition that O'Heron would decide whether contact was allowed. The County does not, however, respond to Lorie's argument that the condition did not provide Lorie with a way to re-establish contact.

> of the rights at stake and the applicable legal standards, is just as appropriate in the unfitness phase of a TPR case where the facts are undisputed as it is in any other type of civil action or proceeding which carries the right to a jury trial.

Steven V., 271 Wis. 2d 1, ¶35. Here, because the County could not prove the notice of conditions element, a careful administration of summary judgment analysis would have resulted in a grant of summary judgment not to the County, but to Lorie.[9]

¶20 We further observe that the summary judgment decision was improperly based on judicial notice of the entire separate CHIPS file. The burden was on the County to present undisputed facts, made part of the record in this case, on which it could rely to prove it was entitled to partial summary judgment. Yet, the documentary evidence on which the County's termination petition relies is not in the record.

¶21 Moreover, the summary judgment decision inappropriately relies upon material facts that are disputed by the existing, limited record. Applying ***Jodie W.*** to facts gleaned from a permanency plan from the CHIPS file, the decision states: "The record in the CHIPS case demonstrates that whether [Lorie] was incarcerated or not incarcerated, she pursued no relationship with the child, whether through direct personal visits, mail, phone, or otherwise." We cannot reconcile this factual conclusion with the County's concession at the summary judgment hearing:

[9] "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." WIS. STAT. § 802.08(6).

> I will acknowledge that since Kody was taken into custody by the Marathon County Department of Social Services and social services reinitiated contact with [Lorie, she] has had very frequent contact with the [Department], requesting updates regarding Kody's welfare, sending pieces of correspondence, and requesting pictures.
>
> So there is no – to be honest, Judge, there certainly has been no lack of interest on [Lorie's] part regarding her child's well-being since she became aware that he was placed at foster care.

The County's concession is confirmed by the history section of a June 2010 post-termination permanency plan, which contains multiple notations that the social worker received letters, pictures, or cards from Lorie for Kody.

By the Court.—Judgment and order reversed and cause remanded with directions.

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