COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1354 **Cir. Ct. No. 2010TP13**

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

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

TIMOTHY F.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] In this termination of parental rights case, the circuit court decided on summary judgment that Timothy F. had abandoned his daughter, Mercedes F., within the meaning of the three-month abandonment ground found in WIS. STAT. § 48.415(1)(a)2. For purposes of summary judgment, it was undisputed that Timothy had "failed to visit or communicate with [Mercedes] for a period of 3 months or longer" and that this occurred while Mercedes was subject to a CHIPS placement order. *See* ***id.*** Thus, it was undisputed that Timothy met the requirements for termination in § 48.415(1)(a)2. Timothy's argument on appeal is based on a statutory defense that, if shown, prevents termination even if the requirements in § 48.415(1)(a)2. are satisfied. Specifically, he argues that the summary judgment submissions show there is a material factual dispute as to whether he "had good cause for having failed to communicate with [Mercedes] throughout the [three-month] time period." *See* § 48.415(1)(c)2.

¶2 The Rock County Human Services Department moved for summary judgment on the abandonment ground at the unfitness phase. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶3-6, 44, 271 Wis. 2d 1, 678 N.W.2d 856 (summary judgment may be granted in the unfitness/grounds phase of a termination of parental rights case). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "An issue of fact is genuine if a reasonable jury could find for the nonmoving party." ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 Timothy argues that a jury could reasonably conclude there was "good cause" for his failure to communicate with Mercedes based on the following events. Mercedes was subject to a CHIPS order and out-of-home placement, and Timothy had to submit to drug and alcohol screenings to satisfy the conditions for Mercedes' return. The social worker assigned to Mercedes' case oversaw these screenings. On June 1, 2009, for reasons that do not matter here, Timothy did not timely provide a required urine sample. According to Timothy's deposition testimony, the social worker called Timothy's probation officer to report his failure to provide the sample. Timothy averred that, based on these events, he knew that his probation officer would seek to revoke his probation, and so Timothy "abscond[ed]." Timothy explained that he absconded to "[a] friend's house" in Janesville.

¶4 According to Timothy, these events correspond to the three months of no communication and provide a basis for a finding of "good cause" for his failure to communicate. Specifically, Timothy asserts that "a reasonable inference can be drawn that Timothy F. had good cause to not attempt to visit or communicate with Mercedes F. because his social worker would cause him to be arrested and incarcerated."

¶5 Under WIS. STAT. § 48.415(1)(c), a parent must prove that he or she had good cause both for failing to visit and for failing to communicate. *See* § 48.415(1)(c)1. and 2. I will assume without deciding that Timothy's proffered justification could be "good cause" for Timothy's failure to physically *visit* Mercedes. That is, I will assume that a reasonable jury could find that Timothy could reasonably fear that if he visited Mercedes he might be arrested and that this, in turn, was "good cause" for his failure to visit her. I do not, however, agree

that a reasonable jury could find that Timothy's status as an absconder was "good cause" for entirely failing to communicate with Mercedes.

¶6 For example, Timothy points to no facts supporting an inference that his predicament prevented him from using a telephone, the mail, or some other means of communication from afar. There is nothing in the submissions suggesting that calling or writing would somehow have led to his apprehension. Thus, I agree with the circuit court and the County that the submissions do not create a material factual dispute as to whether there was good cause for Timothy to fail to communicate.

¶7 In closing, I note that Timothy points to an observation made by the supreme court in ***Steven V.*** There, the court observed that "[s]ummary judgment will *ordinarily* be inappropriate in TPR cases premised on … fact-intensive grounds for parental unfitness," as opposed to grounds that are able to be proved by documentary evidence. *See* ***Steven V.***, 271 Wis. 2d 1, ¶¶36-37 (emphasis added). The court included abandonment in an accompanying list of grounds that are typically fact intensive. *See* ***id.***, ¶36. But this observation does Timothy no good here. This case is not fact intensive. Rather, summary judgment here is consistent with ***Steven V.***'s later explanation that, regardless which termination ground is involved, "[t]he propriety of summary judgment is determined case-by-case." *See* ***id.***, ¶37 n.4.

¶8 For the reasons discussed, I affirm the circuit court.[2]

[2] The County also presents an alternative reason to reject Timothy's argument based on forfeiture. Given my conclusion in the above text, I need not and do not address this alternative reason.

By the Court.—Order affirmed.

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