COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP462 **Cir. Ct. No. 2012TP2**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

JOHN L.-B.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: AMY R. SMITH, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] The Dane County Department of Human Services appeals the circuit court order dismissing its petition to terminate John L.-B.'s parental rights to T.J.[2] The dismissal followed a fact-finding hearing in which the jury found for John L.-B. and against the Department on the Department's two alleged grounds to terminate John L.-B.'s parental rights: failure to assume parental responsibility and six-month abandonment.

¶2 This appeal addresses three Department arguments.[3] First, the Department argues that the circuit court should have directed a verdict, and changed the jury's "no" answer to "yes," on a special verdict question asking whether John L.-B. knew or had reason to believe he was T.J.'s father. Second, the Department argues that the court erred in failing to instruct the jury that "lack of opportunity or ability … is not a defense to failure to assume parental responsibility." Third, the Department argues that the court erred in denying the Department's request to amend its petition allegations to change the six-month abandonment period to end four months later than initially alleged. For the reasons explained below, I reject the Department's arguments and therefore affirm the court's order.[4]

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The parties in this case involving confidential records refer to the child by her first name and last initial in their briefing, consistent with the terms of WIS. STAT. RULE 809.19(1)(g). However, in the interest of further protection of the identity of the child I use initials only and amend the caption accordingly.

[3] The guardian ad litem for T.J. joins in the Department's arguments without filing separate briefs.

[4] The Department makes a fourth set of arguments, which can be summarized by the Department's assertions that "John L.-B. does not enjoy a constitutionally protected interest with regard to [T.J.] because he never had a relationship with her" and that "[a]ny decision this court (continued)

BACKGROUND

¶3 In January 2012, the Department filed a petition to terminate John L.-B.'s parental rights to T.J., who was four years old at the time, having been born in 2007. The petition alleged that the father was John L.-B. "or Unknown." The grounds alleged included failure to assume parental responsibility and six-month abandonment. As relevant here, the statutory provisions describing these grounds are found in WIS. STAT. § 48.415 and read as follows:

> At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights…. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c) ["good cause" defenses], shall be established by proving any of the following:
>
> ….
>
> 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.
>
> ….
>
> (c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

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makes in this matter should be evaluated with the overlay of John L.-B.'s very limited rights in this matter." While the Department elaborates somewhat on this "overlay" concept, it fails to connect it to any legal rule that would provide a basis on which to overturn the jury's verdict or otherwise reverse the circuit court. Moreover, this fourth set of arguments appears to assume findings of fact that the jury did not make. I therefore do not consider this fourth set of arguments further.

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable ....

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

….

(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.

¶4 John L.-B. contested the petition and invoked his right to a jury trial at the fact-finding hearing. It was undisputed that John L.-B. had been in prison since some time in 2010. It was also undisputed that John L.-B. knew he was T.J.'s father as of February 2012, after he received the results of a DNA test. However, the parties disputed, among other issues, whether John L.-B. had reason to believe he was T.J.'s father in 2007, when T.J.'s mother was pregnant with T.J. and informed John L.-B. of that fact, and when, two months after T.J.'s birth, T.J.'s mother told him that she believed him to be the father.

¶5 The parties agreed that the jury would receive several pattern jury instructions, including a combined version of WIS JI—CHILDREN 346A, "Failure to Assume Parental Responsibility: Knowledge of Paternity," and WIS JI—CHILDREN 346B, "Failure to Assume Parental Responsibility: Incarcerated Parent." The parties' agreed-upon instructions included the special verdict form for 346A, which asks the following two questions:

> 1. Did (parent) know or have reason to believe that he was (child's) father? ….
>
> **If the answer to question 1 is "yes," answer the following question:**
>
> 2. Has (parent) failed to assume parental responsibility for (child)? ….

See WIS JI—CHILDREN 346A. As is shown here, neither Question 1 nor Question 2 in the verdict form on its face references any particular date or time frame.

¶6 The Department also requested that the instructions include language to the following effect: "a parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental

responsibility." The Department asserted that similar language was contained in a previous version of the instructions, and that, although the Juvenile Jury Instructions Committee recently removed that language, the Committee's removal of the language was based on an erroneous understanding of the case law. John L.-B. objected to including this type of additional language.[5]

¶7 The court concluded that the additional language should be omitted. The court reasoned that the language might confuse the jury, given other language in the instructions informing the jury that it must consider the totality of circumstances surrounding the alleged failure to assume parental responsibility, including the parent's reasons for failing to care for or support the child.

¶8 The parties agreed that the jury should be instructed to make its findings on the failure to assume responsibility ground as of the date of the fact-finding hearing. Thus, as discussed further below, the parties agreed that the jury would be instructed that its answers to the special verdict form on failure to assume parental responsibility "must reflect your findings as of today's date," meaning the date the instruction was given at the fact-finding hearing.

¶9 Ten days before the date scheduled for the fact-finding hearing, in November 2012, the Department requested leave to amend the petition to

[5] There is some ambiguity in the record as to whether the language the Department requested was narrower, to the effect: "a parent's lack of opportunity and ability to establish a substantial parental relationship *due to incarceration* is not a defense to failure to assume parental responsibility." (Emphasis added.) It appears that the Department may have been requesting the broader language be included as part of WIS JI—CHILDREN 346A, "Failure to Assume Parental Responsibility: Knowledge of Paternity," and the narrower language, which referred specifically to incarceration, be included as part of WIS JI—CHILDREN 346B, "Failure to Assume Parental Responsibility: Incarcerated Parent." I will assume, in the Department's favor, that it made both requests.

terminate parental rights to change the relevant time period for the six-month abandonment ground. Specifically, the Department sought to shift the period significantly forward in time, from the six months ending with the January 9, 2012 filing of the petition to the six months ending in April 2012. Thus, the change the Department sought would have amended the petition to include a period of time after February 2012, when John L.-B. learned of DNA test results confirming that he was T.J.'s father. The circuit court denied the Department's request in a ruling described in more detail below.

¶10 At the November 2012 fact-finding hearing, only two witnesses testified: John L.-B. and the social worker who had been responsible for T.J.'s case management starting in June 2011. What follows is a summary of some of the most pertinent testimony given by John L.-B., viewing the evidence in the light most favorable to the jury's verdict. *See* ***Reuben v. Koppen***, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703 (court of appeals views evidence in the light most favorable to jury's verdict on appeal).

¶11 John L.-B. testified that he had sexual intercourse with T.J.'s mother, H.B., numerous times, including unprotected intercourse approximately nine months before T.J.'s birth. However, John L.-B. said that he believed that H.B. was also having sexual relations with other men at around the same time. H.B. told him that she was unable to get pregnant. However, at some point in 2007, H.B. told John L.-B. that she was pregnant. H.B. told him this in the presence of a man whom John L.-B. described as H.B.'s "boyfriend," who had the same last name as that later given to T.J. H.B. did not tell John L.-B. that she believed him to be the father at the time she told him she was pregnant. When H.B. told John L.-B. that she was pregnant, he decided not to see her anymore because he believed that she had lied to him regarding her ability to get pregnant.

¶12 John L.-B. had no further contact with H.B. until later in 2007, when T.J. would have been approximately two months old. At that time, H.B. indicated that she wanted John L.-B. to see T.J. and told John L.-B. that he was T.J.'s father. In addition, one or more of his relatives, who were acquainted with H.B., told him that they thought that the baby looked like him. However, he did not think the baby looked like him and did not believe H.B. was accurately calling him the father, because he believed that H.B. had lied to him on a range of issues over time. John L.-B. attempted to get a DNA test at that time in order to determine whether he was the father, but H.B. would not agree to it. In the initial months after T.J.'s birth, John L.-B. had some contact with T.J., but that contact could be reasonably described as limited.

¶13 The next time John L.-B. received any indication that he might be T.J.'s father was after he went to prison. He received a June 2011 letter from T.J.'s social worker stating that he was a "potential" father. He responded to the letter "promptly" and agreed to a DNA test. He received a response from the social worker in October 2011. After another letter, he was provided with an opportunity to provide a DNA sample in January 2012. In February 2012, about one month after the Department filed its petition to terminate parental rights, he received the results of the DNA test, showing that he was T.J.'s father. He testified that this was when he first believed that he was T.J.'s father.

¶14 John L.-B. also gave testimony suggesting that, after he received the DNA test results, he made the efforts that he could from prison to assume parental responsibility. For example, he testified that he wrote to T.J., contacted family members to see if they could assist him in taking care of T.J. until he could do so himself, repeatedly reviewed reports relating to T.J.'s progress in order to keep abreast of her situation, and requested to speak with her foster parents.

¶15 Based on the testimony, the Department moved for a directed verdict on Question 1. As indicated above, that question asked the jury, "Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?" The Department argued in particular that the answer could only be "yes" because John L.-B. admitted that he knew he was T.J.'s father as of February 2012.

¶16 John L.-B.'s counsel objected to a directed verdict on Question 1. He argued that, while Question 2 regarding whether John L.-B. failed to assume parental responsibility had to be answered as of the date of the fact-finding hearing, Question 1 regarding whether John L.-B. knew or had reason to believe he was T.J.'s father must be answered as of the date of the petition, January 9, 2012, which was before the DNA test results were known. He relied, in part, on ***State v. Bobby G.***, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81.

¶17 The circuit court denied the Department's motion for directed verdict on Question 1. The court indicated that it would review the ***Bobby G.*** case and could revisit the Department's motion for directed verdict on Question 1 after the jury made its decision.

¶18 The instructions the jury received on the failure to assume responsibility ground included the following:

> Your role as jurors is to answer the following questions in the Special Verdict:
>
> Question 1: Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?
>
> If the answer to Question 1 is "yes," answer the following question:
>
> Question 2: Has John [L.-B.] failed to assume parental responsibility for [T.J.]?
>
> ….

> To establish that a father who appears and contests a petition for termination of parental rights failed to assume parental responsibility for a child, *the petitioner must prove that the father knew or had reason to believe he was the father of the child. As of the time a man knows or has reason to believe he is the father of a child, he has a duty to assume parental responsibility for the[] child.*
>
> *In determining whether a father had reason to believe he was the father of the child*, you may consider the circumstances of and likelihood of conception; what efforts, if any, he did or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; … *his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother, relatives, child support enforcement or child welfare authorities made to establish paternity or to apprise him of his paternity*; his knowledge or lack of knowledge of those efforts; … *any information that would lead him to believe he was not the father of the child*; and any efforts to preclude him from determining that status or of the existence of the child *and all other evidence bearing on that issue.*
>
> …. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.
>
> ….
>
> In answering questions in the Special Verdict for failure to assume parental responsibility, you may consider all evidence bearing on that question, *including evidence of events and conduct occurring before the petition was filed* on January 9, 2012, and since the filing of the petition. *Your answers must reflect your findings as of today's date.*

(Emphasis added.)

¶19 During closing arguments, the Department argued to the jury that there were "two ways" the jury could look at the question of whether John L.-B. knew or had reason to believe he was T.J.'s father. The Department asserted that the jury could consider John L.-B.'s admission that he knew he was T.J.'s father in February 2012, based on the DNA test, "*[b]ut you also have to think back to* …

2007." (Emphasis added.) The Department cited testimony that was relevant to John L.-B.'s knowledge or reason to believe he was T.J.'s father in 2007 and argued that this evidence showed that John L.-B. should have known he was the father at that time as well. Toward the end of its closing argument, the Department returned to the topic of what John L.-B. knew in 2007:

> Again, with regard to the failure to assume parental responsibility ground, the first question you have to ask is, "Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?" …. *I think you can answer that one "yes," and I think you can answer it "yes" based upon the fact that in December of 2007 he had that significant information[,]* knowing he had sexual intercourse with the mother unprotected [many] times, knowing she had borne a child …, knowing that she, in fact, insisted to him that he was the child's father, and knowing that relatives had told him, it looks like you ….

(Emphasis added.)

¶20 The guardian ad litem in her closing argument reviewed at some length the evidence pertaining to whether John L.-B. knew or had reason to believe he was T.J.'s father in 2007. She argued to the jury that "[g]iven all those circumstances, I think there is certainly reason to believe that *by 2007 he knew there was reason to believe he was [the] father. And the jury instruction … said that as a result he had a duty to assume parental responsibility at that time*." (Emphasis added.) The guardian ad litem also pointed out that it was clear that John L.-B. knew he was the father by the time of the DNA test results in February 2012.

¶21 John L.-B.'s counsel's closing may be summarized by counsel's statement, "This case is only fairly about what John knew or should have believed about his paternity of [T.J.] and what he did afterward." Counsel essentially argued that the evidence showed that John L.-B. did not know or have reason to

believe that he was T.J.'s father until 2012, and that, once he did, he made whatever parental efforts he reasonably could from prison.

¶22 Having answered "no" to Question 1 asking whether John L.-B. knew or had reason to believe he was T.J.'s father, the jury did not reach Question 2 as to whether John L.-B. failed to assume parental responsibility. In addition, the jury found in favor of John L.-B. in a special verdict on the six-month abandonment ground, based on a "good cause" defense. *See* WIS. STAT. § 48.415(1)(c) (setting forth elements parent must establish to prove "good cause" defense to abandonment ground).

¶23 The Department moved the court to change the jury's answer to Question 1 to "yes," citing ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854. The Department argued that ***Tammy W.-G.*** establishes that the fact finder determining whether a parent knew or had reason to believe that he was a parent must consider the totality of circumstances up to the time of the fact-finding hearing. John L.-B. objected, arguing that nothing in the jury instructions and nothing in the way the case was argued was inconsistent with the jury's verdict. John L.-B. further argued that ***Tammy W.-G.*** addresses only the time frame for whether the parent failed to assume parental responsibility (Question 2 in the special verdict), not the time frame for whether the parent knew or had reason to believe he was the child's parent (Question 1 in the special verdict). The court agreed with John L.-B.'s analysis and denied the Department's motion to change the jury's Question 1 answer.

¶24 Based on the jury's verdict, the circuit court dismissed the Department's petition to terminate John L.-B.'s parental rights. The Department appeals and the guardian ad litem joins in the Department's position.

DISCUSSION

¶25 As indicated above, this case involves two grounds for termination of parental rights: failure to assume parental responsibility and six-month abandonment. The Department's first two arguments relate to the failure to assume responsibility ground. Its third argument relates to the abandonment ground.

A. Directed Verdict or Change to Jury's Answer in Verdict

¶26 The Department first argues that the circuit court erred in denying its motion to direct a verdict on, and in denying its motion to change the jury's answer to, Question 1. These arguments present a question of law for de novo review. *See* ***Dalka v. Wisconsin Cent., Ltd.***, 2012 WI App 22, ¶15, 339 Wis. 2d 361, 811 N.W.2d 834 (motion for directed verdict); ***Reuben***, 324 Wis. 2d 758, ¶19 (motion to change verdict answer). As already indicated, Question 1 asked, "Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?" The jury answered "no" to this question.

¶27 The Department argues, as it did in the circuit court, that the court should have directed a verdict on Question 1 because John L.-B. admitted in his testimony that he knew as of February 2012 that he was the child's father. The Department points out that there is no evidence to the contrary.

¶28 The Department relies on this same admission in arguing that the court should have changed the jury's answer to Question 1. In making this argument, the Department also relies on the following portion of the instructions the jury received, in particular the final sentence:

> In answering questions in the special verdict for failure to assume parental responsibility, you may consider all evidence bearing on that question, including evidence of events and conduct occurring before the petition was filed on January 9, 2012 and since the filing of the petition. *Your answers must reflect your findings as of today's date.*

(Emphasis added.) The Department argues that, considering John L.-B.'s admission and the above jury instruction, "[o]nly a perversion of the facts or law, or both," could have led the jury to answer "no" to Question 1.

¶29 Thus, the Department's argument is essentially two-fold: (1) based on the evidence, the only reasonable answer to Question 1 is "yes," and (2) in answering the question "no," the jury must have ignored the facts, or misapplied the jury instructions or the law. *See* ***Becker v. State Farm Mut. Auto. Ins. Co.***, 141 Wis. 2d 804, 820, 416 N.W.2d 906 (Ct. App. 1987) ("A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law.").

¶30 John L.-B. argues that the Department's argument is based on an unsupported assumption that the operative date for whether John L.-B. knew or had reason to believe he was T.J.'s father was the date of the fact-finding hearing, November 2012. He argues that the operative date is instead the date of the filing of the petition, January 9, 2012, before he received the DNA test results.

¶31 I agree with John L.-B.'s argument that the Department's position rests on an inadequately supported assumption that the operative date for whether John L.-B. knew or had reason to believe he was T.J.'s father was the date of the fact-finding hearing, in November 2012. In addition, I conclude that the Department's argument falls short because it focuses on John L.-B.'s admission and an isolated part of the jury instructions, without analyzing what the jury may

have reasonably concluded based on the evidence, the instructions as a whole, and the arguments of the parties and guardian ad litem. *See* ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992) ("when [appellate] court reviews jury instructions, it is required to consider the instructions as a whole and in their entirety"). In short, the Department's arguments as to Question 1 are inadequately developed, and I could stop my analysis of those arguments here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may disregard undeveloped arguments).[6]

¶32 Given the interests at stake, however, I choose to determine whether the Department correctly assumes that the operative date for whether John L.-B. knew or had reason to believe he was T.J.'s father was the date of the fact-finding hearing, and to determine whether the Department is correct that Question 1 must be answered "yes" based on the law as applied to the facts of this case. I conclude for the reasons that follow that the Department's assumption is wrong under ***Bobby G.***, and that the jury could reasonably answer Question 1 "no," given the evidence, the jury instructions as a whole, and the arguments of the parties and the guardian ad litem.

[6] The Department separately makes what is essentially a one-paragraph argument that the circuit court should have directed a verdict on Question 2 because John L.-B. admitted under direct examination by the Department that he had not had a substantial parental relationship with T.J. However, the Department does not demonstrate that it moved for a directed verdict on Question 2 in the circuit court, nor does the Department develop its argument as to Question 2 now. I therefore decline to address whether the court should have directed a verdict on Question 2. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an argument in the circuit court forfeits the argument on appeal); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may disregard undeveloped arguments).

¶33 I first note that, even without ***Bobby G.***, the Department's assumption makes little sense. There was no dispute at the fact-finding hearing that John L.-B. knew he was T.J.'s father by the date of the fact-finding hearing. However, it is difficult to see how his knowledge on that date matters. What matters is the date on which he *first* knew or had reason to believe that he was T.J.'s father.

¶34 In ***Bobby G.***, as here, the father was not identified with certainty at the time that a petition to terminate parental rights was filed. *See* ***Bobby G.***, 301 Wis. 2d 531, ¶¶10-11. The father in ***Bobby G.*** first learned of the child's existence when he was served with a summons for the termination proceedings. ***Id.*** His paternity was adjudicated a few months later, as a result of genetic testing. ***Id.***, ¶12. The father's responses to subsequent discovery requests indicated that he took no steps to assume parental responsibility before learning of the child's existence, but that after learning of the child's existence he made repeated efforts to communicate with the child and expressed interest in developing a parental relationship. ***Id.***, ¶16.

¶35 The circuit court granted summary judgment to the state, concluding that summary judgment was warranted on the "sole basis" that the father "had failed to assume his parental responsibilities before he knew of the existence of his biological child." ***Id.***, ¶19. The supreme court reversed. ***Id.***, ¶6. It concluded that, "in determining … [whether] a biological father has failed to assume parental responsibility under WIS. STAT. § 48.415(6), a circuit court must consider the biological father's efforts undertaken *after he discovers that he is the father* but before the circuit court adjudicates the grounds of the termination proceedings." ***Id.***, ¶5 (emphasis added).

¶36 The supreme court in ***Bobby G.*** observed that, until the pertinent statutes were amended in 1995, they contained an express requirement that the father must have had "reason to believe he was the father of the child" before his parental rights could be terminated on the ground of failure to assume parental responsibility. ***Id.***, ¶¶69, 72, 76, 78-80. After the 1995 amendments, the statutes omitted this express requirement. ***Id.***, ¶80. The court concluded, however, that the amendments were not intended to change the requirement, based on the statutory context and legislative history. *See* ***id.***, ¶¶82-83.

¶37 Thus, under ***Bobby G.***, the pertinent question in a case like John L.-B.'s is whether the parent fails to assume parental responsibility *after* the parent first knew or had reason to believe that he is the father. Indeed, the jury here received an instruction essentially to this effect. *See* WIS JI—CHILDREN 346A ("As of the time a man knows or has reason to believe he is the father of a child, he has a duty to assume parental responsibility for the[] child."). However, the Department ignores this instruction in its appellate arguments.

¶38 In the circuit court, the Department relied on ***Tammy W.-G.*** ***Tammy W.-G.***, like ***Bobby G.***, is a failure to assume responsibility case. *See* ***Tammy W.-G.***, 333 Wis. 2d 273, ¶13. The court concluded in ***Tammy W.-G.*** that the fact finder is to use a "totality-of-the-circumstances" test and "should consider the circumstances that have occurred over the entirety of the child's life," up to the time of the fact-finding hearing, in order to determine whether a parent failed to assume parental responsibility. *See* ***id.***, ¶¶22-23, 26. However, ***Tammy W.-G.*** did not involve any issue as to whether the father knew or had reason to believe he was the child's parent. *See* ***id.***, ¶4. Rather, the case involved whether a parent who knew from the start that he was the child's father had a substantial parental relationship with the child. *See* ***id.***, ¶¶4-12, 32-35. The Department provides no

persuasive argument as to why ***Tammy W.-G.*** should be read as addressing the operative date for purposes of whether a parent knew or had reason to know he was the child's father.

¶39 Accordingly, under ***Bobby G.*** and ***Tammy W.-G.***, in a case where a failure to assume responsibility is alleged and there is an issue as to when the parent knew or had reason to believe he was the child's father, the primary inquiry for the fact finder is whether the parent failed to assume parental responsibility *after* the parent knew or had reason to believe he was the child's father. And, in deciding whether the parent failed to assume parental responsibility after the parent knew or had reason to believe he was the child's father, the fact finder must consider the totality of facts revealed about what the father did or did not do up to the time of the fact-finding hearing.

¶40 Having set forth the correct legal standards, I return to the Department's argument. To review, Question 1 asked, "Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?" and the jury answered "no," even though it was instructed, in part, that its answers "must reflect your findings as of today's date," and even though John L.-B. admitted that he knew he was T.J.'s father in February 2012, before the fact-finding hearing in November 2012.

¶41 It is true that, if viewed in isolation, it might seem from the verdict form and John L.-B.'s admission, that the only reasonable answer to Question 1 is "yes." Similarly, it is true that, if viewed in isolation, it might seem from the verdict form, the above instruction, and John L.-B.'s admission, that the jury must have ignored or misapplied the instruction. However, in the broader context of the applicable legal standards, the evidence, the instructions as a whole, and the arguments of the parties and guardian ad litem, I cannot conclude that the only

reasonable answer to Question 1 was "yes" or that the jury's "no" answer to Question 1 was perverse, as the Department argues. The Department does not show that the jury misapplied the instructions as a whole or misapplied the law.[7]

¶42 In addressing the Department's argument, I first note that Question 1 in the special verdict form does not specify a date. Thus, the jury had to take its cues as to the operative date from the evidence, the totality of the instructions it received, and the arguments and theories advanced by the parties and guardian ad litem. I will discuss each.

¶43 As outlined in the background section above, John L.-B. gave extensive testimony relevant to the question of whether he knew or had reason to believe he was T.J.'s father *in 2007*. Whether he knew he was T.J.'s father as of February 2012 or as of the date of the November 2012 fact-finding hearing was the subject of only brief testimony, plainly because it was not in dispute. As to 2007, the person who it would seem could have most clearly contradicted John L.-B.'s testimony on what he knew or had reason to believe was T.J.'s mother, H.B. She did not testify, nor did any other witness who could have given testimony bearing on what John L.-B. knew or had reason to believe in 2007.

¶44 As also outlined above, the jury received a number of instructions in addition to the part of the instructions on which the Department relies. The jury was instructed that, "[i]n determining whether a father had reason to believe he was the father of the child," it should consider a number of circumstances

[7] John L.-B. argues that the part of the jury instructions that the Department relies on is erroneous, but not grounds for reversal because the instruction would have only benefitted the Department. I need not and do not reach this argument, based on my analysis above.

including but not limited to "his efforts or lack of efforts to establish paternity," "what efforts others, including *the mother* … made to establish paternity or [*to*] *apprise him of his paternity*," "any *information that would lead him to believe he was not the father* of the child," "any *efforts to preclude him from determining that status* or of the existence of the child," and "*all other evidence* bearing on that issue." (Emphasis added) In addition, the jury was instructed, that, in answering Question 1, "you may consider *all evidence* bearing on that question, *including evidence of events and conduct occurring before the petition was filed on January 9, 2012*." Given John L.-B.'s extensive testimony regarding factors relevant to what he knew or had reason to believe in 2007, and given his admission that he knew he was T.J.'s father in 2012, these instructions plainly focused the jury's attention on whether John L.-B. knew or had reason to believe he was T.J.'s father *in 2007*, not in 2012, even though the jury was also instructed that its answers "must reflect your findings as of today's date."

¶45 Finally, as summarized above, both the parties and the guardian ad litem during closing arguments focused the jury's attention on what John L.-B. knew or had reason to believe about his possible paternity of T.J. in 2007. Although the parties also referenced 2012, it was plain to the jury that the primary dispute involved what John knew or had reason to believe *in 2007*. As noted above, the Department in its closing argument placed considerably more emphasis on 2007 than 2012, ultimately arguing to the jury as follows:

> Again, with regard to the failure to assume parental responsibility ground, the first question you have to ask is, "Did John [L.-B.] know or have reason to believe that he was [T.J.]'s father?" …. *I think you can answer that one "yes," and I think you can answer it "yes" based upon the fact that in December of 2007 he had that significant information* knowing he had sexual intercourse with the mother unprotected [many] times, knowing she had borne a child …, knowing that she, in fact, insisted to him that he

> was the child's father, and knowing that relatives had told him, it looks like you ….

(Emphasis added.) Similarly, as indicated above, the guardian ad litem argued to the jury that "[g]iven all th[e] circumstances, I think there is certainly reason to believe that *by 2007 he knew there was reason to believe he was [the] father. And the jury instruction … said that as a result he had a duty to assume parental responsibility at that time*." (Emphasis added.)

¶46 Based on John L.-B.'s testimony, the instructions as a whole, and the arguments of the parties and the guardian ad litem, I conclude that the jury was led to understand that it was being asked in Question 1 to find whether John L.-B. knew or had reason to believe he was T.J.'s father in 2007. In other words, even though one part of the instructions told the jury that its answers "must reflect your findings as of today's date," the instructions as a whole, together with the way the evidence was presented and argued to the jury, told the jury that it was being asked to find whether John L.-B. knew or had reason to believe he was T.J.'s father in 2007.

¶47 The question remains whether John L.-B.'s testimony provided sufficient evidence to support a finding that he did not know or have reason to believe he was T.J.'s father in 2007. The Department does not argue that, if the question the jury answered in Question 1 is whether John L.-B. knew or had reason to believe he was T.J.'s father in 2007, the evidence is insufficient to support the jury's "no" finding on Question 1. Nor does the Department make any argument as to how low or high a bar the "reason to believe" standard represents. I thus take the Department to have conceded that, if the pertinent date is 2007, then the evidence was sufficient to support the "no" finding. *See* ***Reuben***, 324 Wis. 2d 758, ¶19 (court of appeals "view[s] the evidence in the light most

favorable to the jury's verdict, and we will sustain the jury's verdict if there is any credible evidence 'under any reasonable view, that leads to an inference supporting the jury's finding'") (quoted source omitted). Given this Department concession and the evidence as it was presented to the jury, I conclude that the jury could reasonably apply the instructions as a whole to the evidence to find that John L.-B. did not know or have reason to believe he was T.J.'s father in 2007. I note that the Department did not object to the part of the jury instructions explaining that the jury should consider a variety of factors in addressing the concept of "reason to believe," and that application of these factors appears to leave the jury free to conclude, based on the totality of circumstances, that a man lacks reason to believe he is a child's father even if he is aware of at least some information that suggests otherwise.

¶48 Moreover, I am not persuaded by any Department argument that, on this record, the instructions as a whole misinformed the jury as to the proper legal standards. As explained above, it is illogical, and contrary to ***Bobby G.***, to conclude that the operative date for a parent's knowledge or reason to believe he is the child's father is the date of the fact-finding hearing. Thus, it would have been erroneous for the jury to have used that date as the operative date and to have answered Question 1 "yes" solely on that basis. Obviously, John L.-B. knew he was T.J.'s father on the date of the fact-finding hearing, and the fact that he knew on that date was not material to whether he failed to assume parental responsibility. What was material was the date on which he first knew or had reason to believe he was T.J.'s father.

¶49 I note that the Department does not develop an argument that there could be reversible error here based in whole or in part on the form of the special verdict, which followed the standard form in WIS JI—CHILDREN 346A. In any

case, the Department agreed to the court's use of that form. The form does not provide the jury with the option of making a finding as to a parent's knowledge or reason to believe that he is the child's father on more than one date. In addition, the form does not allow the jury the opportunity to reach Question 2 unless it answers Question 1 "yes." Thus, the jury does not reach the ultimate question of whether a parent failed to assume parental responsibility unless the jury first finds that the parent knew or had reason to believe he was the child's father. Here, as a consequence of the verdict form and the jury's finding that John L.-B. did not know or have reason to believe he was T.J.'s father in 2007, the jury had no opportunity to make a finding as to whether John L.-B. failed to assume parental responsibility after he knew in February 2012 that he was T.J.'s father. Again, however, the Department makes no arguments on these topics.

¶50 For all of these reasons, I reject the Department's arguments that the circuit court should have directed a verdict on Question 1 or, barring that, should have changed the jury's answer to Question 1.

B. "Lack of Opportunity and Ability … Is Not a Defense" Instruction

¶51 The Department's second argument is that the circuit court erred when it refused to give the Department's requested instruction that "A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility." As indicated in footnote 5 above, there is some ambiguity in the record as to whether the language the Department requested was narrower. However, as explained in the footnote, I will assume, in the Department's favor, that it requested both the narrower language and this broader language. As already noted, the circuit court reasoned that the language might confuse the jury, given other language in the instructions

informing the jury that it must consider the totality of circumstances for failing to assume parental responsibility, including a parent's reasons for failing to care for or support the child.

¶52 "The trial court has broad discretion when instructing a jury." ***Fischer***, 168 Wis. 2d at 849. "A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial." ***Id.*** Such error is prejudicial if it "probably an not merely possibly" misstated the law and misled the jury. ***Id.*** at 850.

¶53 The Department argues that the broader "lack of opportunity and ability … is not a defense" language was previously included in the pattern jury instructions but was removed by the Wisconsin Juvenile Jury Instructions Committee in 2012 based on the Committee's analysis of ***Bobby G.*** and ***Tammy W.-G.*** The Department argues that the Committee erroneously interpreted those cases and that including the broader language is the "better position," given that the ***Tammy W.-G.*** court used this language.

¶54 However, the question is not whether the jury instructions may have been "better" with this language included. The question is whether the instructions, without the language, "probably" misstated the law or misled the jury. The Department's argument points to its requested language in isolation, ignoring the instructions as a whole. In addition, rather than explain why omitting its requested language probably misstated the law or misled the jury, the Department seems to assume that the court was required to use its requested language because the language appears in ***Tammy W.-G.***

¶55 Thus, the Department's argument is again undeveloped, and I could therefore stop my analysis of this issue here. In addition, John L.-B. argues that

the Department failed to properly preserve this argument by failing to re-raise it at the formal jury instructions conference. However, given the interests at stake, I will address whether the court erred in refusing to include the Department's requested language in the jury instructions. I conclude that it did not.

¶56 Under ***Bobby G.***, a parent's lack of knowledge or reason to believe that he is a child's father is, at least in a sense, a defense to a termination of parental rights based on failure to assume parental responsibility. This is because, under ***Bobby G.***, a parent cannot be found to have failed to assume parental responsibility for a child until that parent knows or has reason to believe he is the parent. *See* ***Bobby G.***, 301 Wis. 2d 531, ¶¶5, 82-83; *see also* WIS JI—CHILDREN 346A ("As of the time a man knows or has reason to believe he is the father of a child, he has a duty to assume parental responsibility for the child.").

¶57 The Department's argument is based on the following statement in ***Tammy W.-G.***, which the Department apparently views as overruling ***Bobby G.***: "[A]lthough a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis." ***Tammy W.-G.***, 333 Wis. 2d 273, ¶38. This statement in ***Tammy W.-G.*** appears to mean that, while a parent's lack of opportunity to establish a substantial relationship is not a complete or perfect defense to failure to assume parental responsibility, it may be considered as one relevant factor in the overall analysis.

¶58 It might be argued that the ***Tammy W.-G.*** court's "lack of opportunity is … not a defense" statement is inconsistent with, and therefore modifies, ***Bobby G.*** However, I conclude for two reasons that the more reasonable reading of ***Tammy W.-G.*** is that it does not modify ***Bobby G.*** First, as already

indicated, the court in ***Tammy W.-G.*** did not address a situation in which the father did not know or have reason to believe that he was the child's father. Thus, there is nothing to suggest that the phrase "lack of opportunity" in ***Tammy W.-G.*** refers to a father's lack of knowledge or lack of reason to believe that he is the child's father. Rather, the dispute in ***Tammy W.-G.*** involved whether the father had a good reason for not providing additional care or support for his child after the parents separated and he relocated. *See* ***id.***, ¶¶5-11 & nn. 4-5. Second, the court in ***Tammy W.-G.*** relied for part of its analysis on ***Bobby G.*** and did not indicate that it was overruling or modifying ***Bobby G.*** *See* ***id.***, ¶27 (citing ***Bobby G.***, 301 Wis. 2d 531, ¶84).

¶59 In addition to ***Tammy W.-G.***, the Department cites, but does not meaningfully analyze, ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 500 N.W.2d 649 (1993). In ***Ann M.M.***, the court stated that "parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child." ***Id.*** at 684. However, ***Ann M.M.***, like ***Tammy W.-G.***, did not involve any issue as to whether a parent knew or had reason to believe he was the father. Rather, in ***Ann M.M.*** the child's father argued that the circumstances surrounding his arrest and conviction eliminated his "opportunity and ability" to assume parental responsibility. *See* ***id.*** at 683. It was in that context that the court explained that proof of opportunity and ability was not required.

¶60 For these reasons, I conclude that the circuit court reasonably determined that including the "lack of opportunity and ability … is not a defense" language might have confused the jury. John L.-B.'s case, like ***Bobby G.***, but unlike ***Tammy W.-G.*** and ***Ann M.M.***, involved an issue as to whether the parent knew or had reason to believe he was the child's father. The language that the

Department proposed could have suggested the following erroneous proposition to the jury: John L.-B.'s lack of knowledge or lack of reason to believe he was T.J.'s father in 2007 is not a defense to whether he failed to assume parental responsibility at that time.

¶61 Finally, I note that, if the Department's argument is based on the concern that, without the "opportunity and ability" language, the jury would have erroneously believed that John L.-B.'s imprisonment was a defense to failure to assume parental responsibility, then the argument lacks merit. The jury received a separate, detailed instruction, based on WIS JI—CHILDREN 346B, which made apparent to the jury that the fact of John L.-B.'s imprisonment, along with the ways that imprisonment might limit his ability to provide care or support for T.J., was not dispositive in either direction, but rather a factor to be considered. Once again, the Department's arguments fail to address the jury instructions as a whole.

¶62 For all of the reasons stated, I decline to overturn the circuit court's exercise of its discretion to omit the Department's proposed "lack of opportunity and ability … is not a defense" language from the jury instructions.

C. Leave to Amend

¶63 The Department's third argument is that the circuit court erred in denying the Department's request to amend its petition allegations to reflect a different six-month abandonment period. I reject this argument for the reasons that follow.

¶64 The general rule is that a circuit court should grant leave to amend freely "when justice so requires," provided that the amendment is not unfair to the opposing party. *See* WIS. STAT. § 802.09(1); ***Zobel v. Fenendael***, 127 Wis. 2d

382, 393, 379 N.W.2d 887 (Ct. App. 1985). However, the decision on whether to grant leave is a discretionary one. *See* ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. This court thus upholds the circuit court's leave decision as long as that court "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***

¶65 Here, the circuit court first noted that the Department filed its petition to terminate John L.-B.'s parental rights in January 2012, alleging four separate grounds for termination: failure to assume responsibility, six-month abandonment, ninety-day abandonment, and continuing CHIPS. In June 2012, the Department dropped the ninety-day abandonment and continuing CHIPS grounds. The court pointed out that it was not until November 2012, ten months after the petition was filed and ten days before the scheduled date for the fact-finding hearing, that the Department requested leave to amend the six-month abandonment period. The court also noted that, by the time it was able to address the Department's request, John L.-B. had already filed a brief for the hearing addressing his history of imprisonment. In addition, the court found, based on John L.-B.'s counsel's representation on the record, that John L.-B.'s counsel had prepared for the hearing in reliance on the specific six-month time frame in the petition.

¶66 The court recognized that the standards for leave to amend pleadings are liberal. However, the court concluded that, under the specific circumstances presented here, "I do not believe that justice requires amendment at th[is] late date and I actually find that it may work against justice to do so." The court expressly noted its concern that there would be potential unfairness to John L.-B. if the court granted the Department's request for leave.

¶67 The court considered a number of Department arguments, including an argument that the amendment would not significantly change the pertinent Department evidence or John L-B.'s ability to defend against it, given that the other asserted ground was failure to assume parental responsibility. The court also considered a Department argument that there had been delays outside the Department's control, resulting in continuances and late discovery responses from John L.-B., and that judicial economy warranted the requested amendment. In rejecting these arguments, the court reiterated that the Department had already in effect been permitted to amend the petition, that the Department had ample opportunity to seek leave at earlier times, and that the Department now wanted to "change the rules of engagement 10 days before" the fact-finding hearing.

¶68 On appeal, the Department largely reiterates the same arguments that the circuit court rejected.[8] None of these arguments persuades me that the circuit court misapplied the law, relied on irrelevant facts, or failed to engage in otherwise reasoned decision making. It is not an appellate court's role to re-weigh the factors in a circuit court's discretionary decision.

¶69 Of the Department's arguments, one stands out as more potentially persuasive than the others, namely the Department's argument that changing the six-month abandonment period would not have significantly affected the evidence at the fact-finding hearing, given that the other alleged ground was failure to

[8] To the extent the Department makes new arguments that it did not put before the circuit court, I decline to consider them as a basis to overturn the circuit court's decision to deny the Department's request for leave to amend the petition. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (appellate courts "will not ... blindside trial courts with reversals based on theories which did not originate in their forum," and "it is … unfair and certainly illogical to expect trial courts to discern and resolve every 'argument' that could have been but was not raised in resolving an issue" (quoted source omitted)).

assume responsibility. Clearly, there could be considerable overlap in the evidence relating to abandonment and the evidence relating to failure to assume parental responsibility. It would seem from the cold record that the circuit court might reasonably have given more weight to this particular factor, but the Department does not provide a basis for me to conclude that it was obligated to do so.

¶70 As to the Department's argument that the court should have granted its request for leave to amend because of delays in discovery responses or hearing dates, the Department similarly fails to make a specific, developed argument connecting the nature of these asserted delays to a need for the amendment the Department sought. It is not apparent on the face of the Department's arguments how the delays justified the amendment sought, let alone whether such justification necessarily outweighed other considerations.

¶71 At bottom, I am not persuaded that the circuit court erred in determining that the requested amendment presented potential unfairness to John L.-B., or erred in overlooking or misunderstanding any factor cited by the Department. Thus, the Department fails to show that the circuit court erroneously exercised its discretion in denying the Department's request for leave to amend the petition.

CONCLUSION

¶72 In sum, for all of the reasons stated above, I affirm the circuit court's order dismissing the Department's petition to terminate John L.-B.'s parental rights.

By the Court.—Order affirmed.

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