COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2006

Cornelia G. Clark
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. 2006AP2010 **Cir. Ct. No. 2006TP4**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DYLLAN M.S., A PERSON UNDER THE AGE OF 18:

STACY A. T.,

PETITIONER-APPELLANT,

V.

MATTHEW J. S.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Stacy A.T. appeals the circuit court's judgment dismissing her petition to terminate the parental rights of Matthew J.S., the father of her child, Dyllan, on the grounds of abandonment. She contends the circuit court erred in determining that Matthew has established good cause for failing to visit or communicate with Dyllan for a period of six months or more, as provided by WIS. STAT. § 48.415(1)(c). For the reasons we explain below, we affirm.

BACKGROUND

¶2 Dyllan was born on August 13, 2002. Stacy and Matthew were involved in a relationship and, after Dyllan was born, Stacy and Dyllan lived with Matthew at Matthew's parents home in Fort Atkinson for about eight or nine weeks. In October 2002, Jefferson County initiated a proceeding under WIS. STAT. § 48.13(3) alleging that Dyllan was a child in need of protection and services (CHIPS) because of abuse. Matthew and his mother were both suspected of abusing Dyllan. Stacy and Dyllan were required by Jefferson County Human Services to leave Matthew's parents' home and go to live with her parents.

¶3 Matthew was adjudicated the father on November 1, 2002. Matthew and Stacy were granted joint legal custody; with Stacy having primary physical placement and Matthew having physical placement as determined in the pending CHIPS proceeding.

¶4 The order entered in the CHIPS proceeding in March 2003 stated that Dyllan was a child in need of protection and services under WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 48.13(3). It appears this order was entered based on a plea agreement. Although there had been a jury trial in the CHIPS case, there was no finding by either the jury or the court as to who abused the child; Matthew testified at the trial he had not abused his son. The CHIPS order placed Dyllan with Stacy and permitted Stacy and Matthew to live together, but Matthew could not provide sole care to Dyllan "until services are in place and it is appropriate." The order also provided that Matthew was to be supervised in his visits with Dyllan by Stacy and a responsible adult; when Matthew "clears assessments," Stacy could be the sole supervisor. The order stated that it expired on March 5, 2004. Matthew initially saw Dyllan once a week during the time when Stacy and Dyllan were living with her parents, and then with more frequency. At some point Matthew was cleared to provide sole care for Dyllan, but the record does not reflect when.

¶5 In August 2003, Matthew, Stacy, and Dyllan began living together in Fort Atkinson. Fourteen months later, in October 2004, Stacy moved out with Dyllan and relocated to Johnson Creek; Matthew went to live with his parents. Matthew and Stacy initially agreed that Dyllan should be with each parent on alternating weeks, and they followed this schedule for several weeks. The schedule then changed such that Matthew had placement every other weekend or a few days during the week.

¶6 Matthew initiated mediation in late November 2004 because he wanted to re-establish the equal placement schedule and Stacy objected. The mediator discontinued the mediation after meeting with each party; Matthew received a communication from Family Court Counseling advising him that mediation was not appropriate and he had to file a motion. Matthew did not file a motion. Matthew had sporadic contact with Dyllan between January and March 2005. After April 1, 2005, Matthew did not see Dyllan or communicate with him

and did not send any cards, letters, or gifts. The reasons for this are the subject of dispute between the parties and will be discussed in more detail later in the opinion.

¶7 In January 2006, Matthew filed another mediation request and Stacy refused to participate. Also about this time, Matthew had a co-worker of Stacy's hand-deliver a note from him that stated: "If you want me to sign my rights of [sic] Dyllan, and if Jason will adopt him, and if you abolish all back child support, I will sign my rights off. Call me tonight @ [phone number] [sic]." The precise timing of this letter is not clear from the testimony: Stacy testified she received it in February 2006 and Matthew testified that he prepared the letter between the end of December and the beginning of February; he was not sure, but it was before he filed the mediation request.

¶8 In mid-February 2006, Stacy's attorney wrote Matthew seeking his voluntary consent to terminate his parental rights, but Matthew declined to do that. The next month, Stacy filed this petition to terminate Matthew's parental rights, alleging that he had abandoned Dyllan by failing to visit or communicate with him for a period of six months or more. *See* WIS. STAT. § 48.415(1)(a)(3). A trial was held to the court.

¶9 At the trial, Stacy testified that Dyllan's placement with Matthew stopped in March 2005 because she had concerns that Dyllan was in an unhealthy situation with Matthew and she was not able to come to an agreement with Matthew on her concerns. Her concerns included that Matthew was showing a temper in talking to Dyllan and to her, she was uncertain of Matthew's "rehab situation" with respect to prescription pain medication, Dyllan came back from placement with Matthew smelling heavily of smoke, Dyllan seemed more timid

and rebellious and picked up profanity at Matthew's home, and she was afraid he was being spanked and yelled at while at Matthew's home. Stacy also said that Matthew was showing less interest in having Dyllan with him and at times he did not show up when he was scheduled to take Dyllan. She had some phone contact with Matthew after March 2005, but she could not remember when.

¶10 In response to questions from the court and on cross-examination, Stacy stated that, because of her concerns about Dyllan's situation when he was with Matthew, she told Matthew that he needed to go to court. After telling him that, she stopped placement by not answering her telephone and not seeking Matthew out; this occurred in March 2005. She acknowledged that she had caller-I.D. and could tell who was calling. On cross-examination, Stacy testified that, when she did not answer Matthew's phone calls, he habitually left messages and about half the time the messages were about seeing Dyllan.

¶11 Matthew also testified at the trial. According to his testimony, Stacy unilaterally decided in November 2004, after a court appointment on child support, that he could no longer have 50/50 placement with Dyllan; the reason for her decision was that 50/50 placement meant that he did not have to pay child support and Stacy wanted child support. The only concern about placement at his house that Stacy had ever brought to his attention was the smoking—he and his parents smoked.

¶12 Matthew testified that he has been in rehabilitation consistently since late 2003, and when he changed programs after he and Stacy stopped living together in October 2004, there was less than a week between the two programs. He has maintained sobriety, except for a relapse in December 2004 or January 2005. Matthew identified sixty calls to Stacy on telephone records from his

parents' house for the time period March 2005 to March 2006, with twelve calls in April 2005. He never spoke to her; the answering machine was on every time and he left messages saying he wanted to see his son. He also called Stacy from other phones he did not have records of. During that time period, Stacy called him on one or two occasions, once to thank him for child support and once about a dental bill for Dyllan. On both occasions Matthew brought up seeing Dyllan, but Stacy declined to discuss it.

¶13 Matthew testified that, although he was discouraged that his phone calls to Stacy were not resulting in his seeing his son, he did not file a court action because he did not have the money. He explained the note he wrote by saying he thought it was a way to get Stacy to call him; he did not think she would call if he wrote that he wanted to talk to her. He hand-delivered the note to someone at her work so she would be sure to get it. If she had called, he would have asked her if he could see his son. He did not want to terminate his parental rights. He did not attempt to communicate with Dyllan after March 2005 because he could not talk to Dyllan by phone and Dyllan could not read or write. He did not get gifts for his son during this time period because he could not personally deliver them.

¶14 Following the testimony and argument from the parties' respective counsel and Dyllan's guardian ad litem, the court made a number of factual findings. The court determined that Stacy had proved that Matthew had not visited or communicated with Dyllan for a period of six months or longer, but that Matthew had established by a preponderance of the evidence that he had good cause for failing to visit Dyllan, to communicate with Dyllan, and to communicate with Stacy about Dyllan during that time period. The circuit court issued a written decision containing its findings and conclusions and ordering that the petition be dismissed. The decision contained these findings of fact:

A. In March of 2005, Mother terminated Father's placement and telephone contact with Dyllan for good reasons. Those reasons included smoking in the presence of the child, profanity, Dyllan's hostility after placement, the hectic environment of the Father's home, Father's abuse of pain medication, Father spanking the child when the child was 2 years old and Dyllan seemed timid and frightened when he returned for physical placement with Father.[2]

B. Father could communicate with Dyllan through letters and cards and other similar methods.[3] The child was 2 ½ - 3 years of age at that time and this would not have been an effective way to communicate with him.

C. Mother testified that she received no communication (cards, letters or gifts) from Father.

D. Father did nothing to get a specific physical placement order.

E. Mother conceded that Father called her many times and at least 50% of the messages were about seeing Dyllan.

F. Father sought mediation in January of 2006, but Mother refused to participate.

G. Exhibit 11 shows that Father called Mother approximately 60 times and that Mother returned only two of those calls. One time to thank him for support and the other to discuss a dental bill.

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[2] The findings of fact in the written decision, which was apparently drafted by counsel, for the most part track the court's oral findings. However, the court's oral findings on Stacy's termination of placement and telephone contact do not make it clear whether the court found she had good reason to terminate Matthew's contact with Dyllan, as opposed to Dyllan's placement with Matthew. The court's oral findings do make clear that the court did not find Stacy had a good reason not to communicate with Matthew in response to his phone calls.

[3] The court made the oral finding that Matthew was left "with the ability to communicate with Dyllan *only* by letters, cards and gifts." (Emphasis added.)

> H. There was no specific placement order for Father to see Dyllan although he did have rights to placement with said child.
>
> I. Most worrisome to the Court was Father's note to Mother as evidenced in Exhibit #2 that states, "If you want me to sign off of Dyllan and if Jason will adopt, and you will abolish support, I will sign off my rights." This note was delivered soon before the termination of parental rights petition was filed. Father testified he wrote that note to entice Mother to contact him.
>
> J. Father's ability to communicate and visit with Dyllan from Mach 2005 to March 2006 was controlled by Mother.
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> K. Other types of communication by card, letter or gift would be impractical. Dyllan could not read and any gift or communication would have to go through Mother.

(Footnotes added.)

DISCUSSION

¶15 On appeal, Stacy contends that the circuit court erred in determining that Matthew had established good cause for failing to visit or communicate with Dyllan for a period of six months or more. She asserts that "good cause" is a legal standard that requires construction because it is ambiguous and that we should construe it to mean a cause or reason of a "valid and extraordinary nature." Matthew's conduct does not meet this standard, she asserts, because he did not file a motion to address his right to see or communicate with Dyllan and he did not mail any cards, gifts, or letters to Dyllan. She appears to also argue that the court erred in considering her conduct in keeping Dyllan from Matthew; instead, she asserts, the only question is what Matthew did in response to her conduct. Stacy asks in the conclusion of her brief that we reverse and remand to the circuit court with instructions to the trial court on the proper construction of "good cause."

¶16 Matthew responds that "good cause" is not ambiguous and is commonly understood to mean a "valid reason" for something to occur. Matthew views the determination of good cause to be a factual determination. He points out that, when we review the factual findings of the circuit court, we are to search the record for evidence to support the finding the court made and not for evidence to support a contrary finding. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). We do not set aside a circuit court's factual findings unless they are clearly erroneous, and we accept the circuit court's credibility judgments. WIS. STAT. § 805.17(2). Matthew contends that there is ample evidence to support the court's specific findings and the court's determination of good cause.

¶17 Stacy did not file a reply brief and so does not respond to these arguments. The guardian ad litem argues that the court erred in finding "good cause" but it is not clear whether the guardian ad litem views the error as factual or legal and what our standard of review should be.[4]

¶18 WISCONSIN STAT. § 48.415(1) provides that abandonment is a ground for termination of parental rights:

> **(1)** ABANDONMENT. (a) Abandonment … subject to par. (c), 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

[4] The briefing of all the parties on the issue whether the determination of good cause presents a question of fact or law or both is not developed. Because a resolution of that issue is not necessary in order to address the arguments that Stacy and the guardian ad litem make, we decide the appeal without resolving that issue.

> 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:
>
> 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, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.
>
> 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.

¶19 The petitioner must establish the grounds for termination by clear and convincing evidence. WIS. STAT. § 48.31(1). However, as stated in WIS. STAT. § 48.415(1)(c), the parent opposing the petition need prove good cause by "a preponderance of the evidence."[5]

[5] The preponderance of the evidence standard requires the litigant to demonstrate by the greater weight of credible evidence the certainty of his or her claim. *See* ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 657-58, 529 N.W.2d 905 (1995).

¶20 At the outset of our discussion, we observe that the predecessor to the current version of WIS. STAT. § 48.415(1)(c) (1993-94) provided that:

> (c) A showing under par. (a) that abandonment has occurred may be rebutted by other evidence that the parent has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being.

Based on this earlier version, case law held that, once the petitioner proved the elements of abandonment by clear and convincing evidence, a rebuttable presumption of abandonment was established, which the parent opposing the petition could rebut by a preponderance of the evidence. *See, e.g.*, ***Odd S.-G. v. Carolyn S.-G.***, 194 Wis. 2d 365, 372, 533 N.W.2d 794 (1995); ***T.P.S. v. G.D.***, 168 Wis. 2d 259, 266, 483 N.W.2d 591 (Ct. App. 1992). The parties use these cases and the language of "rebuttable presumption" to present the framework for our analysis, apparently assuming that there is a rebuttable presumption under the current version of § 48.415(1)(c), even though the term "rebutted" no longer appears in the statute. We will assume for purposes of this appeal that there is no difference between establishing good cause on the requisite grounds under para. (c) by a preponderance of the evidence and rebutting a presumption of abandonment by establishing those same grounds by a preponderance of the evidence.

¶21 Turning next to Stacy's argument on construction of the term "good cause," we decline for two reasons to decide whether this term is ambiguous, and, if so, the proper construction. First, Stacy did not argue in the circuit court that this term needed construction; rather, all parties simply argued that the evidence did or did not establish good cause. Thus, the court never made a ruling on the meaning of the term, and we do not know what meaning the court gave the term,

except insofar as that it is revealed in the evidence the court considered relevant to its determination that there was good cause. We generally do not consider issues not raised in the circuit court and do not reverse a circuit court's ruling on a ground not raised in the circuit court. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476.

¶22 Second, Stacy's argument on statutory construction of "good cause" lacks any reference to the constitutional implications of the construction chosen and in that regard it is insufficiently developed. A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child. ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶23, 271 Wis. 2d 52, 678 N.W.2d 831. Therefore, any statute that impinges on this right must be narrowly tailored to meet a compelling state interest. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. Protecting children from unfit parents is a compelling state interest and the statute terminating parental rights must be narrowly tailored to advance that interest. ***Id.*** In construing the grounds for termination of parental rights set forth in WIS. STAT. § 48.415, we must do so, if possible, in a way that makes them constitutional, that is, in a way that is narrowly tailored to further the compelling interest of protecting children from unfit parents. *See* ***Kenosha Co. Dep't. of Human Services v. Jodie W.***, 2006 WI 93, ¶¶50-51, ____ Wis. 2d ___, 716 N.W.2d 845. It follows that in construing the meaning of "good cause" in § 48.415(1)(c), we must take into account the unfitness that the "abandonment" ground is intended to protect against and we must construe "good cause" no more broadly than necessary to protect against that unfitness. Construing "good cause" to mean a reason that is "valid *and extraordinary*" would appear to place a high burden on the parent whose parental rights are sought to be terminated. In the absence of any argument addressing

whether such a construction is narrowly tailored to protect children against parental unfitness, we decline to consider this proposed construction further.

¶23 We next consider the argument of Stacy and the guardian ad litem that the court should have focused exclusively on what Matthew did in response to Stacy's conduct. Neither Stacy nor the guardian ad litem appear to challenge the court's factual findings that Stacy terminated Matthew's contact with Dyllan, that she did not respond to numerous phone messages Matthew left about seeing Dyllan, and that she refused to participate in mediation.[6] We understand their position to be that the only issue in deciding good cause is what Matthew did to nonetheless try to see or communicate with Dyllan.

¶24 The case Stacy relies on, ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 530 N.W.2d 34 (Ct. App. 1995), does not support this position. In that case, we construed the word "left" in WIS. STAT. § 48.415(1)(a)3. ***Id.*** at 704. We concluded that it applied both to situations where the parent actively places the child with another person and to situations where the parent did not do that but, in the words of the statute, "knows or could discover the whereabouts of the child and the parent had failed to visit or communicate with the child…." Section 48.415(1)(a)3. In reaching this conclusion, we made the statement on which Stacy relies:

> Throughout the subsection on abandonment, the focus is on the parent's contact or lack of contact with the child. The purpose of the subsection is to permit a finding of abandonment where there has been incidental contact or no

[6] It appears that these facts are undisputed, except, perhaps, the precise number of times Matthew called Stacy and left messages about seeing Dyllan. However, the court found that Matthew called Stacy sixty times from his parents' house and that at least 50% of the messages he left when he called were about seeing Dyllan; and these findings are supported by evidence.

> contact for a specified period of time, in the absence of certain rebuttal evidence.

Rhonda R.D. at 705. This statement does not support the position that a person's conduct in keeping the child from the parent is not important in determining whether the parent person has good cause for not visiting or communicating with the child.[7]

¶25 We also observe that the jury instructions for determining whether there is good cause under WIS. STAT. § 48.415(1)(c) provide:

> In determining if good cause existed as stated in questions 3, 4, and 6, you may consider whether the (child)'s age or condition would have made any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child) [or the agency responsible for the care of the child during the time period]; attempts to contact (child); whether person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond (parent)'s control which prevented or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

WIS JI—CHILDREN § 313 at 3. While jury instructions are not precedential authority, we generally give them due weight. ***Zak v. Zifferblatt***, 2006 WI App 79, ¶15, ___ Wis. 2d ___, 715 N.W.2d 739. We see no logical reason why the efforts of the parent with physical custody to keep the other parent from visiting or communicating with the child should not be a factor in deciding whether a parent has good cause under § 48.415(1)(c).

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[7] Stacy and the guardian ad litem both cite to an unpublished decision, ***State v. Charles L.***, 2005 WI App 193, 287 Wis. 2d 134, 703 N.W.2d 383 (2005). "An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority…." WIS. STAT. RULE 809.23(3). We therefore do not discuss this case.

¶26 As for the steps Matthew took to see or communicate with Dyllan after Stacy terminated Matthew's contact with Dyllan, Stacy and the guardian ad litem argue that Matthew did not do enough because he did not file a motion in court and did not send cards, letters, or gifts to Dyllan. We know of no authority for the proposition that a parent in Matthew's situation must file a court action in order to establish good cause. The evidence shows and the court found that Matthew made regular and persistent attempts by telephone to persuade Stacy to let him see Dyllan and made a second attempt to obtain a mediated resolution. Although the court did not make an express finding that it believed Matthew's testimony that he did not have the money to hire a lawyer, it is implicit in the court's determination of good cause that he accepted Matthew's testimony on this point. When a circuit court does not make a specific finding on a witness's credibility on a particular point, we may assume a finding that is in favor of the decision the court made. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992).

¶27 With respect to Matthew's failure to send Dyllan cards, gifts, or letters, the court found that, because of Dyllan's age, communication by letters and cards and similar methods were not effective, and because Stacy controlled Matthew's access to Dyllan, gifts and other communications would have to go through Stacy and were not practical. These findings are not clearly erroneous. They address factors that are appropriate to take into account under the jury instruction. *See* WIS JI—CHILDREN § 313 at 3.

¶28 Stacy relies on ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 598 N.W.2d 294 (Ct. App. 1999), arguing that it is an analogous case that supports her position; but we do not agree. In that case, there were no findings comparable to those in the preceding paragraph. In addition, that decision did not address good

cause under WIS. STAT. § 48.415(1)(c), but instead it addressed the issue of whether and to what extent an order establishing conditions for visitation tolled the time period in subd. (a)3. *See* ***id.*** at 702-06; *see also* § 48.415(1)(b) (providing that time periods under subd. (a)2 or 3 do not include any periods during which the parent was prohibited by court order from visiting or communicating with the child).

¶29 We conclude the court's factual findings are supported by the evidence and, in deciding whether Matthew established good cause under WIS. STAT. § 48.415(1)(c), the court considered factors that are appropriate under the jury instruction. WIS JI—CHILDREN § 313 at 3. We are not persuaded by Stacy's or the guardian ad litem's arguments that there are grounds for reversal of that determination. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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