COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP992 **Cir. Ct. No. 2009TP38**

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

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

NATHAN Y.,

PETITIONER-RESPONDENT,

V.

TARIK T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Tarik T. appeals an order terminating his parental rights to Quincy C. based on a petition brought by Nathan Y., Quincy's step-father. Tarik argues that the trial court erred in granting Nathan's motion for partial summary judgment on grounds of abandonment under WIS. STAT. § 48.415(1)(a)(3) because there were genuine issues of material fact regarding whether Tarik demonstrated good cause for his failure to visit or communicate with his son. We disagree and affirm the order.

¶2 Nathan Y. filed a petition for termination of Tarik's parental rights in April 2009, alleging abandonment as grounds for termination. Nathan moved for partial summary judgment as to grounds.[2] Nathan submitted an affidavit from Lauren C., Quincy's mother, and Tarik submitted a competing affidavit. The circuit court determined on the submissions that Tarik had abandoned Quincy for a period of more than six months and had failed to contact Quincy's mother during this period, and that Tarik did not have good cause for failing to contact Lauren and Quincy. Following a dispositional hearing, the court determined that termination was in Quincy's best interests, and entered an order terminating Tarik's parental rights. Tarik appeals.

¶3 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-2008). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Nathan also alleged a second ground for termination, failure to assume parental responsibility under WIS. STAT. § 48.415(6), and moved for summary judgment on this ground as well. Having concluded that summary judgment was appropriate on abandonment grounds, the circuit court did not address whether Tarik had also failed to assume parental responsibility.

77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶4 In a proceeding to terminate parental rights on abandonment grounds, the petitioner must prove that the parent: (1) left the child with a relative or other person; (2) knew or could have discovered the child's whereabouts; and (3) failed to visit or communicate with the child for a period of six months or longer. *See* WIS. STAT. § 48.415(1)(a)3.; WIS JI—CHILDREN 314. If the petitioner proves these elements, the parent may nonetheless defeat the petition by proving the following: (1) he or she had good cause for failing to visit and failing to communicate with the child during the six month period; (2) he or she communicated about the child with the person(s) having physical custody of the child during this period; (3) if he or she did not communicate with the person having custody during this period, good cause existed for him or her not to do so. *See* WIS. STAT. § 48.415(1) (c); WIS JI–CHILDREN 314.

¶5 On appeal, Tarik challenges only the court's determination as to grounds for termination. Tarik argues that he was entitled to a trial on grounds because summary judgment is inappropriate when the ground alleged is abandonment, citing ***Steven V. v. Kelley H.***, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856. Tarik also argues that an issue of fact exists concerning whether there was good cause for his acknowledged failure to visit or contact Quincy or to communicate with Lauren for a period of approximately nine months in 2007 and 2008. We address these arguments in turn.

¶6 In ***Steven V.***, the supreme court concluded that, when no material facts are in dispute and the applicable legal standard has been satisfied, use of

summary judgment procedure in the grounds phase of a termination proceeding does not violate the parent's right to a jury trial or to procedural due process. ***Id.***, ¶5. The ground for termination in ***Steven V.*** was continuing court-ordered denial of periods of physical placement, a ground that is proven by documentary evidence. ***Id.***, ¶2. The ***Steven V.*** court noted that grounds that could be proven by documentary evidence are particularly susceptible to use of summary judgment procedure. ***Id.***, ¶37. The court distinguished these grounds from others that would be more likely to turn on resolution of fact-intensive inquiries, such as abandonment: "In many [termination] cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child." ***Id.***, ¶36, citing WIS. STAT. § 48.415(1) (abandonment). Tarik points to this language in arguing that summary judgment is inappropriate when the alleged ground for termination is abandonment.

¶7 However, ***Steven V.*** makes clear that this language does not establish a bright-line rule that summary judgment is always inappropriate in abandonment cases. First, ***Steven V.*** explained that its discussion of the use of summary judgment procedure on grounds proven by documentary evidence versus those proven by non-documentary evidence was not "mean[t] to imply that the general categorization of statutory grounds in this and the preceding paragraph represent a definitive statement about the propriety of summary judgment in any particular case." ***Id.***, ¶37 n.4. The court added: "The propriety of summary judgment is determined case-by-case." ***Id.*** Second, ***Steven V.***'s holding that use of summary judgment procedure in the grounds phase does not violate the parent's right to a jury trial or to procedural due process was not limited to certain grounds

for termination. Accordingly, we reject Tarik's argument that summary judgment is always inappropriate when the alleged grounds for termination is abandonment. We now turn to the submissions to determine whether summary judgment was appropriately granted in this case.

¶8 In support of his motion for summary judgment, Nathan submitted an affidavit from Lauren, Quincy's mother. Lauren's affidavit states that Tarik physically abused her and her two older children when she was living in Cedar Rapids, Iowa. She avers she moved with her children to Madison, Wisconsin, in July 2007 to escape the abuse, and that Tarik did not contact her from July 2007 to July 2008. Lauren asserts that Tarik did not contact her at all during this period even though Tarik knew where she worked in Madison, had her email address, and knew Lauren's parents' address. Lauren submitted an October 2007 order from an Iowa court terminating its jurisdiction over matters involving her family, which ended a no-contact order the Iowa court had imposed on Tarik.

¶9 In response, Tarik submitted an affidavit in opposition to summary judgment. Tarik avers that he "did not have Lauren's home address at any time while she has been in Madison until receiving the petition in this case." He also avers that he travelled to Madison in August 2007 to try to see Lauren and Quincy, but that Lauren made clear that she did not want to see him. He further avers that his "ability to communicate and visit with Quincy from July 2007 to the present was controlled by Lauren," and that he "felt that writing letters or sending gifts would have been impractical, because Quincy cannot read and any gift or communication would have to go through Lauren." Tarik did not dispute Lauren's assertion that Tarik knew where she worked in Madison, had her email address, and knew Lauren's parents' address. Aside from the August 2007 visit to

Madison, Tarik neither alleges nor provides evidence of other instances of contact with Lauren or Quincy from July 2007 to July 2008.

¶10 As the parties acknowledge in briefs, the submissions demonstrate that Tarik had no contact with Quincy or Lauren from October 2007 to July 2008, a period of nine months.[3] Nor does Tarik seriously dispute that he could have discovered the child's whereabouts at this time, although he avers that he did not know Lauren's home address until he received the petition in this case. The disputed issue, according to Tarik, is whether he had good cause not to contact Lauren and Quincy during this time period. Tarik argues that factual questions remain that are relevant to whether he had good cause not to contact Lauren and Quincy. In his brief-in-chief, Tarik argues:

> Could Tarik T. have done more to see Quincy during this time? Maybe or maybe not, depending on his unique circumstances, as they existed during that time period. How long did he have her email address? What was the best way for him to approach Lauren C. at this point, especially coming off a long period where he was to have no contact with her per a court order? What if he alienated her and she changed her email address, in the process making it impossible to find her? When, if ever, did he know where she lived in Madison, Wisconsin? Would she have called the police if he tried to have personal contact with her in Madison? Could he have sent the 7/15/08 email [which ended the nine-month period of no contact] a few weeks earlier or later? Whether Tarik T.'s [sic] had good cause for having failed to visit or communicate with Quincy or Lauren C. during this time period is a fact-intensive jury question.

[3] The parties accept October 2007 as the starting date for this period of no contact. Good cause arguably existed for Tarik not to have contacted Quincy and Lauren up to October 2007 because the Iowa no-contact order was in effect until this time.

¶11 We conclude that the submissions fail to raise an issue of material fact concerning whether Tarik had good cause for failing to communicate with Lauren or Quincy from October 2007 to July 2008. Tarik's proposed reasons for failing to contact Lauren and Quincy during this time are nothing more than speculation, and are not supported by the summary judgment submissions. Accepting as true Tarik's assertion as fact that his communication with Quincy was controlled by Lauren, and that any gift or communication to Quincy would have to go through Lauren, neither constitutes good cause for failing to even attempt to contact Lauren about Quincy. If Tarik had reasons constituting good cause for his failure to contact Lauren or Quincy, these reasons should have been provided in his summary judgment submissions. Thus, while summary judgment is ordinarily inappropriate in termination of parental rights cases premised on a fact-intensive grounds for parental unfitness such as abandonment, ***Bobby G.***, 301 Wis. 2d 531, ¶40, the submissions in this case fail to present any factual dispute from which a reasonable inference could be drawn that Tarik had good cause for not communicating with Lauren about Quincy or with Quincy during this nine-month period. Accordingly, we conclude that the circuit court properly granted Nathan's motion for summary judgment as to grounds for termination.

By the Court.—Order affirmed.

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