**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

August 29, 1996

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

**NOTICE**

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

**No. 96-1794**

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

**In re the Termination of Parental Rights of Christina S. and Eric S., Persons Under the Age of 18:**

**State of Wisconsin,**

**Petitioner-Respondent,**

**v.**

**Stephen S.,**

**Respondent-Appellant.**

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

SCHUDSON, J.[1] Stephen S. appeals from the trial court order terminating his parental rights to Christina S., and Erik S. He raises five issues. This court affirms.

The State filed a petition to terminate the parental rights of Stephen S. and Pamela M. to their children, Christina and Erik. Pamela, represented by her guardian, did not object to the termination of her parental rights. Stephen did, and his TPR case was tried before a jury.

The jury unanimously found that Stephen had abandoned Christina and had failed to assume parental responsibility for Erik. Based on those findings and additional undisputed submissions regarding the parents, children, and the CHIPS case history, the trial court concluded that: (1) Stephen had abandoned Christina, under § 48.415(1)(a)2, STATS.; Stephen was unfit; and it was in Christina's best interest to terminate Stephen's parental rights; and (2) Stephen had never assumed a full parental relationship with Erik, under § 48.415(6), STATS.; Stephen was unfit; and it was in Erik's best interest to terminate Stephen's parental rights. The trial court ordered termination of Stephen's parental rights to both children.

Stephen first argues, only with respect to Christina, that the trial court "erred by including in the period of abandonment the time period [he] was prevented by the Milwaukee County Department of Social Services\Children's Services Society from having contact with his daughter." Arguing in support of Stephen's motion *in limine* before the trial court, Stephen's counsel maintained that a social worker stated "that she was unwilling to setup visits before she had proof of [Stephen's] alcohol treatment." Therefore, counsel argued, the social worker had confused a condition for return with a condition for visitation and improperly denied visitation. Stephen refers to the trial testimony of Inga Kunzel, the social worker for Children's Service Society assigned to his case. He contends that although she met with him on September 20, 1994 to discuss the conditions he would have to meet in order to be allowed visitation with his children, she never set up any visits. Thus, Stephen contends that "[t]he record shows that during the period of alleged abandonment, [he]

[1] This appeal is decided by one judge pursuant to § 752.31(2) STATS.

attempted to visit Christina S., but was prevented from doing so by what amounted to state action." Stephen further explains:

> The governing [CHIPS] order ... stated that the Children's Services Society of Wisconsin has legal custody of the children, and is the agency which shall provide services in this matter. The order further provided that Stephen S. shall visit Christina S. on a regular basis. However, it was the very agency appointed by the court that prevented Stephen S. from visiting Christina S. during the alleged period of abandonment. Therefore, Stephen S. was, in effect, ... prevented by court order from visiting Christina S., at least until September 20, 1994.

Both the State and the guardian ad litem opposed Stephen's motion *in limine*. The State suggested that there would be a factual issue of whether Stephen "asked for visitation of any kind in any reasonable context."

Section 48.415(1)(a)2, STATS., provides, in part, that abandonment may be established by a showing of a parent's failure "to visit or communicate with the child for a period of 6 months or longer," but that the six-month period "shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child." The trial court, denying Stephen's motion *in limine* to exclude evidence of the challenged time period, examined the court file and concluded "that there is no such order in existence and never had been such an order ... prohibiting him from visiting or communicating with the children."

The trial court was correct. Stephen does not dispute the nonexistence of any such order. Instead, he maintains that the social worker's conduct "in effect" had the force of an order preventing his contact. At the point of his motion *in limine*, his account of the department's action was disputed; further, his account of Ms. Kunzel's trial testimony is incomplete.

Kunzel was one of several social workers who testified about the difficulties encountered in attempting to gain Stephen's cooperation and involvement with the children. Kunzel testified that although she attempted to review with Stephen the conditions for return, and although she asked that he provide documentation of his compliance with conditions including alcohol treatment, she never denied him visitation. As the guardian ad litem accurately summarized:

> Inga Kunzel testified that she attempted to schedule numerous appointments with the father, only to have him cancel all but one of them....
>
> > In the instant case the record supports the fact that Mr. S. had no contact with Christina S. from July, 1992 to the filing of the termination of parental rights petition [on March 8, 1995]. The Court correctly ruled that, since no court order ever barred Mr. S. from visitation, it would be Mr. S.'s right to present evidence to the jury that he did not disassociate himself from or relinquish responsibility for Christina. Mr. S. was provided the opportunity to present evidence regarding his telephone contacts with social workers and his various reasons for not visiting or keeping appointments. The trial court properly allowed the jury to consider the evidence regarding disassociation ....

This court agrees. The trial court properly allowed evidence of both Stephen's and the department's actions during the challenged time period so the jury could determine whether Stephen had abandoned Christina.

Stephen next asserts that "the record does not support the finding that [he] disassociated himself from Christina S., or relinquished responsibility for her care and well-being, pursuant to § 48.415(1)(c), STATS." In support of that assertion, however, Stephen argues only that "[t]he same evidence cited above" regarding the challenged time period "shows that [he] did not disassociate himself from Christina S. during the period of alleged abandonment." Thus, rather than disputing the substantial evidence of

disassociation introduced at trial, Stephen contends that the evidence of disassociation stemming from the challenged time period should have been excluded and, without it, the evidence was insufficient. Having already concluded, however, that the trial court properly allowed that evidence, this court also rejects Stephen's second argument.

Stephen next argues that "the record does not support the finding that [he] failed to establish a substantial parental relationship with Eri[k] S., or failed to assume parental responsibility for Eri[k] S., pursuant to § 48.415(6), STATS." Stephen points to evidence of his "numerous visits" with Erik "at least through 1992," and claims that after 1992, his "numerous attempts ... to visit Eri[k] S. ... were met with a lack of response from the Department."

A jury verdict will be approved if there is any credible evidence to support it. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). Stephen correctly explains that "[t]he issue at trial was whether [he] established a substantial relationship with Eri[k] S., and whether Stephen S. assumed parental responsibility for Eri[k] S." In support of his argument, however, Stephen ignores substantial evidence countering his version of his relationship with the social services department, and establishing his failure to assume parental responsibility. As summarized by the guardian ad litem:

> The testimony presented at trial established that Erik S. had been born out of wedlock, prematurely, with a myriad of special medical needs. The testimony also established that Erik was released from the hospital directly to the home of a paternal aunt and was found to be a Child In Need of Protection or Services on March 21, 1988. The record also established that Mr. S. had sporadic contact with Erik through that child's life and had no contact with Erik at all after January of 1993. Stephen S. did not become adjudicated for Erik S. until August 15, 1995, over five (5) months after the termination of parental rights petition was filed and three days following Erik's eighth birthday.

> ....
>
> Testimony from Erik's foster mother indicated that Erik has twice mentioned his father in the nearly two and a half year period between his placement in the foster parent's home and the testimony given in October of 1995. According to the foster parent, Erik referred to his father as "Uncle Steve" and as "that man" but never as his dad. Finally by Mr. S's own admission he had very little knowledge of what was happening in Erik's life.

This court has reviewed the record and agrees that substantial evidence of Stephen's disassociation supported the jury's verdict and the trial court's conclusion.

Stephen next argues that "the trial court abused its discretion in terminating [his] parental rights." Other than quoting the relevant statutes and case law, however, Stephen only contends:

> The evidence cited in the previous section of this brief shows that despite his problems, [he] maintained contact with his children, or at least attempted to do so. The court failed to consider that on numerous occasions the Department failed to cooperate with [him] when he expressed a desire to visit, or regain custody of his children.

Stephen then argues that "[f]or all these reasons, the trial court abused its discretion in terminating the parental rights."

When a jury finds grounds for termination of parental rights, the trial court must determine whether termination is the appropriate disposition. *See* §§ 48.424(3) & 48.427, STATS. "[T]he trial court 'must consider all the circumstances and exercise its sound discretion as to whether termination

would promote the best interests of the child.'" ***In the Interest of J.L.W.***, 102 Wis.2d 118, 131, 306 N.W.2d 46, 52 (1981).

Other than attempting to rewrap rejected arguments in a new theory, Stephen fails to develop any argument seriously challenging the trial court's determinations. This court has reviewed the record and notes that Stephen did not even appear for the dispositional hearing. The trial court carefully considered the evidence, applied the correct legal standards, and reasonably exercised discretion. While acknowledging certain conflicting evidence and expressing sympathy for certain circumstances beyond Stephen's control, the trial court commented that Stephen "tends just to be overwhelmed by life, and these children cannot afford to have a parent who's overwhelmed by life because they have overwhelming problems and the only way those problems are going to be adequately addressed or resolved is if someone steps up to the plate for them." As the trial court further commented, the prospect of adoption by devoted foster parents provided "a miracle" for the children—"that they're getting this opportunity" despite serious problems and years of parental neglect. The record of the dispositional hearing provides a solid basis for the trial court's conclusions.

Finally, Stephen argues that § 48.415(1)(c), STATS., violates his right to due process because "it shifts the burden of proof to the parent whose parental rights the State seeks to terminate." Stephen failed to present this argument to the trial court. He argues in the alternative, therefore, that trial counsel was ineffective for failing to raise the issue.

Section 48.415(1)(c), STATS., states that "[a] showing ... 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." As the State and guardian ad litem point out, the supreme court recently decided ***In re Kyle S.-G.***, 194 Wis.2d 365, 533 N.W.2d 794 (1995), rejecting the very argument Stephen now raises. The Court held "that the burden of proof does shift to the parent once abandonment has been established, and that it is the parent's burden to show by a preponderance of the evidence that disassociation or relinquishment of responsibility for the child's care and well-being has not occurred." ***Id.***, 194 Wis.2d at 369, 533 N.W.2d at 795. Accordingly, this court concludes that

Stephen could not have suffered any prejudice by virtue of his counsel's failure to present an argument that could not have prevailed.

*By the Court* – Order affirmed.

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