COURT OF APPEALS DECISION DATED AND FILED

July 19, 2005

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. 2005AP884

Cir. Ct. No. 2003TP734

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CHARLES L., JR., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHARLES L., SR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Charles L., Sr. (hereafter, "Charles"), appeals from the order terminating his parental rights to Charles L., Jr. (hereafter, "Charlie").[2] Charles contends that the evidence submitted to the jury was insufficient to prove that he never had a substantial parental relationship with Charlie and that he abandoned Charlie. Charles also argues that even if there were grounds to terminate his parental rights, the trial court erroneously exercised its discretion when it concluded that termination of his rights was in Charlie's best interest. This court affirms the order.

BACKGROUND

¶2 Charles was present at the hospital when Joyce B. gave birth to their son, Charlie, in November 2001. Charlie was born prematurely. He had cocaine in his system at birth and was taken into protective custody in the hospital. Charles was not named as the child's father on Charlie's birth certificate and was not adjudicated Charlie's father until over two years later.

¶3 After two months in the hospital, Charlie was placed in the home of Charles' sister, Peggy L. Charlie stayed with Peggy from January 6, 2002, through April 26, 2002. Charles visited Charlie there, but was unable to say how often. Charlie was placed in non-relative foster homes starting in April 2002. Charles never visited Charlie, or had any other contact with him, after April 26, 2002.

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

[2] This court found at least one reference in the record to the name Charlie as a nickname for Charles, Jr. While it appears that the child is more often called Charles, this court will use the name Charlie to differentiate between Charles, Jr. and Charles, Sr.

¶4 On October 16, 2003, the State filed a petition to terminate the parental rights of Joyce and Charles, the alleged father.[3] The State alleged two grounds for the termination of Charles' parental rights: failure to assume parental responsibility, *see* WIS. STAT. § 48.415(6), and abandonment, *see* WIS. STAT. § 48.415(1)(a)3.

¶5 After Charles was served with the petition in prison, DNA testing was conducted. The tests proved that Charles was Charlie's father. Charles contested the petition to terminate his parental rights and the case proceeded to a jury trial in November 2004.

¶6 The jury found that both grounds for termination of Charles' parental rights were established. The case then proceeded to a dispositional hearing, where the trial court found that terminating Charles' parental rights was in Charlie's best interest. This appeal followed.

DISCUSSION

¶7 Charles contends that there was insufficient evidence to support the jury's findings that he abandoned and failed to assume parental responsibility for Charlie. Charles also argues that the trial court erroneously exercised its discretion in terminating his parental rights. This court addresses each issue in turn.

[3] Joyce's parental rights to four of her other children, as well as the rights of those children's fathers, were ultimately addressed at the same time. Those parental rights are not at issue in this appeal.

I. Sufficiency of the evidence

¶8 When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. ***Id.*** We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. ***Id.*** Applying this standard, we conclude that there is credible evidence to support both of the jury's findings.

A. Failure to establish a parental relationship

¶9 Pursuant to WIS. STAT. § 48.415(6)(a), one's parental rights may be terminated if the State proves that the parent "never had a substantial parental relationship with the child." The statute further provides:

> (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 ever 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 ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Section 48.415(6)(b).

¶10 At trial, the State presented evidence that Charles: (1) never accompanied Joyce to the doctor when she was pregnant; (2) did not ask for his name to be put on the birth certificate; (3) did not ask the hospital staff why

Charlie could not go home with him from the hospital; (4) has never paid child support; (5) has not contributed toward the hospital costs associated with the birth; and (6) did not see Charlie after April 26, 2002, when Charlie was removed from Peggy's home. Charles also took no steps to become Charlie's legal father until the petition for termination of parental rights was served.

¶11 Charles admitted at trial that he had never taken Charlie to the doctor, had done "nothing" to help Charlie get an education, and did not know where Charlie was currently living or attending school. Charles also testified that he had never bought Charlie a birthday present, sent him letters or pictures, or spoken with him on the telephone.

¶12 This evidence is more than adequate to support the jury's verdict. Except for being present at the birth and visiting Charlie when Charlie stayed at Peggy's house, Charles has done nothing to demonstrate concern for or interest in Charlie's support, care or well-being. Charles has not provided care or support for Charlie, or "expressed concern for or interest in the support, care or well-being of the mother during her pregnancy." *See* ***id.***

¶13 Nonetheless, Charles argues that "while it is regrettable that he had to spend a portion of his life in prison during the life of his young child, he did try to help out in parenting the child when he was able to do so." Charles testified that he assisted with Charlie's care during the four months Charlie stayed at Peggy's house, but Charles did not identify the frequency of his visits, and could not say exactly how long Charlie stayed with Peggy.

¶14 It is for the jury, not the appellate court, to determine the credibility of witnesses and to weigh the evidence. "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the

credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). Thus, the jury was free to reject Charles' testimony that he established a relationship with Charlie by visiting him at Peggy's home. The jury's finding that Charles had not established a substantial parental relationship with Charlie is supported by credible evidence and, therefore, must be affirmed. *See* ***Quinsanna D.***, 259 Wis. 2d 429, ¶30.

B. Abandonment

¶15 This court also affirms the jury's second independent ground for terminating Charles' parental rights. The State alleged that Charles had abandoned Charlie, as defined by WIS. STAT. § 48.415(1)(a)3. The statute provides that abandonment can be established by proving that "[t]he 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." ***Id.*** However, abandonment is not established 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.

Section 48.415(1)(c).

¶16 At the close of the evidence, Charles did not dispute that the State had proven that he failed to visit or communicate with Charlie for six months. Thus, the only factual determination for the jury to make was whether Charles had good cause for failing to visit or communicate with Charlie, the Bureau of Milwaukee Child Welfare ("Bureau"), and Charlie's caregivers. *See* ***id.***

¶17 Charles admitted at trial that since April 26, 2002, the date that Charlie left Peggy's house, Charles did not know where Charlie was. Charles testified that he did nothing to try to locate Charlie, except that on the day he learned that Charlie was removed from Peggy's home, he "tried to talk to my sister. She wouldn't listen to me. She wouldn't tell me nothing." Charles admitted at trial that he had not had a conversation with anyone about seeing Charlie since the day Charlie left Peggy's house. He acknowledged that he had not contacted an attorney or the police to help Charles find Charlie, tried to call social workers, or talked to Joyce about getting in touch with Charlie. Charles acknowledged that during at least seven consecutive months between April 2002 and the trial, he was not in prison, and had still not made any effort to find Charlie.

¶18 At trial, counsel for Charles argued that Charles had good cause for not locating Charlie, because the Bureau had not made even minimal efforts to find Charles. She stated: "This is not a man who knowingly and intelligently

abandoned his child.… [It] would have been a lot easier for the Bureau to find him, than for him to find the Bureau." On appeal, Charles again makes this argument, pointing out that two social workers testified that they did not attempt to locate or contact Charles when he was in prison.

¶19 The burden was on Charles to prove that he had good cause for not visiting or communicating with Charlie. The jury's finding that Charles failed to satisfy this burden is supported by credible evidence that Charles did not make any attempt to find or contact Charlie after April 26, 2002. This court affirms that finding.

II. Termination of Charles' parental rights

¶20 Charles contends that the trial court's best interests determination was erroneous because the trial court "failed to consider the fact that Charles['] family had provided placement in the past and would be willing to do so again in the future." Charles also contends that the trial court should have considered that he was personally willing to assume parental responsibility when his current incarceration ended.

¶21 On appeal, we will not overturn the trial court's decision to terminate a parent's parental rights unless there has been an erroneous exercise of discretion. ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). When a trial court considers whether to terminate parental rights, the best interests of the child are the prevailing factor considered by the trial court. WIS. STAT. § 48.426(2). The statute provides:

> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

Section 48.426(3).

¶22 The trial court considered the appropriate factors at the dispositional hearing. As relevant to the issues Charles raises on appeal, the trial court found that there had been an extensive duration of separation between Charles and Charlie. The trial court stated: "[Charles] can't provide a home. He may wish … he could in time raise his son the way he wishes to. But looking at the good of this child, he can't be raised by his father now."

¶23 Charles presented no testimony at the dispositional hearing. Through trial counsel, he asserted that he loved his son and would like to continue a relationship with his son. On appeal, he asserts that his family would have provided placement in the future, but he points to no evidence in the record that Charles' family was interested in having Charlie placed with them. While this court has no reason to doubt Charles' sincere interest in having Charlie placed with him or his family, the fact remains that Charles provided no evidence that he,

or his family, were presently willing and able to provide adequate care for Charlie. Proof of actual present ability to provide a home for Charlie, together with evidence that Charles had reasonable parenting skills and an understanding of Charlie's needs, might have led the trial court to a different conclusion. The lack of any such evidence left the trial court with only one option. This court concludes that the trial court did not erroneously exercise its discretion when it terminated Charles' parental rights.

By the Court.—Order affirmed.

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