COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0605

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

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

LAFAYETTE COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

GARY A.S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Gary S. appeals the circuit court's order terminating his parental rights to his son, James T., d.o.b. May 12, 1988, after a jury found grounds for termination under WIS. STAT. § 48.415(1)(a)3,[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 48.415(1) provides:

> (1) ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
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> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.
>
> 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.
>
> (b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2. or 3. The time periods under par. (a) 2. or 3. shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.
>
> (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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> 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.
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> 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:

(continued)

abandonment, and § 48.415(6),[3] failure to assume parental responsibility. He contends the termination of his parental rights without the warnings described in WIS. STAT. § 48.356(2) violated the statute and his constitutional right to due process. Alternatively, he contends a new trial is necessary in the interests of justice because the judge lacked impartiality and erroneously excluded evidence. We conclude neither the statute nor due process requires that the warnings described in § 48.356(2) be given Gary prior to termination of his parental rights

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> 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.
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> 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.

[3] WISCONSIN STAT. § 48.415(6) provides as follows:

> (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 never 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 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.

under either § 48.415(1)(a)3 or (6). We also conclude the interests of justice do not require a new trial. We therefore affirm.

NOTICE

¶2 Gary and Debra R., James' mother, were never married, and they stopped seeing each other before James was born. James lived with his mother from birth. Gary was adjudicated James' father in 1990 but never had any contact with James. On July 11, 1997, James was placed outside Debra's home after he was picked up for attempting to cash a check in a neighbor's name and Debra refused to take custody of him.[4] James was adjudged a child in need of protection and services (CHIPS) on October 17, 1997, and the court extended that order a year later. Debra received notice that her parental rights could be involuntarily terminated under certain described circumstances, but James did not receive that notice.

¶3 The petition for termination of parental rights, filed on September 2, 1999, sought to terminate the rights of both Gary and Debra. This was the first time that Gary received notice that the county agency was intervening with James. The petition alleged Gary had abandoned James in that he had left James with Debra, knew or could have discovered James' whereabouts, and had failed to visit or communicate with the child for a period of six months or longer without good cause; and the amended petition alleged that Gary had failed to assume his parental responsibility to James in that he never had a substantial relationship with James. The ground for termination alleged against Debra was that James was

[4] Lafayette County Human Services learned that the neighbor had been sexually abusing James, and the neighbor was tried and convicted for that conduct.

CHIPS, Debra had failed to meet the conditions for his safe return to her home, and there was a substantial likelihood she would not meet the conditions within the next twelve months. *See* WIS. STAT. § 48.415(2)(a)3.[5] Debra subsequently voluntarily terminated her parental rights.

¶4 Gary moved to dismiss the petition on the ground that he had not received the notice required by WIS. STAT. § 48.356(2). The circuit court denied the motion, concluding that none was required when the ground for termination was abandonment or failure to assume parental responsibility.

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[5] WISCONSIN STAT. § 48.415(2)(a)3 provides as follows:

> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
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> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> ….
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.
>
> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).

¶5 We address first Gary's contention that WIS. STAT. § 48.356(2) requires that he receive prior notice of the grounds that might be a basis for a termination of his parental rights. The issue presented is one of statutory construction, a question of law, which we review de novo. *See* ***State v. Setagord***, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). The purpose of statutory interpretation is to discern the intent of the legislature. ***Id.*** To do so, we first consider the language of the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, we apply that to the case at hand and do not look beyond the statutory language to ascertain its meaning. ***Id.*** A statute is not ambiguous unless it is capable of being understood in two or more different senses by reasonably well-informed persons. ***Id.***

¶6 WISCONSIN STAT. § 48.356 provides:

> **Duty of court to warn**. (1) Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.
>
> (2) In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1).

¶7 By its plain terms WIS. STAT. § 48.356 refers to the notice required in the prior CHIPS proceeding removing James from Debra's home. However,

Gary argues that § 48.356 requires that, even when the grounds for termination under WIS. STAT. § 48.415 are not based in any way on a child having been removed from his home as CHIPS, a parent is still entitled to the notice specified in § 48.356. The question of whether Gary was entitled to statutory notice of the CHIPS proceeding against Debra is distinct from the question whether his parental rights may be terminated under § 48.415(1)(a)3 and (6) without prior notice of those potential grounds for termination. We are uncertain whether Gary is raising the first question as a distinct issue, but we address it nonetheless.

¶8 Although the CHIPS proceeding was against Debra, not Gary, WIS. STAT. § 48.27(5) does impose upon the court the obligation, when a CHIPS petition is filed, to "make every reasonable effort to identify and notify … any person who has been adjudged to be the biological father of the child in a judicial proceeding…." Gary testified that from July 1996 to December 29, 1997, he was in Indianapolis, having absconded from the electronic monitoring program with the Department of Corrections, and he did not want anyone to know where he was. Therefore, with respect to the initial CHIPS petition, the record does not support an argument that either the court or the county agency did not make a reasonable effort to notify him. Gary has no basis for a complaint that he was not given notice of that proceeding and did not, as a consequence, receive the oral notice under WIS. STAT. § 48.356(1) to "the parent or parents who appear in court" or the written notice under subsec. (2) contained in the order entered in October 1997. With respect to the November 1998 extension order, Gary has not pointed us to any part of the record that would support an argument that either the court or the county agency reasonably should have known where he was at that time. We therefore are not persuaded that Gary's right to notice under § 48.27(5) was violated with respect to the CHIPS proceeding against Debra.

¶9 Turning to the grounds upon which the TPR petition against Gary is based, neither WIS. STAT. § 48.415(1)(a)3 nor (6) requires that any notice prior to the filing of the petition be given the parent. This is in contrast to another type of abandonment, under § 48.415(1)(a)2, which is based upon a child having been removed from the parent's home before the abandonment occurred. Under that subsection, a notice under WIS. STAT. § 48.356(2) must have been given the parent. A notice under § 48.356(2) is also expressly required when the ground for termination is a continuing CHIPS, as was alleged against Debra, *see* § 48.415(2), or continuing denial of periods of physical placement. *See* § 48.415(4). There is only one reasonable interpretation of these provisions: the notice under § 48.356(2) is required for termination of parental rights only when part of the basis for termination is removal of the child from the parent's home by court order or denial to the parent of periods of physical placement by court order.

¶10 We conclude that WIS. STAT. § 48.356, when read alone, does not require that notice of the potential termination of parental rights under either WIS. STAT. § 48.415(1)(a)3 or (6) be given a parent before the filing of the TPR petition alleging those grounds. We also conclude that when § 48.356 is read together with § 48.415 there is still no such requirement.

¶11 Gary contends case law indicates otherwise, but we do not agree. Most of the cases cited by Gary concern TPR petitions filed under WIS. STAT. § 48.415(2), which specifically requires a notice under WIS. STAT. § 48.356. *See, e.g.*, ***Marinette County v. Tammy C.***, 219 Wis. 2d 206, 216-19, 579 N.W.2d 635 (1998) (warning required by § 48.415(2)(a), referencing § 48.356 must be given in every written CHIPS order removing children from their home under a dispositional order or its extension, but need not be given in temporary physical custody orders); ***Cynthia E. v. La Crosse County Human Servs. Dept.***, 172 Wis.

2d 218, 227-28, 493 N.W.2d 56 (1992) (warning containing more than the specific applicable grounds complies with § 48.356 and thus § 48.415(2)(a)).

¶12 One case Gary cites does refer to petitions under WIS. STAT. § 48.415(1) and (6), but only in dicta. ***Winnebago County Dept. of Soc. Servs. v. Darrell A.***, 194 Wis. 2d 627, 534 N.W.2d 907 (Ct. App. 1995), addressed the ground for termination under § 48.415(8)—conviction by a parent of the intentional or reckless homicide of the other parent. The petition against Darrell initially alleged grounds for termination under § 48.415(1), (2) and (4), but the petition proceeded under only § 48.415(2). ***Id.*** at 634-35 n.2. However, when the new subsec. (8) was enacted, the court allowed an amendment of the petition to include that ground and ordered termination of Darrell's parental rights under subsec. (8). Darrell contended there was no compliance with WIS. STAT. § 48.356. The County agreed with Darrell that there was a conflict between §§ 48.356 and 48.415(8) but argued that Darrell was given the warnings for "any grounds for termination of parental rights," § 48.356(1), because at the time he was given the warning, subsec. 8 did not exist. ***Id.*** at 643.

¶13 We decided that the purpose of the warning in WIS. STAT. § 48.356 is to give a parent "every possible opportunity to remedy the situation," and concluded that there was no need for a notice under § 48.356 because the homicide could not be remedied. ***Id.*** at 644-45. In reaching this conclusion, we stated: "Under subsecs. (1) through (6) of § 48.415, STATS., a parent has the ability to remedy the situation. Therefore, the court must inform the parent of the possible grounds and then give him or her guidance on how the children may be returned to the home." ***Id.*** It is this statement that Gary relies on in arguing that he was entitled under § 48.356 to a warning that his parental rights could be

terminated under WIS. STAT. § 48.415(1)(a)3 and (6) so that he could remedy the situation.

¶14 We do not agree that ***Darrell A.*** supports this result. First, our reference to subsecs. (1) through (6) was dicta: it was unnecessary to our holding—which concerned only subsec. (8)—and it was unnecessary to our reasoning supporting that holding. Our central reasoning was that the purpose of warnings under WIS. STAT. § 48.356—to permit a parent to remedy a situation and avoid termination of parental rights—is not served by requiring notice where the ground for termination cannot be remedied. Second, because a CHIPS petition had been initiated against Darrell and the initial petition alleged grounds under WIS. STAT. § 48.415(2), warnings under § 48.356 had been given, which is how the issue of adequacy of the warnings arose; we were not confronted with the question in this case: whether any prior warning at all is necessary when the TPR petition alleges grounds under subsecs. (1)(a)3 and (6). Third, even if our statement on subsecs. (1) through (6) were not dicta, it appears inconsistent with the supreme court's fuller analysis of the purpose of the warning under § 48.356 in ***Tammy C.*** which followed our decision in ***Darrell***.

¶15 And, finally, we agree with the County and the guardian ad litem that our reasoning in ***Darrell*** supports their position just as much, if not more, than Gary's position. Once a parent has left a child with another, knowing or being able to discover where the child is, and fails to visit or communicate with the child for a period of six months, grounds for abandonment exist under WIS. STAT. § 48.415(1)(a)3. The county agency is not involved in the parent's decision to leave the child and not to have contact for six months or more, so there is no feasible way the county agency can warn the parent before the ground for abandonment exists; a warning after abandonment has occurred does not serve the

purpose of providing the parent the opportunity to remedy it. The same analysis holds true of a failure to assume parental responsibility.

¶16 Having concluded that neither WIS. STAT. §§ 48.356 nor 48.415 requires that Gary receive a prior warning of the potential for termination of parental rights under § 48.415(1)(a)3 and (6), we address his claim that due process requires such a warning. Relying on ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982), Gary argues that as a biological parent he has a fundamental liberty interest in his relationship to his child, such that termination of his parental rights must be accomplished through procedures required by the Due Process Clause of the Fourteenth Amendment; one of those procedures, he contends, is prior notice that his parental rights may be terminated for abandonment or failure to assume parental responsibility. We do not agree that the Due Process Clause requires this type of notice.

¶17 As the biological and adjudicated father of James, Gary has the right to be heard before his parental rights are terminated, *see* ***L.K. v. B.B.***, 113 Wis. 2d 429, 439, 335 N.W.2d 846 (1983),[6] and the procedures pursuant to which that termination occurs must be fundamentally fair. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862-63, 537 N.W.2d 47 (Ct. App. 1995). Gary received notice of the proceeding to terminate his parental rights and of the grounds on which

[6] We observe that since ***Santosky***, the Supreme Court has made a distinction, for purposes of constitutional protection, between a biological father who has developed a parental relationship with his child and one who has not. *See* ***Lehr v. Robertson***, 463 U.S. 248, 261-62 (1983). The Wisconsin Supreme Court relied on this distinction to hold that the Due Process Clause permits the termination of parental rights of a biological father who has not established a parental relationship under WIS. STAT. § 48.415 (6)(a)2 (1981-82) without a showing of his parental unfitness. *See* ***L.K. v. B.B.***, 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983). However, the Due Process Clause requires that the father in such a situation have the opportunity to show that he has developed a substantial parental relationship with the child. ***Id.*** at 439.

termination was sought, and had the opportunity to defend against those allegations with all the procedural protection afforded by statute and by the constitution. He has provided us with no authority for the proposition that due process requires, in addition to the notice he did receive, a prior warning that abandoning his child or failing to establish a parental relationship may result in the initiation of a proceeding to terminate his parental rights. ***Patricia A.P.***, 195 Wis. 2d 855, does not support this position. There, we concluded it was fundamentally unfair, and therefore a violation of due process, to inform a parent in CHIPS orders of the grounds upon which parental rights could be terminated, and then terminate parental rights under a less demanding standard. ***Id.*** at 864-65. We did not hold that due process required notice of the potential grounds in the first instance. Moreover, the potential grounds at issue were not abandonment or failure to assume parental responsibility, but were related to the conditions for the return of the child to the parent's home.

¶18 We conclude due process does not require that Gary be informed that abandoning his child as described WIS. STAT. § 48.415(1)(a)3 or failing to assume parental responsibility as described in § 48.415(6) might result in the termination of his parental rights. These provisions are narrowly drawn to achieve a compelling state interest, *see* ***Darrell A.***, 194 Wis. 2d at 639, and it is not fundamentally unfair to expect an adjudicated father to understand, without a warning, that if he conducts himself as described in either of these provisions, he may have his parental rights terminated.

NEW TRIAL IN INTERSTS OF JUSTICE

¶19 Gary asks us to use our discretionary powers of reversal under WIS. STAT. § 752.35 to order a new trial on the ground that the real controversy was not

fully tried.[7] There are two circumstances under which the court of appeals has held that the real controversy has not been fully tried: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. ***State v. Johnson***, 149 Wis.2d 418, 429, 439 N.W.2d 122 (1989), *aff'd on reh'g*, 153 Wis.2d 121, 449 N.W.2d 845 (1990).

¶20 Gary first contends that various rulings of the judge and the judge's comments in front of the jury demonstrate that the judge was biased against the defense and defense counsel. Gary cites to ***Murray v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904 (Ct App. 1986), as authority for the proposition that the bias of a judge is a ground for reversing and ordering a new trial because the real controversy has not been fully tried. We came to that conclusion in ***Murray*** because we determined that the judge, who was acting as fact-finder in a trial to the court, "so clouded the crucial issues that the real controversy was not fully tried." ***Id.*** at 464.

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[7] WISCONSIN STAT. § 752.35 provides as follows:

> **Discretionary reversal**. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

The second ground—that justice has miscarried—requires that we find, in addition, that there is a substantial probability of a different result on retrial; but that is not a requirement for a new trial when the real controversy has not been fully tried. *See* ***State v. Wyss***, 124 Wis. 2d 681, 734-42, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 492, 506, 451 N.W.2d 752 (1990).

We question whether the same analysis applies when the judge is not the fact-finder. However, we agree with Gary that a litigant is entitled, as a matter of due process, to an impartial judge. *See* ***id.*** at 462-63. And if the judge presiding at a TPR proceeding were biased against the defense, that would be a ground for reversal and a new trial, although perhaps not under WIS. STAT. § 752.35. Therefore, we review Gary's claim of bias, and our review is de novo. ***Id.*** at 463.

¶21 We have read the transcripts of all the pretrial proceedings and the trial, and have paid particular attention to the instances cited by Gary as demonstrating bias. We are satisfied that the judge did not show a lack of impartiality.

¶22 Most of the instances Gary refers to involve the judge's rulings when defense counsel is attempting to present testimony that in the judge's view is irrelevant, repetitious or not presented in the proper manner. There is, in each instance, a reasonable basis for the judge's ruling. It may have been preferable for the judge to limit comments in front of the jury to a brief ruling, and reserve expressions of concern over the pace and manner of defense counsel's presentation of evidence until the jury was not present, but the failure to do so does not constitute bias. The record reflects the judge was properly concerned with avoiding unnecessary repetition, confusion and delays for the jury, and he did not hesitate to rule against either the prosecutor or the defense on this ground, or to urge both to facilitate clear and concise presentation of the evidence. Gary also points to uneven rulings on the relevancy of evidence concerning Gary's relationship with his child, Hali, born after James to another woman. While there may be some inconsistency in these rulings—and we are not certain there is, given the difference in the questions objected to, the context of the questions and the evidence already presented—we do not view any such inconsistency as evidence of bias.

¶23 Gary's second argument for reversal under WIS. STAT. § 752.35 is the real controversy was not tried because of the court's erroneous exclusion of evidence. The first challenged ruling was prompted by defense counsel's questions to the social worker on psychological examinations of Debra's former husband, Rick, who helped raise James. We agree with the circuit court that this was not relevant to either abandonment, good cause for abandonment, or failure to assume parental responsibility. To the extent defense counsel was attempting to show that the county agency had not tried to integrate Gary into a family life for James, counsel had already questioned the social worker concerning efforts to find Gary and knowledge of Gary's whereabouts, and we see no error in the court's ruling precluding further questioning along those lines.

¶24 The second challenged ruling concerned Gary's testimony that Debra's father, Frank, had threatened him about having contact with James, once in 1989 and once in 1991. When defense counsel asked Gary to describe the first of the two incidents, the prosecutor objected on hearsay grounds and the court sustained the objection. Gary argues on appeal, although defense counsel did not make this argument to the circuit court,[8] that this was not hearsay, because it was not presented for the truth of what Frank said, but to show the effect of what he said on Gary—staying away from James. We will assume for purpose of

[8] In his brief on appeal, Gary states that defense counsel did not explain why it was not hearsay to the court because the court had already been critical of defense counsel and had already held him in contempt in another TPR proceeding. Since it is unnecessary for a discretionary reversal that defense counsel presented an argument on admissibility to the circuit court, we need not consider the reasons he did not do so. We also do not consider the finding of contempt in another TPR proceeding as an independent ground for concluding the judge was biased against defense counsel. Gary does not develop that argument; there is no record before us on what happened in the prior proceeding; and Gary did not bring a motion in this proceeding asking the judge to recuse himself on this ground. We therefore we have no record or ruling to review.

argument that this testimony was admissible. We nevertheless conclude that its exclusion did not prevent the real controversy from being tried.

¶25 The threats by Frank are relevant, if at all, only to the defense of good cause to abandonment; their exclusion therefore did not prevent a full trial on the ground of failure to assume parental responsibility, which does not have a good cause defense. The jury found Gary did fail to assume parental responsibility and there is ample evidence to support that. This is one reason why we do not order a new trial.

¶26 A second and independent reason is, even though Gary was not permitted to answer the questions about what, specifically, Frank said to him, the issue of whether he had good cause for abandoning James was fully tried. Gary's good cause defense was that he made efforts to get in touch with Debra so that he could have a relationship with James, but she was determined that he not have contact with James, and her father, Frank, threatened him to keep him away from James. Gary testified fully on his efforts to contact Debra and her responses; he presented testimony from a friend to support his position; and he had a full opportunity to cross-examine Debra and her mother and to present the jail log noting visits by Debra and her mother, which they denied, and noting mail dispatched to Debra. Regarding Frank's hostility to Gary, the jury heard extensive testimony from other witnesses of Frank's aggression toward Gary in the 1991 incident, including testimony from the deputy sheriff who arrived at the scene. We are not persuaded that the exclusion of further evidence on this incident, and on the threat in 1989, prevented Gary from a full and fair opportunity to have the jury consider whether Frank's threats to him on those dates were good cause for not visiting or communicating with James from the date of his birth on May 12, 1988, until this petition was filed in September 1999.

By the Court.—Order affirmed.

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