COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 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. 2006AP282 Cir. Ct. No. 2005TP22

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

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

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LARRY M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Larry M. appeals a circuit court order involuntarily terminating his parental rights to his child Isaiah pursuant to WIS. STAT. § 48.415(6)(a). Larry argues there was insufficient evidence for the jury to conclude that he "never had a substantial parental relationship" with Isaiah as required by § 48.415(6)(a). We disagree and affirm.

BACKGROUND

¶2 Isaiah was born on May 20, 2002. At the time of Isaiah's birth, his mother, Melissa C., was married to Osvaldo T., and Larry was married to Michelle M. The Wood County Department of Human Services (the Department) filed this petition for termination of parental rights of both Melissa and Larry in July 2005. At that time, Isaiah had been living in foster care for one year because there was no parent available to care for him. The ground asserted in the petition for terminating Larry's parental rights was based on WIS. STAT. § 48.415(6), which provides:

> **(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

[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.

> 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.

¶3 At trial, Larry testified that he knew Isaiah was his son when Isaiah was born. Melissa told him he was Isaiah's father when she was pregnant with Isaiah, and Larry took Melissa to between five and ten doctor appointments while she was pregnant. In addition, while Larry was not at Isaiah's birth, which was premature, Larry went to visit Isaiah in the hospital about a week after learning about his birth. Isaiah was in the hospital for about three months after being born, and Larry went to visit him about ten times during this period, and also brought his mother once or twice. In addition, Larry's wife Michelle testified that Larry told her about Isaiah after his birth, explaining he was a child Larry had had outside of their marriage.

¶4 After Isaiah was released from the hospital, Melissa initiated contact with Larry about Isaiah. Larry testified that he told Melissa that she could "sign [his] rights over" and then he and his wife Michelle[2] would take Isaiah and raise him with their own children. However, Larry and Melissa had an argument after this conversation and did not talk "for a while." Eventually, Larry's wife Michelle spoke with Melissa, and this was how Larry and Isaiah began to visit.

¶5 Michelle testified she would pick up Isaiah from Melissa and bring him to Larry and Michelle's house. Michelle testified that she and Larry together saw Isaiah between ten and fifteen times during the first year of Isaiah's life, and Larry did "[e]verything a father does" during these visits, including feeding Isaiah,

[2] Michelle and Larry had divorced by the time of this trial in October 2005.

changing his diaper, rocking him, and playing with him. The visits ranged from one hour to "[p]robably a whole day," according to Larry; Michelle testified that the longest they ever had Isaiah was for one-half day. Larry testified that he saw Isaiah "several" times after Isaiah was released from the hospital.

¶6 Both Michelle and Larry testified Isaiah never spent the night at their house; although Larry requested this, Melissa would not allow it. Larry never took Isaiah anywhere outside the house because Isaiah was born prematurely and was not a healthy infant. Larry also never took Isaiah to the doctor, which Michelle explained was because Melissa did not want Larry to be in that part of Isaiah's life.

¶7 Larry was incarcerated in June 2003, but his visits with Isaiah ended before then, because Melissa's husband Osvaldo was released from prison. Larry testified that Osvaldo knew Isaiah was not his son, but after Osvaldo was released, Larry's visits with Isaiah had to be kept secret from Osvaldo. The last time Larry saw Isaiah he was about one year old.

¶8 Larry testified that he was put on probation in December 2003, but he absconded and went to live in Madison and then Indiana that same month. He had not seen Isaiah for several months at that point. While absconding, Larry made trips to Wisconsin to visit his other children, but he did not visit Isaiah on these trips. While in Indiana, Larry lived with his mother, worked, and sent money "every now and then" to Michelle, with whom he was in the process of a divorce.

¶9 In February 2004, Larry was adjudicated Isaiah's father in a paternity proceeding that Melissa and the State of Wisconsin initiated. At that time Larry was ordered to pay $103 per month in current child support, and an

additional $10 a month in arrears. According to the testimony of Kathleen Barth, a case manager with the Wood County Child Support Agency, Larry had paid less than $100 in child support from the time the order was entered in February 2004 up to the time of trial in October 2005. Larry did not testify at trial nor does he argue on appeal that he made any other financial contribution to either Melissa or Isaiah's foster family for Isaiah's care.

¶10 In July 2004, Isaiah and his two half-siblings, all of whom resided with Melissa, were removed from her care and placed in a foster home. They were subsequently found to be in need of protection and services pursuant to WIS. STAT. § 48.13(10). Kimberly Heeg, a social worker for the Department who was assigned Isaiah's case, testified that social workers were not able to reach Larry at the time Isaiah was removed from his mother's care in July 2004.

¶11 Michelle testified that she contacted social services to see if she could get placement of Isaiah, even though Larry was not living with her at the time, so that Isaiah would "be with his brothers and sisters and have the opportunity to see his father." Michelle testified that she had numerous conversations with Larry during Larry's absence from August 2004 until the end of the year in which Larry asked if she had made any progress towards getting placement of Isaiah, because otherwise his own mother wanted placement of him. However, by the time Michelle contacted the appropriate person at social services, her divorce from Larry had become final and she no longer had any grounds for obtaining placement of Isaiah.

¶12 Larry was arrested and was returned to jail in October 2004. Heeg testified that in November 2004 she sent Larry a letter explaining that Isaiah was in foster care because neither Melissa nor any other relative was available to care

for Isaiah. Heeg also informed Larry of Isaiah's address in foster care, and inquired about the "degree of relationship and contact" that Larry had had with Isaiah up until that point. Larry responded, explaining he was incarcerated, and expressing disappointment that Isaiah was in foster care. Larry also wrote that his own parents cared about Isaiah; he hoped Isaiah could be returned home; and he asked if it was possible to send Isaiah pictures and toys. In a phone conversation with Heeg, Larry asked for a visit with Isaiah in jail, asked to be sent a photograph of Isaiah, and gave Heeg his own mother's phone number, asking whether Isaiah might be placed with her.

¶13 Heeg testified that she discussed with her supervisor Larry's request for a visit with Isaiah, but ultimately determined that visiting Larry in jail was not in Isaiah's best interest. Isaiah was a little over two years old at that time, and had not had regular ongoing contact with Larry; the last time Isaiah saw Larry he was between ten months and one year old, and Isaiah did not know Larry. If Isaiah had visited Larry, he would have had contact through a glass booth and Isaiah would have been able to use a telephone in order to communicate with Larry. According to Heeg, the decision not to allow Isaiah to visit Larry in prison was not based on the possibility of the prison environment frightening Isaiah, but rather on the possibility that Isaiah would be frightened by being taken to meet someone he would not recognize. Heeg wrote to Larry explaining this, and also informing Larry that placing Isaiah with Larry's mother was not in Isaiah's best interests because Isaiah had never formed a relationship with Larry's mother, and it was not in Isaiah's best interest to be separated from his siblings, with whom he was living in foster care.

¶14 Heeg testified that Larry wrote another letter to her saying that he had "just played the background because of [Isaiah's] mother and [Larry's]

marriage," but he loved his son and wanted him to be with his family if it was possible. In another letter Larry stated that he would be getting out of prison in July 2006; he wanted to have Isaiah home with him at that time and he intended to write Isaiah letters and to be a part of his life. However, Heeg was not aware that Larry ever did write Isaiah any letters.

¶15 In April 2005, Larry sent a letter asking Heeg for phone contact with Isaiah, but this was denied because Isaiah did not know who Larry was, and Heeg determined phone contact "is not an appropriate way to start to establish a relationship with a child who is not yet three years old." Heeg testified that she believed that a relationship with a young child is formed through daily contact, and, if daily contact is not possible because of a separation, through weekly visitation.

¶16 Isaiah's foster mother, Jackie K., testified that she had never received any phone calls or letters from Larry for Isaiah. Jackie also never received any letters or gifts for Isaiah from any of Larry's family members. At the time of the trial, Isaiah had been living with Jackie and her husband for fifteen months and called them mom and dad.

¶17 Mary Christensen took over as the social worker for Isaiah when Heeg left the Department in June 2005. She testified that she sent a letter to Larry, but he never responded, and she had not had any contact with him. At the time of the jury trial in October 2005, Larry had nine months of incarceration remaining.

¶18 At the conclusion of the evidence, the jury was instructed, in accordance with WIS JI—CHILDREN 346:

> To establish a failure to assume parental responsibility, Wood County Department of Human Services must prove

> by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent … of Isaiah [M.] have never had a substantial parental relationship with Isaiah [M.].
>
> The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of Isaiah [M.]. In evaluating whether Larry [M.] has had a substantial parental relationship with the child, you may consider factors, including, but not limited to, whether Larry [M.] has ever expressed concern for or interest in the support, care, or well-being of Isaiah [M.], whether Larry [M.] has neglected or refused to provide care or support for the child, and whether … [he] has ever expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy.
>
> Before you may answer the special verdict question "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes." If you are not so convinced, you must answer the question "no."

¶19 The jury answered "yes" to the question whether Larry had failed to assume parental responsibility for Isaiah. The court subsequently determined Larry unfit and terminated his parental rights to Isaiah.

ANALYSIS

¶20 On appeal, Larry argues that there was insufficient evidence for the jury to conclude he *never* had a substantial parental relationship with Isaiah because the evidence shows that he did have a substantial parental relationship with Isaiah during Isaiah's first year. He contends that after that, because he was incarcerated, he did not know Isaiah had been removed from Melissa's care; but once he found out, he sought visitation and began working towards getting Isaiah placed with his family. According to Larry, the Department prevented him from re-establishing his relationship with Isaiah while he was incarcerated.

¶21 In a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the jury's verdict. ***Morden v. Continental AG***, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). We sustain the jury's verdict "if there is any credible evidence to support it." ***Id.***, ¶38 (citations omitted). In addition, "if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding," we will not overturn the jury's finding. ***Id.*** (citations omitted). This is because the jury, not the appellate court, is to "balance the credibility of witnesses and the weight given to the testimony of those witnesses." ***Id.***, ¶39.

¶22 Applying this standard, we conclude that the evidence, viewed most favorably to the jury's verdict, is sufficient for a reasonable jury to find that Larry never had a substantial relationship with Isaiah, even during the first year of Isaiah's life.

¶23 We agree with Larry that his conduct prior to Isaiah's birth is relevant in determining whether he had a substantial parental relationship with Isaiah. *See* ***L.K. v. B.B.***, 113 Wis. 2d 429, 439, 335 N.W.2d 846 (1983). *See also* WIS. STAT. § 48.415(6)(b) (listing as a relevant factor whether "a person who is or may be the father of the child … has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy"). However, a reasonable jury could decide that the fact that he took Melissa to the doctor between five and ten times while she was pregnant with Isaiah, plus his other contact with Isaiah while he was in the hospital and after he came home, did not constitute "acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care" of Isaiah. A reasonable jury could view Larry's contact with Isaiah after he came home from the hospital and up until the time he was approximately a year old as not significant in providing the daily

care an infant needs, given that Larry also did not provide any financial support for Isaiah until after he was ordered to do so nearly two years after Isaiah's birth. There is no evidence that he contributed to any of the expenses associated with Isaiah's birth, and there is evidence that his total financial assistance for Isaiah's care has been less than $100.

¶24 In addition, while Larry argues Melissa controlled Larry's visits with Isaiah, Larry could have obtained the legal right to visit Isaiah by bringing a paternity action to have himself adjudicated Isaiah's father. *See* WIS. STAT. § 767.45(1)(d). The evidence shows, however, that Larry was not responsible for initiating the paternity action in which he was adjudicated Isaiah's father nearly two years after Isaiah's birth. There is also evidence that Melissa initiated contact with Larry after Isaiah's release from the hospital, and evidence that Michelle was the one who picked up Isaiah from Melissa and brought him to the house she and Larry lived in together. Viewing this evidence in the light most favorable to the verdict and resolving all credibility issues in favor of the verdict, a reasonable jury could infer that Larry was not interested in seeing Isaiah any more than he did, and that even that amount of time with Isaiah would not have occurred if Melissa and Michelle had not taken the initiative.

¶25 It is true there was evidence that Larry requested in person and telephone contact with Isaiah while he was incarcerated and the Department denied these requests. However, there was also evidence that the reason for the denial was that, due to Larry's complete absence from Isaiah's life after he was about a year old, such contacts were not in Isaiah's best interests: Isaiah was then two and one-half years old and did not know who Larry was. A jury could reasonably view Larry himself as responsible for the circumstances that caused his complete absence from Isaiah's life during that time period: his incarceration for

criminal conduct and his absconding from probation. *See* ***Ann M.M. v. Rob S***., 176 Wis. 2d 673, 683-85, 500 N.W.2d 649 (1993); ***L.K.***, 113 Wis. 2d at 442; *and* ***State v. Quinsanna D***., 2002 WI App 318, ¶¶22-24, 259 Wis. 2d 429, 655 N.W.2d 752 (the fact finder is not required to ignore the reasons for the parent's inability to care for child). A jury could also consider the evidence that Larry did not write any letters, send any gifts, or make any significant financial contribution to Isaiah's care, even though no one prevented him from doing that, and he did not visit Isaiah when, as a fugitive, he returned to Wisconsin to visit his other children.

¶26 Thus, to the extent that Larry is suggesting that he was prevented by others from having a substantial parental relationship with Isaiah, a reasonable jury could have rejected that claim. We observe, however, that WIS. STAT. § 48.415(6)(a) requires only that clear and convincing evidence show that Larry never established a significant parental relationship with Isaiah. The statute does not require the petitioner to show that Larry had the opportunity to do so. ***Ann M.M.***, 176 Wis. 2d at 683-84. In ***Ann M.M.***, the supreme court explained that prior to 1988, § 48.415(6)(a) required a petitioner to show that the father had had the opportunity and ability to assume parental responsibility, but the legislature "specifically removed that requirement" in 1988. ***Ann M.M.***, 176 Wis. 2d at 683-84. "Thus, the Wisconsin legislature has concluded that a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child." ***Id***. at 684.

¶27 In his reply brief, Larry points out that some of the factors to consider under WIS. STAT. § 48.415(6)(b) in evaluating whether the person has a substantial parental relationship with the child include "whether the person has ever expressed concern for or interest in the support, care or well-being of 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." Larry appears to argue that this language requires that his expressions of concern and interest for Isaiah be considered as creating a substantial parental relationship even though he may not have "accept[ed] and exercise[d] … significant responsibility for the daily supervision, education, protection and care" of Isaiah. Section 48.415(6)(b). This is not a reasonable reading of the statute. The statute plainly defines "substantial parental responsibility" as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." Section 48.415(6)(b). The subsequent list of factors to consider in deciding whether this standard is met is not an exclusive list; and the list includes, in addition to those Larry quotes, "whether the person has neglected or refused to provide care or support for the child…." Section 48.415(6)(b) When read as a whole, § 48.415(6)(b) permits the fact finder to consider "whether the person has ever expressed concern for or interest in the support, care or well-being of the child … [or] … the mother during her pregnancy," but nothing in the statute suggests that those are sufficient to meet the standard, or are more significant than other factors.

¶28 Viewing the evidence most favorably to the verdict in this case, a reasonable jury could either doubt the sincerity of Larry's expressions of concern and interest for his child, given his conduct, or could decide that he does feel concern and interest but those feelings, in combination with his actual conduct, do

not constitute "acceptance and exercise of significant responsibility for the daily supervision, education, protection and care" of Isaiah.[3]

¶29 Because we conclude there was sufficient evidence in the record for the jury to find that Larry had never had a significant parental relationship with Isaiah, we affirm.

By the Court.—Order affirmed.

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

[3] In his reply brief, Larry also argues that we must not read WIS. STAT. § 48.415(6) broadly because that "is inconsistent with due process and fundamental fairness" given that it is the basis for terminating "a parent's fundamental rights." He does not further develop this argument and we therefore do not address it. We do observe, though, that "parental status that rises to the level of a constitutionally protected liberty interest … is dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs." ***Randy A.J. v. Norman I.J.***, 2004 WI 41, ¶16, 270 Wis. 2d 384, 395, 677 N.W.2d 630.