

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2002

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 Nos. 01-3402
01-3403**

**Cir. Ct. Nos. 01-TP-19
01-TP-20**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

NO. 01-3402

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

AMY L. H.,

PETITIONER-RESPONDENT,

V.

DEAN L. B.,

RESPONDENT-APPELLANT.

NO. 01-3403

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

AMY L. H.,

PETITIONER-RESPONDENT,

V.

DEAN L. B.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Sheboygan County:
JOHN B. MURPHY, Judge. *Affirmed.*

¶1 BROWN, J.¹ Dean L.B.’s parental rights to two children were terminated. He has three claims: (1) Amy L.H.’s lawyer, an attorney in private practice who is retained as corporation counsel for Sheboygan County in a part-time capacity, had a conflict of interest and should have been disqualified as counsel; (2) he should have been warned during his divorce that he possibly could have his parental rights terminated for failing to visit the children. He posits that, although the statutes do not require a warning during a divorce under WIS. STAT. § 48.356, constitutional equal protection jurisprudence requires that we judicially amend the statute and hold that he should have been warned during his divorce; and (3) he established good cause for failing to visit the children.

¶2 We see no conflict of interest, the “warnings” issue is waived and he has not established good cause for failing to visit or communicate with the children. We affirm the termination.

¶3 Amy filed two petitions for termination of the parental rights of Dean, one petition for each of her two children, Curtiss M.B. and Holly M.B. Dean is the natural father. In each petition, Amy claimed that Dean was an unfit

¹ This case is decided as a one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All statutory references are to the 1999-2000 version of the Wisconsin Statutes unless otherwise noted.

parent and his rights should be terminated because he abandoned his children, contrary to WIS. STAT. § 48.415(1)(a) and (c) and failed to assume parental responsibility, contrary to § 48.415(6). In particular, she alleged that Dean had made no sustained effort to “utilize the placement periods granted to him or to expand them.” She also alleged that, for at least two years, Dean had not contacted her or the children in any fashion or attempted to arrange to see or hear about the children. She asserted that she had not kept the whereabouts of her or the children hidden and averred that there was no reason for him to have had no contact whatsoever with them for two years.

¶4 An attorney was appointed for Dean and he exercised his right to a jury trial to contest the facts alleged by Amy in her petitions. Prior to trial, Dean moved to have Amy’s counsel, Carl Buesing, recused from the case. Dean noted that Buesing was the corporation counsel of Sheboygan County. He theorized that, under the table of organization for Sheboygan County employees, the corporation counsel acted as the superior of the attorney who handles child support enforcement. Dean noted that he had been the subject of a prior child support enforcement action. He argued that the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys prohibit a lawyer from representing a client when that lawyer has also participated as a public officer against the same opposing party. He contended that this rule applied to the situation before the court. He further argued that there was a confidentiality problem in that the child support file could be used by Buesing to prosecute Amy’s case. The trial court denied the motion.

¶5 At the jury trial, Amy presented evidence consistent with the allegations outlined in her petition. Dean vigorously disputed those allegations with allegations of his own, representing to the jury that, far from abandoning his

children, the separation from his children was solely due to Amy's active efforts to thwart his attempts to visit the children. He alleged that the sole motive for Amy's allegations was to pave the way for her new husband to adopt the children and cast Dean out of his children's lives forever. After the jury heard both sides, it rendered a special verdict finding, in pertinent part, that Dean had failed to visit or communicate with the children for a period of six months or longer and that he did not have good cause for having failed to communicate with them during that period. The trial court thereafter held a dispositional hearing and, following the hearing, ordered that Dean's parental rights to Curtiss and Holly be terminated. From the orders terminating his rights, Dean appeals.

ATTORNEY CONFLICT OF INTEREST ARGUMENT

¶6 Dean renews his claim that Buesing should have been disqualified from continuing to represent Amy in this proceeding. He again contends that Buesing's participation violates the Rules of Professional Conduct for Attorneys. In particular, he cites SCR 20:1.11(a) which provides in relevant part:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

¶7 Dean submits that he was the subject of a past child support enforcement action. He further submits that this action was prosecuted by an attorney employed by Sheboygan County on behalf of its Child Support Enforcement Agency. He points out that, under the county table of organization, the corporation counsel is this attorney's superior. Based on these facts, he comes to the following conclusion: Buesing's office prosecuted Dean and now Buesing is acting as private counsel to prosecute Dean further. Buesing's access to

confidential government information gives his client an unfair advantage. Lawyers should not be allowed to use their public office to benefit their private clients against a party. Dean asserts that his past support payment problem was a factor in determining whether his parental rights should be terminated and Buesing's continued representation of Amy therefore prejudiced him.

¶8 We agree, however, with the trial court that the rule is inapplicable under the facts adduced here. As the trial court pointed out, the testimony obtained during the hearing reveals that Buesing is a part-time corporation counsel whose law firm is retained by the county. The statutes require that the county employ attorneys for child support enforcement. WIS. STAT. § 59.53(6). But while the table of organization may say that the child support enforcement attorney reports to the corporation counsel, that attorney is not part of the corporation counsel's office. A child support enforcement attorney even testified that there is no active involvement between the corporation counsel and her office in general, and in Dean's case in particular. So, there was no control exercised by Buesing regarding Dean's child support enforcement case.

¶9 Moreover, as the trial court noted, the child support enforcement attorney pointed out that the records of the agency are public records and that means that Dean's records are open for anyone's scrutiny, not just Buesing's. The trial court determined that since they are public records, it could not see how Buesing was in any more advantageous position than any other citizen. We agree with the trial court.

¶10 The rule, on its face, does not permit a lawyer to represent a private client when that lawyer has "participated personally and substantially" as a public officer. There is no evidence to support the claim that Buesing participated

personally and substantially in the prosecution of Dean's child support problem. For that reason, Dean's claim fails.

EQUAL PROTECTION CLAIM

¶11 Dean next quotes WIS. STAT. § 48.356. This is a section of the children's code that gives parents who face the prospect of having their parental rights terminated because of their action or inaction in certain matters, the right to a warning that termination may result if the parent's pattern of behavior does not change. These warnings are required whenever a court orders a child to be placed outside the home, when the expectant mother of an unborn child is placed outside her home, or when a parent is denied visitation because the child or unborn child has been adjudged a child in need of protection or services. Dean argues that, during his divorce, the divorce court should have warned him that if he did not visit or communicate with his children, as he was being given a right to do by the judgment of divorce, he could face a termination of his parental rights. Dean concedes that the statutes do not require such a warning. However, Dean argues that "[t]here is no reason why the statute in juvenile cases which require the notice under Section 48.356 and the divorce statutes should treat parents differently when similarly situated." He contends that since he is similarly situated in a divorce action to the parent who is involved in an action described in § 48.356, he is being denied equal protection of the law.

¶12 As pointed out by Amy, however, this argument is being made for the first time on appeal. We hold that the issue is waived. There is no compelling reason why we should entertain this issue. *Sambs v. City of Brookfield*, 66 Wis. 2d 296, 314, 224 N.W.2d 582 (1975).

GOOD CAUSE FOR FAILING TO VISIT

¶13 Finally, Dean reiterates the testimony favorable to his side of the story in an attempt to convince us that there was good cause on his part for failing to visit or communicate with the children. Based on this testimony, he contends that the jury erred when it found that he had abandoned the children. He also contends that the trial court misused its discretion in terminating his rights based on this evidence.

¶14 This court will uphold a jury verdict if there is any credible evidence to support it. *Kinship Inspection Serv., Inc. v. Newcomer*, 231 Wis. 2d 559, 570, 605 N.W.2d 579 (Ct. App. 1999). The credibility of the witnesses and the weight afforded to their testimony are left to the jury. *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). This court must search the record to find evidence supporting the verdict and accept all inferences drawn by the jury. *Id.* This court does not search for evidence to sustain a verdict the jury could have reached, but did not. *Heideman v. Am. Family Ins. Group*, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991).

¶15 Even if the jury finds that grounds for termination exist, the trial court may still dismiss the petition if “the evidence of unfitness is not so egregious as to warrant termination of parental rights.” *B.L.J. v. Polk County Dep’t of Soc. Servs.*, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991). This discretionary decision of the trial court preserves the constitutionality of termination proceedings. *See id.* at 92-93. The trial court should evaluate “the quantity, quality, and persuasiveness of the evidence” in making its discretionary decision to terminate. *Id.* at 104.

¶16 We understand Dean’s argument to be that there was no credible evidence to support the finding of abandonment because the only credible

evidence was that he had good cause not to visit the children. That evidence consisted of the roadblocks thrown in his way by Amy during the time of the divorce and thereafter. He also appears to contend that, even if there is evidence from which the jury could find that there was not good cause for failing to visit the children, Dean's conduct was not egregious and termination should not have been ordered by the trial court.

¶17 Dean first recites how the divorce judgment specified certain conditions of visitation, including that Dean's visits be supervised by a person named by Amy. He explains that Amy named Dean's mother as the supervisor and shows how Dean's mother testified that she supervised about twenty visitations before declining to act anymore. He says that throughout the pendency of the divorce, Amy was obstinate. She gave him such trouble that he had to file eight complaints with the police in order to exercise his rights to visitation. He tells how Amy admitted that Dean exercised visitation for three to four weeks in August 1998 and how he attempted to exercise visitation, naming his own supervisor when Amy refused to act to designate one on her own, but how Amy refused to allow visitation. He tells of his testimony that after this attempted visitation, no further arrangements were made for an alternate supervisor by Amy and no court action was initiated by him regarding visitation. As a result, no visitation took place after the divorce. He does cite one attempt where he asked Amy to let the children visit at her stepfather's place of business but blames Amy for the failure. He also cites a correlative attempt to send Valentine's cards to his children at about the same time.

¶18 Dean excuses his failure to attempt visitation after the divorce on a variety of factors. He cites the following pieces of evidence that the jury had in its possession, but which he claims the jury ignored. First, he points to his testimony

that, after the divorce, with his health problems requiring him sometimes to lie flat on his back to reduce swelling on his spinal cord, getting around was difficult for him. Second, he points to his testimony about the confrontational nature of Amy's new husband and explains that he simply lacked the strength to challenge Amy's husband. Third, he reiterates Amy's intransigence regarding the whole visitation idea. He claims, in passing, that Amy's phone number was unlisted throughout this time. He cites this as evidence of Amy's continued obstinacy. Fourth, he says that he contemplated bringing a contempt action against Amy, but two things prevented it: he did not have the finances to hire a lawyer and he did not want Amy to go to jail for contempt because that would not be in the best interests of the children. Fifth, Dean tells how he finally complained to the court about the lack of visitation after a child support action had been initiated against him and tells how the court responded by sending him a packet of information explaining how to bring a postjudgment action, but which involved costs plus the payment of fees to the guardian ad litem. He complained that he could not understand the packet of information given to him by the court and could not afford to retain counsel.

¶19 Dean concludes that the above five pieces of evidence, taken together, weave a mosaic of good cause not to visit. He faults Amy as being the "provocateur of the abandonment." He asserts that her actions during the divorce caused him to thereafter become "discouraged, disheartened and depressed and unable to assert his rights in court."

¶20 Amy argued to the jury that her actions during the pendency of the divorce, true or not, and her failure to name a new supervisor when Dean's mother refused to act as supervisor anymore should not be an excuse for Dean to thereafter decide not to visit his children for almost two years. Amy argued that

Dean never went to court to seek an order compelling her to name a new supervisor and grant visitation. Even when he finally did complain and got a packet of information on how to bring a postjudgment action, he decided it was too much trouble to go to court.

¶21 The jury apparently believed, as Amy did, that the onus was on Dean to assert his visitation rights after the divorce was over. The jury found that Dean's excuses were not "good cause." That verdict is supported by sufficient evidence.

¶22 Of course, the final decision about whether Dean's inactions is enough for the court to take the drastic step of terminating his parental rights is for the trial court. Here, the trial court acknowledged the problem before it at the start of its disposition decision. The trial court remarked:

There are more than a few people I've terminated who I would have liked to do more than terminate them from their parental rights because they had seriously abused their children physically, emotionally and every other way possible.

That's not the case here. There are no allegations that Mr.[B] is an abusive parent. The allegation before the jury was that he basically withdrew from the children's lives, and therefore in doing so, he gave up his ability to parent, and in a sense gave up his right to be a parent in the process. That's the allegation against him, not that he's an abusive person.

¶23 The trial court then commented that "[w]hat's unfortunate" is that Dean "did drop out of the kids' lives for 32 months ... 32 months is an awfully long time. That's a bit more than a back burner." The court then went on to explain how the children are at a developmental stage in their lives where they are much more affected by the father's absence than they would be as teenagers. The trial court reasoned that small children live for the moment and they need to feel

secure. The trial court noted that there is no substantial relationship with the children anymore. The daughter does not even remember who Dean is. The trial court then targeted one of Dean's excuses for his absence. The court said:

I can say this Mr. [B.]. Your description of your legal options and the things you could have done is totally inconsistent with my perception of what's available for you here in Sheboygan County. I've been involved in the practice of family law in this county since 1983 either as a lawyer or as a judge, and I can tell you there were a lot of things that you could have done. For whatever reason, you really didn't follow up on these things. You may have convinced yourself that you were running up against a wall that was one that you could never scale.

... Frankly, it's not true. It's not a question of can you win or not win. If you want to see your kids in this county and there is no justifiable reason for you not to, there are so many ways to accomplish that I couldn't even begin to list them all. I have people in here all the time who are having visitation problems and we get them resolved. [T]he door was open for you as well.

¶24 The trial court then went on to recite how the children are now part of a stable family unit and "frankly, you're just not part of that picture." The trial court then commented that suddenly bringing Dean back into the children's lives would be a destabilizing condition. The trial court concluded that Dean had failed in his responsibilities as a parent and that it was in the children's best interests to terminate.

¶25 We agree with the trial court that Dean abdicated his responsibility to remain part of the children's lives. He made the conscious decision to stay away. He may have thought the decision was temporary and that, sooner or later, he would resume visiting and communicating with his children. But during his absence, the children were gaining a stable life-style without their father involved. Dean cannot walk away, expecting that everything will remain the same, and then

come waltzing back in when a termination action is brought and he finally has a lawyer to plead his case. The justice system provides plenty of opportunities for parents without custody to remain an important part of a child's life. In fact, it is the public policy of this state to give those parents that opportunity and to help them achieve it. Dean appears to argue that he turned his back on the legal system because of the costs and legal gymnastics involved, but he never turned his back on his children. The response is that, when Dean turned his back on the justice system, he failed in his responsibility as a parent.

By the Court.—Orders affirmed.

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