COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

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.

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

No. 95-2528

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

In the Interest of Scott D.K., Jr.
A Person Under the Age of 18 Years:

FOND DU LAC COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Respondent,

v.

SHAIRI K.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

ANDERSON, P.J. Shairi K. appeals from an order of the trial court terminating her parental rights to Scott D.K., Jr. We conclude that the evidence presented did not warrant Shairi's requested instruction. Accordingly, we affirm the trial court's order.

A petition for termination of Shairi's parental rights was filed alleging that Shairi was unfit and the grounds for termination were abandonment and continuing need of protection or services.[1] Prior to Scott's birth, Shairi was charged with the murder of Peter D. Peter was one of three men alleged to be Scott's father. At the time of Scott's birth, Shairi was incarcerated. Shairi was convicted and sentenced to life imprisonment with a parole eligibility date of twenty-five years. Scott was subsequently adjudicated a child in need of protection or services and placed in foster care.

The petition alleged that Scott had been abandoned by Shairi pursuant to § 48.415(1)(a)3, STATS., because Shairi had failed to contact him since August 1991. It was alleged that while incarcerated, Shairi has made no phone calls to Scott or sent letters since August 1991. Allegations were also made that Scott was a child in need of protection or services.

A fact-finding hearing was held before a jury. The jury concluded that grounds existed for termination on the basis of continuing need of protection or services and abandonment. In June of 1995, the court filed an order terminating Shairi's parental rights. Shairi appeals.

Shairi raises two issues in her appeal. She asserts that (1) the court erred in denying her motion to strike § 48.415(2), STATS., from the petition as grounds for termination of parental rights; and (2) the court erred in denying

[1] This case was previously before us on appeal in ***Fond du Lac County Dep't of Social Servs. v. Shairi A.K.***, No. 94-2956, unpublished slip op. (Wis. Ct. App. Dec. 28, 1994), where we reversed the trial court's order dismissing the department's petition for termination of Shairi's parental rights to Scott.

her request for the language of the rebuttable presumption contained in standard jury instruction 7042.

We only need address Shairi's argument regarding the ground of abandonment[2] and the requested instruction on the rebuttable presumption. As long as jury instructions fully and fairly inform the jury of the law applicable to the particular case, the trial court has the discretion in deciding which instructions will be given. ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 60, 443

[2] Section 48.415(1), STATS., provides:

(1) ABANDONMENT. (a) Abandonment may be established by a showing that:

1. The child has been left without provision for its care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent;
2. 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) and the parent has failed to visit or communicate with the child for a period of 6 months or longer; or
3. The child has been left by the parent with a relative or other 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 one year 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) A showing under par. (a) 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.

In ***P.S. v. G.O.***, 168 Wis.2d 259, 266, 483 N.W.2d 591, 594 (Ct. App. 1992), the court stated that a parent's failure to have contact with his or her child during the time periods under § 48.415(1)(a), only establishes a presumption of abandonment. Section 48.415(1)(c) provides that a showing under subsec. (a) may be rebutted by other evidence that the parent did not disassociate himself or herself from the child.

N.W.2d 50, 54 (Ct. App. 1989). If the overall meaning communicated by the instructions was a correct statement of the law, no grounds exist for reversal. ***Fischer v. Ganju***, 168 Wis.2d 834, 850, 485 N.W.2d 10, 16 (1992). Whether jury instructions are a correct statement of the law is a question of law that we review de novo. *See* ***State v. Neumann***, 179 Wis.2d 687, 699, 508 N.W.2d 54, 59 (Ct. App. 1993).

Shairi argues that the County alleged that her parental rights should be terminated on the ground of abandonment and her defense was to rebut the presumption of abandonment. Shairi requested that the standard jury instruction 7042 be given to the jury and the language of the rebuttable presumption provided in § 48.415(1)(b) & (c), STATS. WIS J I—CIVIL 7042 instructs on "Involuntary Termination of Parental Rights: Abandonment under Wis. Stat. § 48.415(1)(a)2 or 3" and provides in relevant part:

> Your role as jurors in this case will be to determine whether (child) has been abandoned by (parent).
>
> The verdict asks:
>
> As of (date of petition), was (child) abandoned by (parent)?
>
> Before you may find that (parent) has abandoned (child), you must be satisfied that:
>
> [For petitions based on Wis. Stat. § 48.415(1)(a)2: (parent) has not visited or communicated with (child) for a period of at least 6 months.]
>
> [For petitions based on Wis. Stat. § 48.415(1)(a)3:
>
> 1. (parent) left (child) with a relative or other person; and
> 2. (parent) knows or could discover the location of the (child); and
> 3. (parent) has not visited or communicated with (child) for a period of at least one year.]
>
> [Add if evidence warrants:
>
> If you find there was contact between (parent) and (child) during the (six month) (one year) period, but that such

> contact was only incidental contact, you may still find that (parent) failed to visit or communicate with (child). Incidental contact means contact which occurred merely by chance or which demonstrated no intention on the part of (parent) to re-establish or maintain a significant relationship with the child. (In determining whether any failure to visit or communicate has lasted for at least (six months) (one year), you should not include any periods during which (parent) was prohibited by court order from visiting or communicating with the child.)]
>
> Even if you determine from the evidence that (parent) has not visited or communicated with (child) for at least (six months) (one year), you are not required to find that he or she abandoned (child), if you determine that (parent) has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being.
>
> (Petitioner) has the burden of convincing you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that (parent) has abandoned (child).[3]

The trial court denied Shairi's request for instruction 7042 regarding the rebuttable presumption.

Shairi argues that there was testimony which indicated that Judge Mickiewicz had addressed the issue of visitation and had initially ordered visits once a week and then rescinded that order. She further argues that "The evidence had already showed that Department of Social Services had determined to not allow visits unless there was a court order. When Judge Mickiewicz rescinded the order allowing visits there was a de facto court prohibition against visitation."

[3] If the jury determines that grounds for abandonment exist, the trial court must find that the parent is unfit, pursuant to § 48.424(4), STATS.

We disagree. The jury instruction expressly states that the "parent was prohibited by court order from visiting or communicating with the child." This was not the situation here. There was no affirmative court order prohibiting visitation. We agree with the County that an instruction regarding a nonexistent order would have been inappropriate. Additionally, Shairi presented no evidence of any contact with Scott that would have necessitated the giving of her requested instruction regarding disassociation. We conclude that the trial court did not err in refusing to instruct the jury on the rebuttable presumption. Therefore, termination of Shairi's parental rights was proper on the ground of abandonment. We need not address the alternative ground for termination which was a child in need of protection or services.

By the Court.—Order affirmed.

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