COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP669 **Cir. Ct. No. 2006TP101**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

¶1 FINE, J. David W. appeals the order terminating his parental rights to his son Ameen W. A jury found that David W. failed to assume his parental responsibility in connection with Ameen, *see* WIS. STAT. § 48.415(6), and the trial

court determined that it was in Ameen's best interests to terminate David W.'s parental rights to him. David W. claims that the trial court erred in upholding the jury's verdict, and, also, that the trial court erred in terminating his parental rights to Ameen. We affirm.

I.

¶2 Ameen was born in April of 1996 to Iraida B., who was then five months shy of her eighteenth birthday.[1] David W. was twenty-six and in prison when Ameen was born. Released in February of 1997, David W. saw Ameen once during that period of his incarceration, when Iraida B. brought the boy to the prison. David W. was rearrested in September of 1997 and is still in prison. Although David W. testified that Iraida B. gave Ameen to him after he was released in February of 1997, and that the boy was living with him and his then girl-friend essentially during the seven months before he was arrested again, Iraida B. testified that Ameen never lived with David W. but, rather lived with her. According to Iraida B., David W. did, however, "pick up Ameen on a regular basis," but "didn't keep him over for long periods of time." Iraida B. also testified that David W.'s interest in Ameen seemed "pretty consistent":

> A I mean, he always came around asking for his son and picking him up. I mean, it was pretty much on a pretty regular basis. I mean, every--
>
> Q Maybe he had him two days out of a week?
>
> A No, that--
>
> Maybe out of a week, he would have him too [*sic*], three-- too [*sic*], two, three days.

[1] Iraida B. voluntarily terminated her parental rights to Ameen, and that matter is not before us.

Q But you considered he lived with you?

A Yes, I do.

Q Where were Ameen's belongings?

A In my home.

David W. testified that during the days that Ameen stayed with him, he would "change his diapers, feed him, cloth[e] him, [and] bathe him." He also testified that he took Ameen "to the hospital, make sure his checkups were all right because his mother, I didn't trust."

¶3 During David W.'s current incarceration, the expression of his interest in Ameen waned somewhat. Thus, Iraida B. testified that although Ameen lived with her from 2001 to 2005, David W. never wrote to her. He also never sent letters, cards, or gifts to the Bureau of Milwaukee Child Welfare to be given to Ameen. He did, however, once ask the social workers how Ameen was doing. He testified that in 2000 he sent on Ameen's behalf $7, and $10 before that, to Ameen's maternal grandmother.[2] David W. also enrolled Ameen in a Salvation Army program that sent gifts to children of inmates, and Ameen sent a card to David W. thanking him for a soccer ball and pants. David W. also sent letters and pictures to Ameen when he lived with his maternal grandmother, and Ameen sent two cards to David W. during that time. The maternal grandmother also sent pictures of Ameen to David W.

[2] The woman had adopted Iraida B. when the latter was a child.

II.

A. *Jury Verdict.*

¶4 We give great deference to jury verdicts on appeal, and may not overturn them "'if there is any credible evidence'" that supports what the jury has found, giving to jury verdicts every reasonable supporting inference. ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 449, 655 N.W.2d 752, 761 (quoted source omitted).

¶5 WISCONSIN STAT. § 48.415(6) sets out a ground that warrants going to the best-interests phase of a termination-of-parental-rights proceeding:

> 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 not 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 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 expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.[3]

[3] The petition to terminate David W.'s parental rights to Ameen was filed on March 23, 2006. The first day of the trial as to whether there were grounds to terminate David W.'s parental rights was December 11, 2006, when the jury was selected. Prior to April 21, 2006, WIS. STAT. § 48.415(6) read:

(continued)

(Footnote added.)

¶6 The evidence, in a light most favorable to the jury's verdict, supports its finding that although David W. periodically expressed and undoubtedly felt paternal feelings toward Ameen, his actions fell below the standards that WIS. STAT. § 48.415(6)(b) recognizes as a "substantial parental relationship"; sporadic concern and care, and the occasional exchange of letters, pictures, and even gifts do not necessarily cut it. The jury heard the witnesses, assessed their demeanor, and was in a much better position to weigh the evidence as it unfolded than any appellate court can from a type-script record. *See* ***Morden v. Continental AG***,

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> (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.

(Emphasis added.) The italicized "never" in paragraph (a) was changed to "not," and the italicized words "ever" in paragraph (b) were deleted by 2005 Wis. Act 293, § 21, effective April 21, 2006, ***id.***, § 71. The parties agree that the new version applies to this appeal, a matter that we do not decide. Nevertheless, the trial court used the word "never" in instructions to the jury. As the State points out, however, the "never" standard reflects a more stringent burden of proof than does the "have not had" standard in the current version of § 48.415(6)(a). Thus, if anything, the State and not David W. was prejudiced by the instruction.

2000 WI 51, ¶¶38–39, 235 Wis. 2d 325, 351–352, 611 N.W.2d 659, 672. The trial court did not err in refusing to overturn its verdict.[4]

B. *Best Interests of Ameen.*

¶7 A decision whether to terminate a person's parental rights is in the trial court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94, 107 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). We will not reverse a trial court's discretionary decision if it applied the relevant facts to the correct legal standard in a reasonable way. ***Brandon S.S.***, 179 Wis. 2d at 150, 507 N.W.2d at 107. We review *de novo* whether the trial court has applied the correct legal standard. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823, 826 (Ct. App. 1992).

¶8 WISCONSIN STAT. § 48.426 sets the standards that, if appropriate, the trial court should consider in exercising its discretion in deciding whether termination of parental rights is in a child's best interests. It provides:

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in

[4] David W. faults the trial court for, as phrased in his appellate brief, denying his "motion for judgment notwithstanding the verdict." A judgment notwithstanding a verdict concedes the sufficiency of the evidence to support the verdict but alleges some other defect. WIS. STAT. RULE 805.14(5)(b) ("A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment."); *see also* ***Greenlee v. Rainbow Auction/Realty Co.***, 202 Wis. 2d 653, 661, 553 N.W.2d 257, 261 (Ct. App. 1996). David W. points to nothing that meets his burden under RULE 805.14(5)(b).

> determining the disposition of all proceedings under this subchapter.
>
> **(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.

In a well-reasoned analysis, the trial court touched all the appropriate bases, noting that it had to put the best interests of Ameen first. It further found from the evidence adduced at the dispositional hearing that: (1) Ameen's maternal grandmother was an appropriate adoptive resource; (2) Ameen was doing very well in her care; (3) whatever were Ameen's feeling for his father in the past, Ameen, who was eleven at the time of the hearing, no longer had a bond with his father, did not want to live with him, and was, indeed, afraid of him, and that thus it would not harm Ameen to sever his parental relationship with David W.; (4) Ameen wanted to live with his maternal grandmother and did not want to live with David W.; (5) David W. had only seen Ameen twice since the boy was seven months old; and (6) living with his maternal grandmother would permit Ameen to

be in a stable, loving, and nurturing environment.[5] David W. does not dispute any of these conclusions, other than arguing that he "has demonstrated his concern and care for his son throughout Ameen's life." That may be, and, indeed, the trial court found that David W. "clearly cares incredibly" about Ameen. The focus at the disposition phase, however, is on the child and not on the parent. *See* ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). Given Ameen's contemporary feelings toward his father, which David W. does not address on this appeal, the trial court did not erroneously exercise its discretion in determining that Ameen would be better off with the family with which he wanted to continue to live: that of the maternal grandmother.

¶9 David W. also contends that the trial court erred by considering David W.'s current incarceration. David W. claims this violated ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845.

¶10 This is what the trial court said in connection with David W.'s incarceration: "And I think that if he had not been incarcerated, he would have been available to take care of Ameen. But-- But he made some choices. And that's unfortunate." The trial court later put it in context when he noted that David W.'s choices reflected "[a] pattern of not taking responsibility." The trial court further explained:

> And while I think it's a tragedy that Mr. W[.], who clearly cares incredibly about this Child, that he didn't

[5] Ameen did not testify at the dispositional hearing. The trial court relied on things that the boy told the social workers. David W. does not assert that this was error.

> provide for this Child, he didn't develop a stable and permanent spot for this Child, he didn't develop a substantial relationship. But I have to deal with reality as it is, not as someone would like it to be.
>
> And so at the end of the day, when I look at the stability and permanence,-- which I think is an extremely important factor, --it is clear that this Child feels stable and feels and wants permanence and wants that stability, and feels that stability in the [maternal grandmother's] home. And I think-- and he does not feel that stability or permanence with either his Father or his Mother. In fact, he's afraid to going [*sic*] back to his mother or father.

¶11 ***Jodie W.*** concerned a case where the parent's incarceration made it impossible for her to avoid a ground for termination of her parental rights—compliance with conditions set for return of the child:

> [W]here a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent's incarceration, Wis. Stat. § 48.415(2) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child.

Jodie W., 2006 WI 93, ¶51, 293 Wis. 2d at 560–561, 716 N.W.2d at 860. This is not the situation here—the trial court appropriately considered the effect of David W.'s imprisonment and the decisions that led to it; under no circumstances did David W.'s imprisonment make it impossible for him to have developed and to maintain the "substantial parental relationship" envisioned by WIS. STAT. § 48.415(6).

¶12 In sum, there is sufficient evidence to support the jury's verdict, and the trial court did not erroneously exercise its discretion in terminating David W.'s parental rights to Ameen. We affirm.

By the Court.—Order affirmed.

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