COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2919

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF JEFFREY P.S., A PERSON UNDER THE AGE OF 18:

ANTHONY R.V.,

PETITIONER-RESPONDENT,

V.

GERALD P.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

ROGGENSACK, J.[1] Gerald P.C., the putative father of Jeffrey, P.S., whom he had not seen in more than nine years, appeals the termination of his

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

parental rights. Because we conclude Gerald had no constitutionally protected liberty interest in his parental rights and that the circuit court's findings in regard to the statutory grounds to terminate those rights are not clearly erroneous, we affirm the order.

BACKGROUND

Jeffrey was born to Michele A.V. and Gerald on October 1, 1987, out of wedlock. Michele and Gerald lived together for approximately two months after Jeffrey was born. Gerald left town when Jeffrey was one-and-one-half years old, and he has not seen Jeffrey or verbally communicated with him since that time. Jeffrey did receive a birthday card from Gerald when he was four years old and Gerald may have tried to send Jeffrey a Christmas present in 1997.

Michele has had the same phone number since Jeffrey was born and she has been in regular communication with Gerald's sister, who has always known her address. Michele has never prevented Gerald from talking with Jeffrey nor has she refused phone calls from him, be they collect or with the charges prepaid. Additionally, she has never returned any mail from Gerald.

Gerald did not contribute to the financial expenses of Michele's pregnancy and delivery and he has never contributed to her support or to Jeffrey's, during the more than ten years since Jeffrey was born. Gerald's paternity was never adjudicated and Gerald did not file a statement acknowledging his paternity, nor in any other manner attempt to have himself adjudicated as Jeffrey's father.

This action for the termination of Gerald's parental rights was commenced on March 16, 1998 by the filing of a petition by Anthony R.V., Michele's husband and the potential adoptive father for Jeffrey. Gerald was

personally served on May 5, 1998, while incarcerated in a Texas jail and a public defender was appointed to represent him. On June 3, 1998, an initial hearing was held in the circuit court, but because the public defender had had insufficient time to prepare for the hearing, it was adjourned. The final hearing was held on July 13th, where fact finding and disposition were completed. Gerald's attorney appeared on his behalf at that hearing.

Because Gerald was incarcerated in Texas at the time that the petition was heard, he appeals, claiming that he was not given a meaningful right of participation through his court appointed attorney. Rather, he contends that the hearing on Anthony's motion should have been delayed until he could either personally appear or appear by telephone.

DISCUSSION

Gerald bases his appeal on what he contends is a denial of due process sufficient to protect what he asserts is a constitutionally protected liberty interest in the society and companionship of his child. He claims due process was denied because he did not have a meaningful opportunity to participate in the proceedings where his parental rights to Jeffrey were terminated. Gerald's claim requires us to determine questions of constitutional fact in regard to whether he had a constitutionally protected liberty interest in his paternity, to which due process protections attached. It also requires this court to interpret the statutes which were applied to Gerald.

Standard of Review.

Whether a parent has made a showing of a constitutionally protected liberty interest in his parental connection to his child is a question of constitutional

fact which we review *de novo*. *See* ***Lehr v. Robertson***, 463 U.S. 248, 261 (1983); *see also*, ***State v. Xiong***, 178 Wis.2d 525, 531, 504 N.W.2d 428, 430 (Ct. App. 1993) (citations omitted). The construction and application of a statute also presents a question of law which we review independently, without deference to the circuit court. ***I.P. v. State***, 157 Wis.2d 106, 118-19, 458 N.W.2d 823, 829 (Ct. App. 1990). However, a circuit court's finding of historic fact will be affirmed, unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

Gerald's Rights.

In order to assess what process is necessary in a termination of parental rights proceeding, we must first assess the "precise nature of the private interest" that is the subject of the proceedings. ***Lehr***, 463 U.S. at 256. The nature of the rights of a parent to the society and companionship of his/her child are determined by the level of parental responsibility that the parent has shown for the child. Therefore, in order for Gerald to prevail in this appeal, the record must demonstrate that his parental rights rise to the level of a constitutionally protected liberty interest due to the responsibility he has assumed for Jeffrey. ***L.K. v. B.B.***, 113 Wis.2d 429, 447-48, 335 N.W.2d 846, 855 (1983).

That a constitutionally protected liberty interest may be attenuate to a putative father's paternity was developed in a line of United States Supreme Court cases analyzing parental rights in terms of the type of relationship that the putative father had with his child. *See* ***Stanley v. Illinois***, 405 U.S. 645 (1972); ***Quilloin v. Walcott***, 434 U.S. 246 (1978); ***Caban v. Mohammed***, 441 U.S. 380 (1979); ***Lehr***, 463 U.S. 248. In those cases, the United States Supreme Court determined that:

> The difference between the developed parent-child relationship that was implicated in ***Stanley*** and ***Caban***, and the potential relationship involved in ***Quilloin*** and [***Lehr***], is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood "by com[ing] forward to participate in the rearing of his child," … his interest in personal contact with his child acquires substantial protection under the Due Process Clause. … But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children … as well as from the fact of blood relationship."

Lehr, 463 U.S. at 261 (citations omitted).

The Wisconsin Supreme Court, in ***W.W.W. v. M.C.S. and R.J.S.***, 161 Wis.2d 1015, 1029-30, 468 N.W.2d 719, 724-25 (1991), adopted the reasoning of ***Lehr*** in regard to the criteria which are to be used to determine when a putative father's parental rights rise to the level that requires constitutional due process protections. It concluded that the analysis of a putative father's interest turned on the level of commitment he has shown to the responsibilities of parenthood and that "minimal contact" with a child was insufficient to establish a liberty interest in paternity. ***Id.***

In ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 500 N.W.2d 649 (1993), the supreme court reviewed the rights of a putative father who was incarcerated, but who had not established a substantial parent-like relationship with his child. Sue Ann A.M., the child of Ann and Rob, was less than one month old when Ann filed a petition to terminate her own parental rights and those of Rob so that Sue Ann could be adopted. Rob resisted the termination proceedings. Ann then put on proof that Rob had failed to assume parental responsibility for Sue Ann pursuant

to § 48.415(6)(a), STATS. In reviewing the proof that Ann provided, it found significant that Rob knew of the pregnancy; Rob did not offer to marry Ann; Rob did not offer any plan for either Ann or himself to keep the baby when it was born; Rob did not offer financial support or assistance of any kind, either before or after the child was born. The court further noted that Ann's father had attempted to contact Rob after learning of Ann's pregnancy and had left at least three messages for Rob to return his calls, but Rob had failed to do so. Based on those facts, the court concluded that Rob had no constitutionally protected liberty interest in maintaining his parental status to Sue Ann. The court, however, went on to note that even though Rob did not have a liberty interest deserving of constitutional protection under the circumstances therein presented, he still had a statutory right which required the petitioning party to prove a ground for involuntary termination. The ground the court found proved by the facts presented in ***Sue Ann***, was "failure to assume parental responsibility." ***Id.*** at 687, 500 N.W.2d at 655.

In the case at hand, Gerald's son, Jeffrey, was many years older than Sue Ann when the petition to terminate Gerald's parental rights was filed, but the lack of financial or emotional involvement are very similar to those examined in ***Sue Ann***. For example, Gerald had not contributed to Michele's support during the time that she was pregnant, nor had he contributed to the costs associated with Jeffrey's delivery and birth. He paid for none of Jeffrey's food, clothes and shelter since his birth. While a letter from Gerald to the guardian *ad litem* indicates that he once tried to send a Christmas gift to Jeffrey, and Michele testified that Gerald sent a birthday card to Jeffrey when he was four years old, such insignificant contacts are patently insufficient to show any meaningful assumption of parental responsibility. Additionally, the record reflects that Gerald never filed an acknowledgment of paternity, nor did he ever attempt to have his paternity

adjudicated during the almost eleven years since Jeffrey's birth. Therefore, based on our independent review of the record, this court concludes that Gerald's parental rights did not rise to the level of a constitutionally protected liberty interest and the process Gerald was due was purely statutory.

Process Afforded.

Anthony moved to terminate Gerald's parental rights alleging that Gerald had abandoned Jeffrey, as defined under § 48.415(1), STATS.,[2] and that he had failed to establish a substantial parental right with Jeffrey, pursuant to § 48.415(6)[3]. Michele testified about Gerald's lack of involvement with Jeffrey

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[2] Abandonment under § 48.415(1), STATS., may be proved by establishing that:

> 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 (a)2. or 3.

(Subsec. (1m) was renumbered (1) by 1997 Wis. Act 35, § 97, effective December 31, 1997.)

[3] Section 48.415(6), STATS., states in relevant part:

> (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

(continued)

over the ten and a half years of his life. Gerald's attorney's cross-examination of Michele was unrevealing of any assumption of parental responsibility by Gerald. Jeffrey was present in court at the July 13th hearing, yet Gerald's attorney did not attempt to call him to demonstrate an existing parent-type relationship. And, Gerald's incarceration in Texas was of his own doing and does not affect our analysis of his parental rights under constitutional or statutory parameters.

Based on the testimony at the July 13th hearing, the circuit court found that the grounds for abandonment had been met because Gerald has failed to visit or to communicate with Jeffrey for more than six months. The circuit court also found that grounds for termination existed because Gerald had failed to assume parental responsibility through the lack of the development of a substantial parental relationship with Jeffrey and that it was in Jeffrey's best interest to have Gerald's parental rights terminated. The findings of the circuit court are not clearly erroneous. Therefore, they must be affirmed. ***Noll***, 115 Wis.2d at 643, 340 N.W.2d at 577; § 805.17(2), STATS.

Gerald argues that notwithstanding the testimony at the July 13th hearing, the termination of his parental rights should be overturned because he was not given a meaningful opportunity to participate. He bases his argument on our decision in ***D.G. v. F.C.***, 152 Wis.2d 159, 448 N.W.2d 239 (Ct. App. 1989). Gerald's reliance on ***D.G.*** is misplaced. In ***D.G.***, we assumed that F.C., the putative father, had a fundamental right in retaining his parental status. There had been no showing or argument made to us that F.C.'s parental rights did not rise to the level of a constitutionally protected liberty interest. However, here, a full

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> ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

evidentiary showing and an argument has been made that Gerald does not have a constitutionally protected liberty interest in his parental rights and we have concluded that the respondent is correct in this regard. Therefore, ***D.G.*** has no application in this appeal. Additionally, Gerald's statutory right not to have his parental rights terminated without proof of grounds for termination was fully protected by his court appointed attorney at the evidentiary hearing before the circuit court. Therefore, we affirm the order terminating Gerald's parental rights.

CONCLUSION

Because Gerald's parental rights did not rise to the level of a constitutionally protected liberty interest, he received all the process he was due when he was represented by counsel at a hearing where statutory grounds to terminate his parental rights were established.

By the Court.—Order affirmed.

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