

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2003

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. 02-2970

Cir. Ct. No. 02-TP-2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

LANGLADE COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

v.

JEREMY M., SR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Jeremy M., Sr., appeals an order terminating his parental rights to his son Jeremy M., Jr. Jeremy, Sr., raises a number of issues.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

We conclude the order may be affirmed on the basis of the six-month abandonment grounds and therefore decline to address the other issues.²

BACKGROUND

¶2 In June 2000, Jeremy, Jr., was removed from his parents' home and placed in foster care due to allegations of abuse, neglect and unsanitary living conditions. On June 19, 2000, Jeremy, Jr., was adjudged to be in need of protection and services. The court told the parents, Niki W. and Jeremy, Sr., that their rights could be terminated if they did not meet certain conditions. The order and TPR warnings were sent to Jeremy, Sr.'s then-current address. The warning stated:

A list of potential grounds to terminate a parent's rights is given below. Those that are check-marked are most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

The CHIPS ground was the only one check-marked.

¶3 In September 2000, Jeremy, Sr., moved to Milwaukee. He had no contact with Jeremy, Jr., from November 11, 2000, through March 21, 2001. He failed to make three scheduled visits between November and January. After a visit on March 21, 2001, Jeremy, Sr., had no further contact with his son until after the TPR petition was filed.

¶4 The June 19, 2000, CHIPS order was orally extended for a year on June 18, 2001. The court signed a written order on September 10, which was

² Jeremy, Sr.'s other issues surround the charge of three-month abandonment: (1) the CHIPS order was not validly extended, and (2) he did not have notice of the abandonment charge.

served on Jeremy, Sr., by mail on November 5. The order contained the TPR warnings, with both CHIPS and three-month abandonment check-marked.

¶5 The Langlade County Department of Social services filed a petition on February 19, 2002, to terminate the parental rights of Niki and Jeremy, Sr. The petition alleged two grounds: (1) continuing need of protection and services, and (2) abandonment for three months.³ The petition was later amended to add a third ground: abandonment for six months.⁴

¶6 The case was tried before a jury, which found against the department on the grounds of continuing need of protection and services. However, the jury did find grounds for termination based on three-month and six-month abandonment. The court later terminated Jeremy, Sr.'s parental rights.

DISCUSSION

¶7 Jeremy, Sr., first argues his due process rights were violated because he never received notice that his parental rights could be terminated based on six-month abandonment. Second, he argues the department cannot allege both three-month and six-month abandonment in the same action. Finally, he argues there is not sufficient evidence to support the six-month abandonment claim.

³ Niki's parental rights were terminated on April 8, 2002.

⁴ To be charged with three-month abandonment, the child must be placed outside the parent's home by a court order and the parent has failed to have any contact with the child for three months or longer. WIS. STAT. § 48.415(1)(a)2. To be charged with six-month abandonment, the parent must leave the child with any person, knows or is able to discover the child's whereabouts, and has failed to have any contact with the child for six months or longer. WIS. STAT. § 48.415(1)(a)3.

1. Notice

¶8 Jeremy, Sr., points out that the CHIPS orders did not identify six-month abandonment as a ground for termination of his parental rights. The first order checked only continuing need of protection and services. The extended order added three-month abandonment. Jeremy, Sr., claims his due process rights were violated when the County then sought to terminate his rights based on six-month abandonment.

¶9 Jeremy, Sr., relies on *In re Jason P.S.*, 195 Wis. 2d 855, 537 N.W.2d 47 (Ct. App. 1995), for the proposition that due process requires that a parent be given notice when the state substantially changes the type of conduct that leads to loss of rights. *See id.* at 863. However, *Jason P.S.* deals with a very different issue from the one presented here. In that case, Jason's mother was given a warning based on continuing need of protection and services. *Id.* at 861. However, by the time the petition to terminate her parental rights was filed, the statute had been changed to make it easier for the State to establish grounds for termination. *Id.* at 864. We determined that it was unfair and a violation of the mother's due process rights for the State to proceed under the amended statute when the TPR warnings were given under the old statute. *Id.* at 864-65. Here, there is no statutory change. Therefore, the holding in *Jason P.S.* does not apply in Jeremy, Sr.'s situation. Because Jeremy, Sr.'s entire due process argument is based in *Jason P.S.*, his argument fails.

¶10 In addition, we note that the statute does not require notice in a CHIPS order of six-month abandonment as grounds for terminating parental rights. WISCONSIN STAT. § 48.415(1)(a)3 lists the elements of six-month abandonment:

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.

Nothing is mentioned regarding notice. This is in contrast to three-month abandonment, which expressly requires notice:

[T]he 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) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

WIS. STAT. § 48.415(1)(a)2. Thus, by the language of § 48.415(1)(a)3, Jeremy, Sr., was not entitled to notice of six-month abandonment.

¶11 Finally, even if notice was required, Jeremy, Sr., did receive it. The original CHIPS order indeed only had continuing need of protection and services check-marked. However, the notice also contained language warning that “if any of the other[] [grounds] also exist now or in the future, your parental rights can be taken from you.” The notice identified all grounds, including six-month abandonment.

2. Three-month and six-month abandonment in the same action

¶12 Jeremy, Sr., argues the three-month and six-month theories of abandonment are inconsistent. Three-month abandonment requires a finding that the child has been placed outside the parents’ home by court order; six-month abandonment requires a finding that the child has been left by the parent with any person. Jeremy, Sr., argues that a child cannot simultaneously be placed outside the home by the court and left by the parent. This is a question of statutory interpretation that we review independently. See *In re Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

¶13 We conclude the theories are not inconsistent. To be left with any person includes “any circumstance in which the child resides apart from [the parent] and with the other person, (including instances in which the child resides there pursuant to a court order).” WIS JI—CHILDREN 314. The case *In re Christopher D.*, 191 Wis. 2d 680, 530 N.W.2d 34 (Ct. App. 1995), illustrates the point. The mother had been awarded sole custody. *Id.* at 689. The issue was whether the father “left” the child with the mother. *Id.* at 703-05.

It is inconsistent with this purpose [of] § 48.415(1)(a)3, STATS., to depend only on whether the parent initially placed the child with another person rather than on the parent's conduct once the child is with that person.

....

It is more in keeping with the purpose of § 48.415(1)(a), STATS. to interpret subd. 3 to apply both to those situations where the parent actively places the child with another person and to those situations where the parent does not do so, but “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.”

Id. at 705-06 (citation omitted). Thus, a child can be left by means of a court order.

3. Evidence of six-month abandonment

¶14 Jeremy, Sr., argues there is insufficient evidence to sustain the six-month abandonment charge. We review a jury’s finding under the “any credible evidence” standard. *See Foseid v. State Bank*, 197 Wis. 2d 772, 783, 541 N.W.2d 203 (Ct. App. 1995). Under this standard, we will uphold the jury’s determination if there is any credible evidence to sustain the verdict. *Id.* at 782.

¶15 As previously mentioned, six-month abandonment requires:

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.

WIS. STAT. § 48.415(1)(a)3.

¶16 We have already determined that Jeremy, Sr., left his son with another person. The child has been with the same foster family since June 2000, and the family's address was on the dispositional order that Jeremy, Sr., received. The foster parents also provided Jeremy, Sr., with their phone number. Jeremy, Sr., therefore knew or could have discovered the child's whereabouts. Finally, Jeremy, Sr., had no contact with the child from March 2001 through February 2002. This is a period greater than six months. We therefore conclude there is credible evidence to support the jury's verdict.

By the Court.—Order affirmed.

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

