COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0676 **Cir. Ct. No. 02TP000787**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHN S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] John S. appeals from an order terminating his parental rights to Stachel S. John claims: (1) that the trial court erred in directing

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

a verdict on the first question of the special verdict for abandonment; (2) WIS. STAT. § 48.415(1)(a)2, as applied to John, is unconstitutional because there was no evidence that he actually received notice, therefore, he claims his due process rights have been violated; and (3) the trial court erred when it instructed the jury that "'a parent's lack of opportunity and/or ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.'" Because each issue is resolved in favor of upholding the order, this court affirms the order to terminate John's parental rights.

BACKGROUND

¶2 Stachel was born on August 28, 1995. When Stachel's mother was about a month and a half into her pregnancy, she told John he was the father of the child she was carrying. John was present at Stachel's birth, but about a month later was incarcerated for ninety days because he removed his electronic monitoring bracelet. After this incarceration, he lived with Stachel and Sophia E. (Stachel's mother) for a period between two and eight months. He never lived with them again. In March 1996, John again cut off his monitoring bracelet, exposing himself to another ninety days' incarceration. For the first six years of Stachel's life, John was incarcerated for a total of about fourteen months. John and Sophia have never been married.

¶3 Stachel lived with her mother for the first four years of her life. John testified that he knew Sophia was taking cocaine and had trouble taking care of Stachel, but he never urged Sophia to get help. John also testified that although he would pick Stachel up from her mother's home, he was unaware of the unacceptable condition of the home.

¶4 In August 1999, the Bureau of Milwaukee Child Welfare ("BMCW") detained Stachel from Sophia's home after she was brought back from the hospital from a cocaine overdose. In September 1999, Stachel was found to be a child in need of protection or services ("CHIPS") and was placed in foster care pursuant to a court order. This September 1999 court order was reduced to writing and annually extended, with each extension order containing warnings of grounds for termination of parental rights.

¶5 Former BMCW social worker Adrienne Fluker was responsible for Stachel's case from 1999 to June of 2001. Sophia told Fluker that John was Stachel's father, but Sophia did not know John's whereabouts. Fluker made inquires with family members and requested BMCW to search public records for contact information in an effort to locate John, but her methods were unsuccessful.

¶6 In August 2000, John's mother called Fluker asking if she could get placement of Stachel. Fluker arranged a visit with the grandmother; John arrived during the visit. Fluker explained that if John were to become the adjudicated father, the grandmother could be eligible to receive Stachel through a kinship placement. When Fluker asked John for a home address, he told her to use the grandmother's address. Fluker gave John her contact information, but he never called, and he did not become adjudicated until September 2001.

¶7 After Stachel's detainment, John testified that he knew the child was placed with Mary Terry, a relative, until November 2002. He also testified that Terry gave him the opportunity to visit with Stachel and did not interfere with his ability to see the child. John claimed he visited Stachel twelve times during these years but, apart from this, he never contacted Terry to inquire about Stachel's schoolwork, he never took Stachel to the doctor or dentist, and he was not aware

that Stachel had behavioral problems and was in therapy. From August 2002, until late December 2002, John had no contact with Stachel.

¶8 On December 30, 2002, the State filed a petition for termination of parental rights regarding Stachel. The TPR petition alleged that grounds existed to terminate the parental rights of John because he had abandoned the child pursuant to WIS. STAT. § 48.415(1)(a)(2), and because John had failed to assume parental responsibility for the child pursuant to WIS. STAT. § 48.415(6). The petition also alleged grounds to terminate Sophia's parental rights. Sophia was found to be in default.

¶9 John presented his case to a jury. The jury returned a verdict finding that grounds existed to terminate his parental rights. The trial court found that it was in Stachel's best interests to terminate John's parental rights. An order terminating the parental rights of John and Sophia was entered. Sophia does not appeal. John appeals from the order.

DISCUSSION

A. Directed Verdict—Notice.

¶10 John claims that there was no evidence showing that he received actual notice regarding the termination of his parental rights. Thus, he asserts that the trial court erred when it directed a verdict on this issue. This court rejects his argument. Sufficient notice was given in the court order removing Stachel from Sophia's care. The order specifically warned of the possible termination of parental rights as required by WIS. STAT. § 48.356(2). Therefore, there was no material issue of fact for the jury to consider, and the trial court's directed verdict on this issue was proper.

¶11 The standard of review of a trial court's grant of a directed verdict is whether the trial court was "clearly wrong" in refusing to instruct a jury on a material issue raised by the evidence. ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). "'A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.'" ***Id.*** at 465 (citation omitted).

¶12 The first question of the special verdict on abandonment grounds, WIS. STAT. § 48.415(1)(a)2, stated: "Was Stachel S[] placed, or continued in a placement, outside the parental home pursuant to a court order which contained the termination of parental rights notice required by law?" John argues that, after careful examination, there must be more notice given than just a court order with a termination of parental rights notice attached to it. John argues that ***Waukesha Co. v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607 determined the meaning of the word "notice" found in WIS. STAT. § 48.415(2). This notice "is meant to ensure that a parent has adequate notice of the conditions with which the parent must comply for a child to be returned to the home." ***Waukesha Co.***, 233 Wis. 2d 344, ¶37. John interpreted this to mean that the parent must actually receive the written notice.

¶13 However, no Wisconsin case law or statute supports the claim that WIS. STAT. § 48.415(1)(a)2 requires that a parent actually receive notice. The abandonment and notice statutes make it clear that any written order issued by the court must contain the warning of termination of parental rights, but the statutes do

not require personal service.[2] Moreover, John's reliance on ***Waukesha Co.*** is misleading, for the case did not address whether WIS. STAT. § 48.356(2) requires actual notice.

¶14 If WIS. STAT. § 48.356(2) required proof of actual notice, it would reward parents whose whereabouts are unknown and who have had minimal to no contact with the child in question. That parent would be shielded against termination of parental rights based on the three-month abandonment grounds, and would defeat the primary purpose of the Children's Code, which is to serve the "best interests" of the children. *See* WIS. STAT. § 48.01. Therefore, § 48.356(2) was fully satisfied and the directed verdict was appropriate.

B. Due Process.

¶15 John claims that his basic due process rights were violated when the court directed a verdict on the first verdict question without evidence that he actually received the TPR warnings. He is challenging the constitutionality of WIS. STAT. § 48.415(1)(a)2, and claims that the procedures applied to him were "fundamentally unfair." This court finds that this statute and its procedures were not constitutionally infirm.

¶16 Constitutional issues in TPR cases are reviewed *de novo*. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). "One

[2] WISCONSIN STAT. § 48.415(1)(a)2 provides: "That 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) or 938.356(2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer."

attacking a statute on constitutional grounds has the burden of proving that it is unconstitutional beyond a reasonable doubt." ***R.D.K. v. Sheboygan County Soc. Serv. Dep't***, 105 Wis. 2d 91, 105, 312 N.W.2d 840 (Ct. App. 1981).

¶17 Although a parent's right to his or her child is a substantial right that is subject to both substantive and procedural due process considerations, the procedure applied to John did not violate his due process rights. The BMCW attempted to locate John but could not find him. John had the contact information needed to find Stachel, he knew where she was, and he knew he was free to visit her at that home or send gifts or cards to her. However, John chose to have no more than twelve visits with Stachel in a three and one-half year period, and he also chose to have no contact with her at all between late August 2002, and late December 2002.

¶18 John essentially wants to be granted a constitutional right to abandon his child, only to be shielded against termination of parental rights due to the difficulties involved in giving him actual notice. The court finds this request fundamentally unfair. The notice procedures in the statute satisfy basic due process rights. John has not satisfied his burden of showing that the statute is unconstitutional beyond a reasonable doubt.

C. Jury Instruction.

¶19 John claims that the trial court's modified jury instruction was an incorrect statement of the law. Based in part on ***Ann M.M. v. Rob. S.***, 176 Wis. 2d 673, 684, 500 N.W.2d 649 (1993), the court added the following language to the standard jury instruction on the subject: "'A parent's lack of opportunity and/or ability to establish a substantial parental relationship is not a defense to

failure to assume parental responsibility.'" This court holds that this special instruction did not mislead the jury regarding requirements of settled law.

¶20 "The trial court has broad discretion when instructing a jury." ***Fischer v Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). A challenged jury instruction will be grounds for reversal if the reviewing court finds "the meaning communicated by the instruction as a whole was an incorrect statement of the law." ***Miller v. Kim***, 191 Wis. 2d 187, 194, 582 N.W. 2d 72 (Ct. App. 1995). "We will reverse … only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury." ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W. 2d 318 (Ct. App. 1998).

¶21 John contends that the only statement that encapsulates the holding in ***Ann M.M.*** is "a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child." ***Id.***, 176 Wis. 2d at 684. John claims that because the instruction was modified, the State's burden of proof was lessened, and John's right to present evidence was limited.

¶22 The State, however, still holds the same burden of proving failure to assume parental responsibility by clear and convincing evidence, and John was still given free rein to present evidence that he had established a parental relationship with Stachel. Trial counsel chose to focus on alleged failings by the BMCW to contact John about the CHIPS order as though these difficulties prevented John from establishing a substantial parental relationship with his child. Unlike abandonment, there are no statutory defenses to failure to assume parental responsibility.

¶23 The jury is instructed by the statute to consider a range of factors when evaluating the presence of a substantial parental relationship, such as (1) whether the parent "ever expressed concern for or interest in the support, care or well-being of the child," (2) whether the parent "neglected or refused to provide care or support for the child," and (3) the parent "expressed concern for or interest in the support, care, or well-being of the child." WIS. STAT. § 48.415(6)(b). The jury is also instructed that it is not limited to these factors and should consider all relevant evidence presented during the trial. The ***Ann M.M.*** case, along with the 1988 revision of the statutes, made it clear that the jurors were to keep in mind that a parent's lack of opportunity or ability to establish a substantial parental relationship is not a defense.

¶24 Even if this could be used as a defense, it would not work in this case, for the evidence clearly shows that John had ample opportunity and ability to establish a parental relationship; he simply chose not to do so. John admitted that he knew where the child was living, he knew whom to contact regarding the whereabouts of his daughter, and he could have contact whenever he requested it. In light of this evidence showing his lack of pursuance, the jury had no problem determining that John had unfettered access to Stachel, and concluded that grounds existed to terminate John's parental rights.

¶25 Based on the foregoing, this court affirms the order terminating John's parental rights. He has failed to present any reason for this court to reverse.

By the Court.—Order affirmed.

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