

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT X

Case No. XXXXAPXXX-NM

*In re the termination of parental rights to Jackie S.,
a person under the age of 18:*

BAY COUNTY HUMAN SERVICES,
Petitioner-Respondent,

v.

JOHN S.,
Respondent-Appellant.

On No-Merit Notice of Appeal to Review an Order
Terminating Parental Rights, Entered in the Circuit Court for
Bay County, the Honorable Grover Cleveland Presiding

NO-MERIT BRIEF OF RESPONDENT-APPELLANT
PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

ISSUES PRESENTED

1. Was this case subject to the ICWA?
2. Was the evidence sufficient to support the verdict?
3. Did the trial court properly exercise its discretion in determining termination of John's parental rights was in the best interest of the child?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On February 15, 2011, Bay County filed a petition to terminate John S.'s parental rights to two-year-old Jackie. The petition alleged the grounds of abandonment and failure to assume parental responsibility pursuant to Wis. Stat. § 48.415(1) and (6). (1).

A jury trial was held on May 26, 2011, in the circuit court for Bay County, the Honorable Grover Cleveland, presiding, and the jury found grounds to terminate John's parental rights. (98:324-325).

The facts presented at trial showed that Jackie was born on August 31, 2008. (98:67). John was out of jail for the first five months of Jackie's life but after that was in and out of jail numerous times. (98:70-89). In June 2009, while John was in jail, Jackie was removed from her mother's care and placed in foster care. (98:67-68). A CHIPS order was entered in July 2009. (98:68-69).

John was out of jail for brief periods between incarcerations, including 10 days in August 2009, 43 days ending in April 2010, and from June 2010 until

December 2010. (98:73, 76, 79, 81, 101). John's last contact with Jackie was March/April 2010, when he had three supervised visits. (98:83). These visits went well, but John did not see Jackie again. John cancelled a fourth visit due to a job interview and did not show up for a scheduled April visit because he had been arrested. (98:94). John did not contact the social worker after April 2010. (98:99). There was no contact at all with Jackie after April 2010, although John was not in jail for seven months. (98:101). John had no contact with Jackie during the June 2010 until December 2010 time period when he was not in jail. (98:83, 246). The foster parents received one letter from John. (98:83). John did not pay child support after December 2009. (98:85).

The jury found that John had failed to visit or communicate with Jackie for more than three months. The jury also found that John had good cause for failing to visit. However, the jury found that John did not have good cause for failing to communicate with Jackie and therefore the abandonment ground was met. (98:324). The failure-to-assume-parental-responsibility ground was also met. (98:325).

On June 21, 2011, the court held a dispositional hearing at which it terminated John's parental rights. (74).

John appeals from the order terminating his parental rights to Jackie.

ARGUMENT

- I. Because Neither Jackie Nor John were Members of an Indian Tribe, the ICWA Did Not Apply.

John argued that his mother was told that she was part Sioux Indian and therefore the Indian Child Welfare Act (ICWA) applied to his case. John's mother testified that she was not a member of an Indian tribe. She told the court that when she was about six years old a social worker informed her that her biological mother was Sioux. (98:313, 315).

The county social worker in John's case testified that John told her that his mother is Native American, Sioux, but was not registered nor was he registered. (96:18). John confirmed in court that he was not a member of an Indian tribe. (96:24). The social worker then sent out notice to approximately 17 different Sioux affiliated tribes and all came back indicating that no one in the family was enrolled. (96:19).

The court found that the department exercised due diligence in ascertaining whether Jackie as a child subject to the ICWA. Further, the court found that Jackie was not a member of an Indian tribe, was not a biological child of a member of an Indian tribe and therefore the ICWA did not apply. (96:24).

The court's ruling was correct. Pursuant to 25 U.S.C.S. § (4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. Jackie was not a member of an Indian tribe and Jackie is not the biological child of a member of an Indian tribe. Based

on the plain language of the statute, the court correctly found that the ICWA did not apply in this case.

II. The County Met its Burden to Prove There Was a Basis to Terminate John's Parental Rights.

At the conclusion of the grounds phase of this proceeding, the jury found the county had proven the abandonment and failure to assume parental responsibility grounds for termination. (98). John may wish to argue the evidence was inadequate to support the court's verdict.

Grounds for termination must be proven by clear and convincing evidence. *In re SueAnn A.M.* 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). On appeal, this court will affirm a verdict if there is any credible evidence to support it. *Kinship Inspection Serv., Inc. v. Newcomer*, 231 Wis. 2d 559, 570, 605 N.W.2d 579 (Ct. App. 1999).

To establish the abandonment ground, the county had the burden of proving elements represented by two questions in the special verdict. Wis. Stat. § 48.415(1); WIS JI-CHILDREN 313.

First, the county was required to prove that Jackie was placed or continued in a placement outside of John's home pursuant to a court order which contained the termination of parental rights notice. WIS JI-CHILDREN 313. The court answered this question "yes" and its determination was supported by the evidence. (98:324). The county introduced Exhibit 1, which was a copy of the July 29, 2009, CHIPS dispositional order that placed Jackie in foster care. John acknowledged that he received the order and that the order included the termination of parental rights warnings. (98:68-69).

The second question asked whether John failed to visit or communicate with Jackie for a period of three months or longer. WIS JI-CHILDREN 313. The jury answered this question “yes.” (98:324). The evidence showed that John was in and out of jail throughout Jackie’s life, beginning when she was less than five months old. (98:70-89). John was out for brief periods between incarcerations, including 10 days in August 2009, 43 days ending in April 2010, and from June 2010 until December 2010. (98:73, 76, 79, 81, 101). John’s last contact with Jackie was March/April 2010, when he had three supervised visits. (98:83). John had no contact with Jackie during the June 2010 until December 2010 time period when he was not in jail. (98:83). The foster parents received one letter from John. (98:83). John did not pay child support after December 2009. (98:85). There was sufficient evidence to support the jury’s answer to question two.

Once the county met its burden on the first two questions, the burden shifted to the parent to address four more questions. In this case, John had to show that he had good cause for failing to visit with Jackie. The jury found that John did have good cause for failing to visit with Jackie. (98:324).

Next, John had the burden of showing that he had good cause for failing to communicate with Jackie during that period. The jury, with one juror dissenting, found that John did not have good cause for failing to communicate with Jackie. (98:324). That determination is supported by the evidence that although John was not incarcerated from April 2010 through December 2010 he did not have contact with Jackie. John’s last contact with Jackie was March/April 2010, when he had three one-hour supervised visits. (98:83). John cancelled a fourth visit due to a job interview and did not show up for a scheduled April visit because he had been

arrested. (98:94). John did not contact the social worker after April 2010. (98:99). There was no contact at all with Jackie after April 2010, although John was not in jail for seven months. (98:101). In addition, throughout the time they were caring for Jackie, the foster parents received one letter from John. (98:83). This evidence supports the jury's verdict.

The county also alleged a second ground, failure to assume parental responsibility. Here, the county had the burden to prove one element: that John failed to assume parental responsibility for Jackie. The jury instruction defines substantial parental relationship as "acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." The instruction also informs the jury that incarceration of the parent alone cannot establish failure to assume. WIS JI-CHILDREN 346B.

The jury found that John had failed to assume parental responsibility. (98:325). The evidence was sufficient to support the jury's verdict.

For about the first five months of Jackie's life John was out of jail. The evidence showed that John was in and out of jail throughout Jackie's life, beginning when she was less than five months old. (98:70-89). John was out of jail for brief periods, including 10 days in August 2009, 43 days ending in April 2010, and from June 2010 until December 2010. (98:73, 76, 79, 81, 101).

Many of the same facts that applied to the abandonment ground were also relevant to the failure to assume ground, particularly the facts regarding John's lack of contact with Jackie. John's last contact with Jackie was March/April 2010, when he had three one-hour supervised visits. (98:83). John cancelled a fourth visit due to a job interview and did not show up for a scheduled April visit

because he had been arrested. (98:94). John did not contact the social worker after April 2010. (98:99). There was no contact at all with Jackie after April 2010, although John was not in jail from June 2010 until December 2010. (98:101). The foster parents received one letter from John. (98:83). Eric paid no child support after December 2009. (98:85).

Based on the record in this case, the county presented sufficient evidence which, if believed by the jury, supported the verdict. Any argument challenging the sufficiency of the evidence would be without merit.

III. The Trial Court Did not Misuse its Discretion in Determining it Was in the Best Interest of the Child to Terminate John's Parental Rights.

Once statutory grounds for termination have been found to exist, the question of whether termination should be ordered is one which lies within the trial court's discretion. *In the Interest of K.D.J.*, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). The standard is the best interest of the child and the trial court is required to consider the factors set forth in Wis. Stat. § 48.426(3), which states:

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.

Judge Cleveland specifically addressed each of these factors as he concluded it was in the best interest of Jackie to terminate John's parental rights.

First, the court noted that Jackie has resided with her foster family and they are potential adoptive parents. (99:65). The court noted that Jackie was only nine months old when she was removed from her home and at the time of disposition she was almost three years old. (99:65).

The court found that Jackie did not have a substantial relationship with John as he "has been in jail for the majority of Jackie's life" and that severing the relationship would not be harmful to Jackie. (99:65-66).

In terms of the wishes of the child, the court observed that at three years old Jackie was too young to understand the nature of the proceeding. (99:65).

By terminating John's parental rights, the court found that Jackie would have more permanence and stability. (99:65-66). After considering the mandated factors, Judge Cleveland determined it was in the best interest of Jackie to terminate John's parental rights (99:64). The record

demonstrates Judge Cleveland thoughtfully considered the statutory factors and utilized the correct best interests of the child standard in making the dispositional decision. Any challenge to that decision would be without merit.

CONCLUSION

For the reasons set forth above, counsel respectfully asks the court to relieve her of any obligation to represent John S. further in this matter.

Dated this 10th day of November, 2011.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

**CERTIFICATION IN COMPLIANCE
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 10th day of November, 2011.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant