

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-1537

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
JOSHUA G.H., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JEAN H.,

RESPONDENT-APPELLANT.

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

WEDEMEYER, P.J.¹ Jean H. appeals from an order terminating her parental rights to her son, Joshua. She claims: (1) the trial court erroneously

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

exercised its discretion in terminating her rights; (2) the trial court erred when it denied her motion to adjourn the trial; (3) the trial court erroneously exercised its discretion in admitting a former case worker's notes during the testimony of the current case worker; and (4) the trial court erred when it denied her motion for a directed verdict. Because the trial court did not erroneously exercise its discretion when it terminated Jean's parental rights; because the trial court's decision to deny the adjournment motion was reasonable; because the trial court's evidentiary ruling was proper; and because the trial court did not err in denying the motion for a directed verdict, this court affirms.

BACKGROUND

Joshua was born to Jean on January 19, 1997. Jean was in prison at the time and Joshua was immediately placed in a foster home. On June 3, 1998, the State filed a petition to terminate the parental rights of Jean and the father, Emanuel P., to Joshua.² The petition alleged that Jean had failed to assume parental responsibility for Joshua, as that term is defined in § 48.415(6), STATS.

Jean had been incarcerated for part of Joshua's life. She was released to transitional living in May 1997 and in September 1997 she moved to her own apartment. She had liberal visitation with Joshua until the end of the year. She appeared to have fulfilled all of her conditions for return. However, shortly thereafter, Jean lost her job, failed to cooperate with her parole officer and a warrant was issued for her arrest.

² Emanuel failed to appear and a motion for default was granted. His parental rights were also terminated. However, this appeal deals solely with Jean. Emanuel has also appealed the decision, but his appeal was remanded to the trial court for further proceedings relative to an ineffective assistance of counsel claim.

A jury trial was set for February 1, 1999. Jean moved to adjourn the trial date, but the trial court denied her motion. After the State presented its case, Jean moved for a directed verdict. This motion was also denied. The jury returned a verdict finding that Jean had failed to assume parental responsibility for her son. At the dispositional hearing, the trial court found that it would be in the best interests of the child to terminate Jean's parental rights. She now appeals.

DISCUSSION

A. Decision to Terminate.

Jean first argues that the trial court erroneously exercised its discretion when it terminated her parental rights based on the jury's finding that she failed to assume parental responsibility.³ The decision to terminate Jean's parental rights was a discretionary call and, therefore, this court reviews her claim under the erroneous exercise of discretion standard. The trial court's decision will be upheld if it examined the relevant facts, applied the proper law, and reached a reasonable conclusion. *See Loy v. Bunderson*, 107 Wis.2d 400, 415, 320 N.W.2d 175, 184 (1982).

A review of the transcript in this case confirms that the trial court did not erroneously exercise its discretion. The trial court considered the proper factors and reached a reasonable conclusion. It looked at the age and health of the child and found that Joshua was in need of a more stable environment. The trial court found that any relationship Joshua had with his family was not substantial

³ Jean also argues that the trial court erroneously exercised its discretion when it terminated her parental rights because she had fulfilled all of the conditions required for the return of her child. However, the trial court did not rely on this fact when it made its ruling and, therefore, we need not address this claim.

and he would not be harmed if that relationship was severed. The trial court observed that Joshua was separated from Jean for his entire life and that termination would allow a more stable and permanent family relationship. The foster family was interested in adopting Joshua.

Although this case certainly presents some tragic circumstances and this court does not dispute Jean's claim that she tried to parent Joshua the best she could, the trial court's decision does not constitute an erroneous exercise of discretion.

B. Adjournment.

Jean argues that the trial court erred when it refused to grant her request for an adjournment on the grounds that her trial counsel was not prepared to defend the case. This court rejects this claim.

A trial court's decision on a request for adjournment will not be reversed absent a clear showing that the trial court erroneously exercised its discretion. *See State v. Elliott*, 203 Wis.2d 95, 106, 551 N.W.2d 850, 854 (Ct. App. 1996). According to the record, the trial date of February 1, 1999, was selected on August 12, 1998.⁴ The petition had been pending since June 1998. When Jean raised the request for an adjournment, the State and the *guardian ad litem* opposed any further delay of the trial.

In ruling on the motion, the trial court weighed the child's interest in having the trial proceed against the argument presented relative to preparedness by

⁴ Although this date exceeded the 45 days from initial appearance time limit in § 48.422(2), STATS., all parties stipulated to waiving this time limit.

Jean's counsel. The trial court ruled that the child's interest in a resolution on the petition outweighed the reasons underlying the request to adjourn. This was not an erroneous exercise of discretion.

C. Evidentiary Challenge.

Jean also claims that the trial court erroneously exercised its discretion when it allowed into evidence, through one case worker, notes made by an unavailable case worker. This court rejects her claim.

During the State's case, it called case worker Jennifer Lent. During Lent's testimony, the State introduced notes from another case worker, Carolyn Simon. Jean objected. The trial court overruled the objection on the basis that the notes qualified as an exception to the hearsay rule as regularly kept business records, *see* § 908.03(6), STATS.

On appeal, Jean claims that this was erroneous because Lent cannot qualify as a "custodian or other qualified witness" as that term is used in § 908.03(6), STATS. Jean asserts that only Simon's supervisor could qualify as the "custodian" of these records. This court disagrees.

The hearsay exception does not define "custodian or other qualified witness" and Jean does not cite any authority indicating that a supervisor is the only witness who could fill this role. Lent testified as to how and why these records are kept, she testified that she has used these records in the past, is familiar with them and had reviewed Simon's notes. Under these circumstances, this court concludes that the trial court did not erroneously exercise its discretion when it determined that Lent was an "other qualified witness" to allow the records in through her testimony.

D. Directed Verdict.

Jean also claims that the trial court erred when it denied her motion for a directed verdict. This court does not agree.

A motion challenging the sufficiency of the evidence to support a verdict may not be granted “unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” § 805.14(1), STATS.

The record contains sufficient evidence to support the trial court’s decision to terminate Jean’s parental rights. The record also contains evidence which arguably could be used to support Jean’s attempt to demonstrate that she was assuming parental responsibility to the best of her ability. That, however, is not the standard by which these motions are governed. The motion was made at the close of the State’s case-in-chief. The evidence Jean refers to was not presented until after the directed verdict motion was made. Thus, this evidence should not even be considered.

Further, in response to the motion, the State argued that the evidence demonstrating that Joshua had never lived with Jean was alone sufficient to prove failure to assume parental responsibility. The trial court agreed and denied the motion. The trial court did not err. There was credible evidence to support the allegation that Jean failed to assume parental responsibility.

By the Court.—Order affirmed.

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

