COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2763

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

IN THE INTEREST OF ANTHONY D.B.,
A PERSON UNDER THE AGE OF 18:

WAUKESHA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TERESA L.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Teresa L.B. appeals from an order terminating her parental rights to her son, Anthony D.B. Teresa argues that there is insufficient evidence to support the jury's special verdict finding that she left her son without providing for his care and support. She also contends that the trial court erred by allowing the abandonment jury instruction to be amended. We reject these arguments and affirm.

¶2 Waukesha County Department of Health and Human Services (the County) petitioned to terminate Teresa's parental rights for child abandonment pursuant to WIS. STAT. § 48.415(1)(a)1. Section 48.415(1)(a)1 defines the grounds for the involuntary termination of parental rights because of abandonment as:

> That the child has been left without provision for the child's care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent.

Teresa concedes that the evidence sufficiently supports the jury's findings that the County investigated the circumstances and that it was unable to locate her for sixty days. The issue she raises is whether the evidence clearly and convincingly supported the finding that she left Anthony without any provision for his care and support.

¶3 Teresa requested that a jury conduct the fact finding in her case. A jury may decide whether the facts of the case constitute grounds for termination. *See* WIS. STAT. § 48.424(3). If the jury responds in the affirmative, the court will then declare the parent unfit and independently review the evidence, examining

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

whether it clearly and convincingly supports the jury's findings. *See* ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 103-05, 470 N.W.2d 914 (1991). The court may still dismiss the petition for termination of parental rights if "the evidence of unfitness is not so egregious as to warrant termination of parental rights." ***Id.*** at 103. "The court evaluates not just the fact that 'grounds' for termination have been found but the court evaluates the quantity, quality, and persuasiveness of the evidence." ***Id.*** at 104. Considering what is in the best interests of the child, the court, using its discretion, determines whether the evidence warrants the termination. *See* ***id.***

¶4 On appeal, Teresa contends that the jury's special verdict finding that she left her son without providing for his care and support is not supported by clear and convincing evidence. Appellate review of a challenged jury verdict is quite properly limited to a search for credible evidence, *see* WIS. STAT. § 805.14(1); we do not search for evidence that might sustain a verdict the jury could have reached but did not. Rather, we look only for evidence supporting the verdict returned by the jury. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). Thus, if the record contains any credible evidence that, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding will stand. *See* ***Ferraro v. Koelsch***, 119 Wis. 2d 407, 410-11, 350 N.W.2d 735 (Ct. App. 1984); § 805.14(1).

¶5 To overturn a verdict, we must be satisfied that, considering all the credible evidence—and all reasonable inferences that can be drawn from that evidence—in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). And if more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be

followed "unless the evidence on which that inference is based is incredible as a matter of law." ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). Finally, we give special weight to the jury's finding where, as here, it has the specific approval of the trial court. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995).

¶6 The evidence submitted to the jury is summarized as follows. On August 12, 1998, Teresa paged her stepmother, Diane, to come and pick up Anthony because she was unemployed, homeless and unable to care for him. Before Teresa handed over her son, she drafted this letter:

> I Terri B. give Diane B. and Maria L. permission to take care of my son Anthony D.B. until I am capable of taking care of him myself.
>
> As of 8-12-98 I am releasing Anthony to Diane B. and Maria L. [Signed by Teresa, Diane and a witness.]

Maria L. is a friend of Diane. Diane told Teresa that she would not be able to care for Anthony because she had to work during the day. Teresa testified that as she understood the situation, Anthony would stay with Maria during the day and with Diane at night. Diane took Anthony to Maria's that evening. Anthony primarily stayed with Maria. Teresa had met Maria approximately five times at barbecues and parties at Maria's home. Teresa admitted that she was not aware of Maria's religious preferences or child discipline practices.

¶7 During the months that followed, Teresa bounced around and stayed at different friends' or acquaintances' homes. Teresa testified that she attempted to contact Diane approximately five times during August and September. She claimed she spoke briefly with Diane but never left an address or a phone number where she could be contacted. Diane confirmed speaking with her three times but disputed the content and timing of the phone calls. Diane also stated that Teresa

never paged her or left a message on the answering machine. Teresa made no effort to contact Maria. She did not give Diane or Maria any money, food or clothes for Anthony.

¶8 The County became aware of Anthony's case after he received emergency treatment at a hospital. The County began to investigate the case and tried to locate Teresa. Eventually, Teresa surfaced at a homeless shelter in November. The County petitioned to terminate Teresa's parental rights. The jury returned a special verdict finding that the statutory grounds for termination had been proven. The court issued an order terminating Teresa's parental rights from which she now appeals.

¶9 The issue in this case is whether the evidence supports the jury's finding that Teresa left her son without provision for his care and support. To terminate parental rights, the element of "without provision for the child's care or support" is explained in WIS JI—CHILDREN 307.[2] The court incorporated some of this language into the instruction given to the jury. It stated:

> The phrase … means that the child has been left by the parent and the parent has relinquished parental responsibility for the child. The term also requires that the parent did not provide sufficient and adequate care for the child.

[2] Teresa objects to the court amplifying the abandonment jury instruction, WIS JI—CHILDREN 305, with language from WIS JI—CHILDREN 307. WISCONSIN JI—CHILDREN 307 covers abandonment situations where the child is left without provision for care per WIS. STAT. § 48.415(1)(a)1m (child left without provisions for care and support "in a place or manner that exposes the child to substantial risk of great bodily harm … or death"). Teresa claims that the definition for the elements of "without provision for [the child's] care or support" found in § 48.415(1)(a)1 and 1m are not the same. Because the court used subd. 1m's definition to explain subd. 1, she argues, the court misstated the law. To the contrary, WIS JI—CHILDREN 305 directs the court to do exactly that. *See* ***id.*** cmt. ("For a discussion of 'without provision for care,' see Comment to WIS JI—CHILDREN 307."). As a result, we reject her argument.

¶10 Supporting her argument that the evidence is insufficient to meet this definition, Teresa contends that she "took the kind of action that this society should encourage when a single parent finds himself or herself homeless and in a position that he or she is temporarily unable to care for a child. [She] contacted her stepmother and arranged for her stepmother to take care of Anthony until she could get back on her feet and resume an active parenting role." She notes that she did leave written authorization for Anthony's temporary care. Also, she argues that it is irrelevant that she could have contacted or visited her son but did not.

¶11 It is a rare case where the evidence can support only one inference, and, as we have noted above, our task is to search the record for evidence to support the jury's verdict, not for evidence that might support a verdict the jury did not reach. *See* ***Richards***, 200 Wis. 2d at 671. Much of Teresa's testimony was contradicted by other witnesses. For example, Teresa asserted that it was her friend's suggestion that she write the letter giving temporary custody of Anthony to Diane and Maria; however, Diane testified that she insisted that Teresa do it. It is for the jury, not the appellate court, to determine the credibility of witnesses and to weigh the evidence. "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

¶12 The letter was, indeed, the most crucial piece of evidence presented regarding this element. The jury unanimously concluded that it was not sufficient to provide for Anthony's care and support. Other evidence in the record supports this conclusion. Teresa was forced to write the custody letter. The letter does not express Teresa's wishes for Anthony's education, medical care or religious

upbringing. She relinquished custody to a family friend financially capable of providing for Anthony but whom she had met only five times and had no idea about how the friend would raise her son. She never gave Diane or Maria information on how to reach her in the event of an emergency. She failed to phone, write letters, visit or communicate in any manner with her son after relinquishing custody.

¶13 Given all these circumstances, we are satisfied that there was sufficient evidence in the record supporting the jury's finding that Teresa did not provide for her son's care and support.

By the Court.—Order affirmed.

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