

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 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. 98-3226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
YVONNE, A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER,

YVONNE S.,

APPELLANT,

V.

RODERICK M.,

RESPONDENT.

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

WEDEMEYER, P.J.¹ The guardian ad litem for Yvonne S. appeals from a non-final order denying the guardian's request to set aside the jury verdict finding that the parental rights of Roderick M., Yvonne's father, should not be terminated on the grounds that he failed to assume parental responsibility. The guardian claims: (1) the trial court erroneously exercised its discretion when it admitted irrelevant evidence and evidence about the caseworker's job performance; and (2) the trial court erroneously exercised its discretion when it excluded evidence of physical neglect of Yvonne. Because the trial court did not erroneously exercise its discretion in ruling on the first claim, and because the second claim was not raised in the petition for review, this court affirms.

I. BACKGROUND

Yvonne was born to Teresa S. ("mother") in 1988. Roderick was in California at the time. In 1991, he returned to Milwaukee and subsequently moved in with Yvonne and her mother. During the time Roderick resided there, he contributed to all the household expenses and bills. Roderick moved out in December 1993. The following month, Yvonne was placed in foster care as a child in need of protection. Roderick alleged that he did not know of the CHIPS proceedings. Roderick admitted that he was Yvonne's father during paternity proceedings in 1994.

In March 1998, the State filed a petition to terminate the parental rights of both Roderick and Yvonne's mother. The petition alleged that the mother abandoned Yvonne and that Roderick failed to assume parental responsibility. The case was presented to a jury in July 1998. The jury returned a

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

verdict in favor of the State as to the abandonment grounds against the mother, but against the State as to the failure to assume grounds against Roderick. The guardian filed a motion to set aside the jury verdict and for a new trial. The trial court denied the motion. The guardian filed a petition with this court for leave to appeal from the non-final order denying the guardian's motion. This court granted the petition. The dispositional hearing has been continued pending resolution of this appeal.

II. DISCUSSION

The guardian raises two evidentiary issues. First, he claims the trial court allowed the admission of irrelevant evidence. Second, he claims the trial court excluded evidence which should have been admitted. In reviewing evidentiary issues, this court is limited to determining whether the trial court erroneously exercised its discretion. *See In re Michael R.B.*, 175 Wis.2d 713, 723-24, 499 N.W.2d 641, 646 (1993).

A. Admission of Evidence of Caseworker's Attempts to Locate Roderick.

The guardian claims that the trial court should not have admitted evidence from a Department of Human Services caseworker regarding her efforts to locate Roderick and notify him of court proceedings. The guardian's objection to this evidence came during Roderick's cross-examination of the caseworker. This court concludes that the trial court did not erroneously exercise its discretion in admitting this evidence.

The State and the guardian presented the "notification" evidence to the jury during direct examination of the caseworker and additional State witnesses, and argued the issue during opening statements and closing arguments.

A review of the transcripts clearly demonstrates that the State made this an issue. There was testimony that Roderick was mailed notification of the proceedings, which included a number to contact, and that Roderick never called. The guardian told the jury that Roderick knew Yvonne was in foster care and never contacted the Department of Human Services. One caseworker testified that neither Roderick, nor anyone acting on Roderick's behalf, ever contacted her during the time she was on the case. The district attorney specifically asked this caseworker: "And did you try to make attempts to locate Roderick?" The caseworker responded "Yes, I did." Finally, in closing arguments, the State and the guardian argued the issue. The State told the jury that the evidence showed numerous letters being sent to Roderick, with a number to call, but Roderick never called. The guardian argued that Roderick was denying receiving notice of the CHIPS proceedings because, if he admitted receiving the notices, the jury would wonder why he did not do anything.

Roderick claimed that he never received notice of the CHIPS proceedings. In response to the State's and the guardian's positions, he argued that he was not contacted by the Department of Human Services. In response to the State's presentation that a caseworker attempted to locate Roderick, Roderick questioned a caseworker about what efforts were utilized to track him down. In response to the State's and the guardian's positions that Roderick ignored the CHIPS proceedings, Roderick argued that he never received the notification.

The trial court ruled that the challenged evidence was "within the context of all the questioning, all the testimony, and all the evidence that came in." This was not an erroneous exercise of discretion. The State opened the door to the objectionable evidence. Thus, the trial court did not err in allowing Roderick to introduce controverting evidence on the same issue. *See State v. Hardwick*, 144

Wis.2d 54, 61, 422 N.W.2d 922, 925 (Ct. App. 1988). Further, the guardian's position on appeal is contrary to the position asserted during the trial. Although the guardian did object to the cross-examination of the caseworker regarding efforts to track down Roderick, the guardian did not object to similar evidence introduced in the State's case-in-chief. Thus, this court agrees that the doctrine of judicial estoppel operates to preclude the guardian's challenge here. *See State v. Magnuson*, 220 Wis.2d 468, 471, 583 N.W.2d 843, 844 (Ct. App. 1998).

B. Exclusion of Evidence of Physical Neglect of Yvonne.

The guardian also claims that the trial court erroneously exercised its discretion when it excluded evidence of the deplorable conditions present in the mother's home when Yvonne was removed. The trial court excluded this evidence because the father was not present in the home at the time and because of the potential prejudice to the mother. The guardian acknowledges that this issue was not raised in his motion to set aside the verdict, but requests that this court visit the issue pursuant to our discretionary authority set forth in § 752.35, STATS. The guardian argues that exclusion of this evidence resulted in an inability to "fully try" the "failure to assume responsibility" allegations in the termination petition.

This court declines the invitation as it is without jurisdiction to do so. This court granted the guardian's petition for leave to appeal from a non-final order. The subject of that order was limited to the admission of the caseworker evidence. Therefore, this court's review must be limited to that order. *See* § 808.03(2), STATS. By implication, this statute does not allow review of matters beyond the scope of the interlocutory appeal.

By the Court.—Order affirmed.

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

