

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
MICHEL'LE H., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS P. DOHERTY, Judge.¹ *Affirmed.*

¹ The order terminating parental rights was entered by Judge Thomas P. Doherty. The fact-finding hearing generating the issue on appeal, however, was before Reserve Judge Russell W. Stamper.

¶1 SCHUDSON, J.² Michael H. appeals from the trial court order terminating his parental rights to Michel'le H. He argues that "[t]he trial court erred as a matter of law when it found that grounds existed for ... termination of [his] parental rights" under WIS. STAT. § 48.415(6). This court affirms.

¶2 The facts relevant to resolution of this appeal are undisputed. Michel'le, a non-marital child, was born on February 10, 1997. One month later, Michel'le was found to be a child in need of protection or services. Her legal custody was transferred to the Milwaukee County Department of Human Services for placement outside any parental home, and her county custody and out-of-home placement continued to, and included, the time of the termination proceedings.

¶3 On June 3, 1998, the State petitioned for termination of Michel'le's parents' parental rights. Michel'le's mother was found in default; her parental rights were terminated and she does not appeal the termination. Michel'le's father, Michael H., contested termination and, after waiving his right to a jury trial, proceeded with a fact-finding hearing to the court on April 6, 1999, to determine whether grounds existed for termination of his parental rights under WIS. STAT. § 48.415(6).

¶4 One of the "[g]rounds for termination of parental rights," *see* WIS. STAT. § 48.415, shall be:

FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Section 48.415(6).

¶5 Michael argues that the trial court “misinterpreted” WIS. STAT. § 48.415(6) and that its “misinterpretation constituted an error of law invalidating the court’s finding that [he] had failed to assume parental responsibility for Michel’le.” He contends that the court “did not evaluate the factors listed in the statute.” Additionally, he maintains:

The [S]tate failed to establish by clear and convincing evidence that Michael H. failed to assume parental responsibility for Michel'le. The evidence in this case, on the contrary, was clear and convincing that appellant accepted responsibility as a parent for his child. He consistently showed his concern for the support, care and well[-]being of his child.

¶6 In support of his argument, Michael points to facts established by his undisputed trial testimony. He explains that although he was incarcerated shortly after Michel’le’s conception, he “maintained telephone contact with the mother for the purpose of determining the progress of her pregnancy and how ‘the baby was coming along.’” He points out that when discharged from the hospital following her birth, Michel’le was placed with his mother where she lived for approximately six months.

¶7 Michael emphasizes that, despite the continuation of his incarceration through the time of Michel'le's birth and first years of life, he took several steps to maintain contact with her, including: placing Michel'le on his prison visiting list; arranging for two prison visits with Michel'le, during which he had the opportunity to hold and feed her, "make little baby noises and stuff like that," and change her diaper; writing to Michel'le's foster parents requesting photographs and information about Michel'le; and maintaining contact with a social worker.³

¶8 Michael concedes that he was unable to financially support Michel'le, but attributes that to his limited prison income. He also notes that his inability to send gifts or cards to Michel'le was first due to the fact that he had not yet been adjudicated the father, and later due to the fact that an injunction prohibited his contact with Michel'le. In summary, Michael maintains that he failed to provide for Michel'le's daily needs simply because he "has been incarcerated and unavailable to provide hands-on care."

¶9 Michael argues that the trial court improperly ignored important factors that should have been considered: whether he "has ever expressed concern for or interest in the support, care or well-being of the child," whether he "has neglected or refused to provide care or support for the child," and whether he "has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy." *See* WIS. STAT. § 48.415(6)(b). He notes the comments of both the prosecutor and the trial court indicating that, under

³ Michael also claims that he initiated the court process to be adjudicated Michel'le's father, thus allowing him to participate in her CHIPS proceedings. The record, however, reveals that the State and Michel'le's mother were the petitioners and Michael was the respondent.

circumstances such as his, no incarcerated parent could ever assume parental responsibility.

¶10 This court will not overturn a trial court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether a trial court has utilized the proper legal standard governing termination of parental rights presents a question of law subject to *de novo* review. *See State v. Patricia A.P.*, 195 Wis. 2d 855, 862-63, 537 N.W.2d 47 (Ct. App. 1995).

¶11 Here, Michael does not dispute any of the trial court's factual findings. Instead he argues, in effect, that if the trial court had considered and given weight to the statutory criteria he says the trial court ignored, his efforts to demonstrate responsibility for, and maintain contact with, Michel'le surely would have precluded the trial court's conclusion that he had failed to assume parental responsibility. Although many of Michael's efforts may have been commendable, and although his incarceration limited his ability to have done many things to assume parental responsibility, his fundamental argument is defeated by the supreme court's decision in *Ann M.M. v. Rob S.*, 176 Wis. 2d 673, 500 N.W. 2d 649 (1993).

¶12 In *Rob S.*, a termination of parental rights case, the supreme court considered, among other things, whether, under WIS. STAT. § 48.415(6) (1989-90), the evidence was sufficient to establish that Rob had failed to assume parental responsibility. *See id.* at 675. Rob had argued that "the record does not support by clear and convincing evidence that he failed to assume parental responsibility

because the circumstances surrounding his arrest and conviction for sexual assault eliminated his opportunity and ability to do so.”⁴ *See id.* at 683.

¶13 Rejecting Rob’s argument, the supreme court explained that WIS. STAT. § 48.415(6), by virtue of revisions effective in 1988, “no longer require[s] a showing that the father had the opportunity and the ability to assume parental responsibility for the child.” *See id.* at 683-84. “Thus,” the supreme court declared, “the Wisconsin legislature has concluded that 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.* at 684. Additionally, in words that are as applicable to Michael, incarcerated for armed robbery and possession of cocaine with intent to deliver, as they were to Rob, the supreme court emphasized that it could not “ignore the fact that any roadblock to establishing a relationship with [the child] caused by [the father’s] arrest, bond, and conviction was produced by [the father’s] own conduct.” *See id.* at 685.

¶14 Notwithstanding Michael’s commendable efforts to demonstrate responsibility for Michel’le, the undisputed evidence overwhelmingly establishes that by “never ha[ving] a substantial parental relationship” with Michel’le, he failed to “assume parental responsibility.” *See* WIS. STAT. § 48.415(6). Even if one were to conclude, based on his efforts and apparent interest, that Michael desired to “accept[] ... significant responsibility,” he never “exercise[d] ...

⁴ Rob was twenty-one years old when he impregnated Ann M.M., then fourteen years old. *See Ann M.M. v. Rob S.*, 176 Wis. 2d 673, 676, 500 N.W.2d 649 (1993). Rob was arrested on May 17, 1991, and charged with second-degree sexual assault. *See id.* at 683. He was released on a bond prohibiting contact with Ann. *See id.* After pleading no contest, Rob was convicted on August 6, 1991. *See id.* Ann gave birth to Rob’s child the following day. *See id.* at 676. On August 27, 1991, Ann petitioned to terminate parental rights of both herself and Rob. *See id.* On September 16, 1991, Rob was sentenced to jail for one year, plus probation. *See id.* at 683.

significant responsibility for the daily supervision, education, protection and care of the child.” *See* § 48.415(6)(b) (emphases added).

¶15 WISCONSIN STAT. § 48.415(6)(b) identifies factors a trial court “may consider” in determining whether a parent has had a “substantial parental relationship” with a child. It does not, however, require a court to do so with any special consideration of a parent’s limited opportunity resulting from incarceration. Accordingly, this court concludes that the trial court’s determination that Michael had failed to assume parental responsibility for Michel’le was consistent with the statute and was supported by clear and convincing evidence.

By the Court.—Order affirmed.

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

