

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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. 01-1593

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
BRENDA F.W., A PERSON UNDER THE AGE OF 18:**

DEREK W.,

PETITIONER-RESPONDENT,

V.

SUSAN K.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County:
THOMAS H. BARLAND, Reserve Judge. *Affirmed.*

¶1 PETERSON, J.¹ Susan K. B. appeals an order terminating her parental rights to her daughter, Brenda F.W., after a jury found grounds for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

termination under WIS. STAT. § 48.415(1)(a)3, abandonment. Susan argues that the answers on the special verdict form are inconsistent, thus entitling her to a new trial. We disagree and affirm the order.

BACKGROUND

¶2 Derek W. and Susan were living together when their child, Brenda, was born on October 21, 1994. A short time later, the couple separated and Derek took Brenda to live with him.

¶3 On June 22, 2000, Derek filed a petition requesting termination of Susan's parental rights. The petition alleged that Susan had not had contact with Brenda since October 1995. It also alleged that Brenda's whereabouts had been known or could have been discovered by Susan, and that Susan had not visited or communicated with Brenda.

¶4 The case proceeded to a fact-finding hearing before a jury. The jury found that grounds existed to terminate Susan's parental rights. In answer to question 2 of the special verdict, the jury specifically found that Susan knew or could have discovered Brenda's whereabouts. In answer to question 4, the jury found that Susan had good cause for having failed to visit Brenda.

¶5 Susan filed a motion for a new trial on the ground that the jury's verdict was inconsistent. The trial court denied the motion. At the dispositional hearing the court found it was in Brenda's best interests to terminate Susan's parental rights. This appeal followed.

STANDARD OF REVIEW

¶6 A jury finding will not be overturned if there is any credible evidence to support the verdict. *Coryell v. Conn*, 88 Wis.2d 310, 315, 276 N.W.2d 723 (1979). An inconsistent verdict is one in which the jury answers are logically repugnant to one another. *Fondell v. Lucky Stores, Inc.*, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978). An inconsistent verdict, if properly objected to, requires a new trial. *Westfall v. Kottke*, 110 Wis. 2d 86, 100, 328 N.W.2d 481 (1983).

DISCUSSION

¶7 To establish abandonment under WIS. STAT. § 48.415(1)(a)3,² three elements must be proved: (1) the parent must have left the child with another person; (2) the parent knows or could discover the whereabouts of the child; and (3) the parent has failed to visit or communicate with the child for six months or longer.

² WISCONSIN STAT. § 48.415(1)(a)3 reads as follows:

Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

....

3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

¶8 Under WIS. STAT. § 48.415(1)(c),³ abandonment is not established if a parent resisting the termination of parental rights proceeding proves that: (1) the parent had good cause for failing to visit the child; and (2) the parent had good cause for failing to communicate with the child.

¶9 In this case, the special verdict was modeled after WIS JI—CHILDRENS 314 and reads as follows:

1. Was [Brenda F. W.] left by [Susan B.] with a relative or other person?

³ WISCONSIN STAT. § 48.415(1)(c) reads as follows:

(c) Abandonment is not established under par. (a) 2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a) 2. or 3., whichever is applicable, or, if par. (a) 2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a) 2.

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a) 2. or 3., whichever is applicable.

Answer: Yes

....

2. Did [Susan B.] know, or could she have discovered, [Brenda F. W.'s] whereabouts?

Answer: Yes

....

3. Did [Susan B.] fail to visit or communicate with [Brenda F. W.] for a period of 6 months or longer?

Answer: Yes

....

4. Did [Susan B.] have good cause for having failed to visit with [Brenda F. W.] during that period?

Answer: Yes

....

5. Did [Susan B.] have good cause for having failed to communicate with [Brenda F. W.] during that period?

Answer: No

....

¶10 Susan argues that the answers to questions 2 and 4 are inconsistent. According to Susan, the answer to question 4 implies that she made reasonable efforts to find Brenda while the answer to question 2, that Derek and Brenda could have been found, implies the opposite.⁴

¶11 We conclude that both questions 2 and 4 could be answered affirmatively based upon the evidence presented in this case. For question 2, the

⁴ At her postverdict motion hearing, Susan argued that the answers to questions 4 and 5 were inconsistent. However, on appeal, Susan only argues that questions 2 and 4 are inconsistent.

jury was convinced that Susan either knew Brenda's whereabouts or that she could have discovered Brenda's whereabouts. Michael Mason, an investigator and youth services officer with the Menominee Police Department, testified that Susan had approached him months before the petition was filed and mentioned "something about [Derek] living in Chippewa Falls." He also testified that Susan gave him a telephone number for one of Derek's relatives. Susan wanted Mason to call the relative and ask whether Derek had moved back to Menominee.

¶12 The fact that the jury also found that good cause existed for Susan's failure to visit Brenda does not render the verdict inconsistent. At trial, Susan claimed that Derek had beat her. She further testified that she had been suffering from mental and drinking problems and that she had attempted suicide. This testimony gave the jury a basis for finding that she had good cause for not visiting Brenda because of her personal problems. However, the jury also found that these problems were not sufficient to establish good cause for Susan's failure to communicate with Brenda and answered "no" on question 5.⁵

¶13 The jury was satisfied that Derek proved all the elements of abandonment. However, it was not convinced that Susan had good cause for failing to communicate with Brenda. We conclude, based upon the evidence presented, that the jury verdict was not inconsistent.

⁵ It is undisputed that Susan did not send any letters or cards or make any phone calls to Brenda.

By the Court.—Order affirmed.

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

