

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2002

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.

Appeal No. 02-0264

Cir. Ct. No. 01TP104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

RANDY C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Randy C. appeals an order terminating his parental rights to his son, Cherokee W.D. Randy argues that the County did not present

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

sufficient evidence because: (1) he could not assume parental responsibilities when he had no knowledge of Cherokee's existence; and (2) it was unfair to require him to comply with the CHIPS orders because he was incarcerated. We disagree and affirm the order.

BACKGROUND

¶2 Cherokee was born out of wedlock in December 1993 to Randy and Kimberlee D.D. Randy and Kimberlee ended their relationship before Kimberlee knew she was pregnant. Randy did not learn of Cherokee's birth until March 2000.

¶3 In 1996, Kimberlee voluntarily placed Cherokee with relatives. On March 21, 2000, the County filed a petition alleging that Cherokee was a child in need of protection and services, pursuant to WIS. STAT. § 48.13(10m). The petition named both Kimberlee and Randy as Cherokee's parents. Kimberlee pled no contest to the petition. Randy appeared by phone from prison, but since he had not been adjudicated the father, he did not enter a plea.² On May 8, 2000, CHIPS dispositional orders were entered against Kimberlee imposing conditions for Cherokee's return.

¶4 Randy's paternity was established on January 31, 2001. The County then requested a revision of the CHIPS dispositional order to impose conditions on Randy. On February 13, 2001, the circuit court imposed conditions. Among other things, Randy was required to complete a parenting program and a sex-offender

² Randy is serving a thirteen-year prison sentence for forgery and battery of a prisoner. His mandatory release date is 2005.

treatment program. Randy was also required to "obtain and maintain stable housing and employment for a minimum of four months prior to Cherokee's return"

¶5 On August 28, 2001, the County filed a petition for termination of Kimberlee's and Randy's parental rights. A jury found that grounds for termination of parental rights existed: failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6); and continuing need of protection and services, pursuant to § 48.415(2). At the dispositional hearing, the circuit court found that it was in Cherokee's best interests to terminate the parents' rights.

STANDARD OF REVIEW

¶6 "Grounds for termination of parental rights must be proven by clear and convincing evidence." *In re SueAnn A.M.*, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). The burden is on the County to establish by clear and convincing evidence that the parent has not met the conditions to establish the return of the child. *In re T.M.S.*, 152 Wis. 2d 345, 358 n.11, 448 N.W.2d 282 (Ct. App. 1989).

¶7 We examine the evidence and reasonable inferences drawn from the evidence in a light most favorable to the verdict. *State v. Pankow*, 144 Wis. 2d 23, 30, 422 N.W.2d 913 (Ct. App. 1988). We will only substitute our judgment for the trier of facts when the fact finder relied upon evidence that was inherently or patently incredible. *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

DISCUSSION

I. FAILURE TO ASSUME PARENTAL RESPONSIBILITY

¶8 Randy argues that the County failed to prove his failure to assume parental responsibility because he had no knowledge of Cherokee's existence until March 1, 2000, when Cherokee was already more than six years old. Randy contends that it was impossible to establish a parental relationship with a child he did not know existed and that it is fundamentally unfair not to require the County to show that he had knowledge of Cherokee's existence. We disagree.

¶9 WISCONSIN STAT. § 48.415(6) does not require that the father had the opportunity and the ability to assume parental responsibility of the child.³ *SueAnn A.M.*, 176 Wis. 2d at 682. The legislature has concluded that a person's parental rights may be terminated without proof that the person had the

³ WISCONSIN STAT. § 48.415(6)(a) and (b) read as follows:

(6) 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 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.

opportunity and ability to establish a substantial parental relationship with the child. *Id.*

¶10 In addition, Randy undercuts his own argument because he did have knowledge of Cherokee's existence on March 1, 2000. The termination petition was not filed until August 21, 2001, approximately one year and six months after he learned about Cherokee. Randy did not assume parental responsibility during this time. Granted, Randy was in prison, but as stated above, having the opportunity to exercise parental rights is not a precondition for termination based on failure to assume parental control. *Id.* Therefore, we conclude that the County established by clear and convincing evidence that Randy failed to assume his parental responsibilities.

II. CONTINUING NEED FOR PROTECTION AND SERVICES

¶11 Randy claims that the CHIPS orders were fundamentally unfair in that he could not comply with the conditions because of his incarceration. To begin with, this assertion should have been raised in the CHIPS case rather than in the termination of parental rights case. However, Randy did not appeal the CHIPS dispositional orders.

¶12 Further, Randy's claim is not developed. He cites no real authority. He develops no argument. Rather, he simply asserts unfairness. Therefore, we need not address the argument. See *Barakat v. Dept. of Health & Soc. Servs.*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

¶13 Even if Randy's claim was properly before us, we disagree that there was any fundamental unfairness. The CHIPS orders required Randy to complete a parenting program and a sex offender program.⁴ He was also required to maintain stable housing and employment. Randy could not fulfill these conditions because he is incarcerated.⁵ Yet Randy's incarceration was the result of his own actions. Randy cannot blame the County and claim fundamental unfairness for circumstances that are the result of his own doing.

¶14 Logically, Randy's claim would mean he is immune from a petition for termination of parental rights until 2005, his expected release date. That is not the law. Prohibiting termination of parental rights while a parent is in prison would, in effect, force the child to suffer the consequences of the parent's conduct.

By the Court.—Order affirmed.

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

⁴ Randy contends that the prison's parenting program did not allow contact with the child and that the County refused to allow Cherokee to visit Randy. However, the CHIPS orders did not require visitation with Cherokee. Randy was only required to complete a parenting class.

⁵ Randy was unable to complete any of the programs offered by the prison because he was in the segregation unit. In addition, he asserts he could not complete the sex offender program because he had to wait until the prison could place him in the program.

