

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2000

Cornelia G. Clark
Acting 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.

**Nos. 99-2758
99-2759**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 99-2758

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

**WAUKESHA COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,**

PETITIONER-RESPONDENT,

V.

CRYSTAL P.,

RESPONDENT-APPELLANT.

NO. 99-2759

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

**WAUKESHA COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,**

PETITIONER-RESPONDENT,

V.

CRYSTAL P.,

RESPONDENT-APPELLANT.

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

¶1 SNYDER, J.¹ Crystal P. appeals from orders terminating her parental rights to her children, Rachel P. and Jonathan P. She contends that certain court orders placing the children outside of the home lacked the required parental rights notice setting forth the conditions for return of the children to the home. She also argues that the juvenile court wrongly admitted photograph evidence at the fact-finding hearing. We affirm the court's evidentiary ruling and the termination of parental rights (TPR) orders.

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

BACKGROUND

¶2 The historical facts are undisputed. Crystal first became involved with the Waukesha County Children's Court in 1995 as a result of the exposure of her children to her unkempt household. On October 9, 1995, she entered into a consent decree which placed certain conditions on her, including participation in an alcohol and drug program, attending weekly counseling and following a household maintenance schedule. On February 27, 1996, the court vacated the consent decree because Crystal had failed to abide by its terms.

¶3 On September 16, 1996, Rachel and Jonathan were found to be children in need of protection or services (CHIPS) pursuant to WIS. STAT. § 48.13(10) (1995-96). Dispositional orders were filed on September 25, 1996, requiring that the children be supervised in Crystal's home by the Waukesha County Community Human Services Department. On December 22, 1996, the children were placed outside of the home by the Waukesha County Department of Health and Human Services (DHHS) based upon "emergency conditions" described as follows:

Crystal P[.] (mother) [was] picked up by the police on Sunday 12/22/96. It is not clear how long Crystal will be in jail. The children were placed in the [] home (friend of the family) on a Detention Order.

Change of placement notices were filed on December 26, 1996, and the court authorized the emergency out-of-home placements on January 14, 1997. Crystal was served with copies of the notices that included the termination of parental rights warnings. On January 24, 1997, Crystal objected to the out-of-home placement of her children and requested a hearing pursuant to WIS. STAT. § 48.357(1). The court denied Crystal's hearing request on February 6, 1997, because it was not timely. Crystal did not contest or appeal from that denial.

¶4 On February 26, 1997, DHHS filed a petition to revise the prior CHIPS orders from that of in-home supervision stating that:

Petitioner states that the herein recommended revision of the original dispositional order entered by the Court in this matter on the above specified date, is now preferable in light of current information and alternatives.

Petitioner respectfully states that the proposed revision of the Disposition Order is needed to reflect that Crystal P[...] ... was returned into Huber for child neglect. Minor [child] was placed in foster placement and Crystal P[...] is to follow through with the Conditions of Return recommended by the Department.

....

Petitioner asks that the Court hold a hearing prior to any revision of the dispositional order, if the request indicates that new information is available which affects the advisability of the court's dispositional order and unless written waivers of objections to the revision are signed by all parties entitled to receive notice and the court approves of the revision.

¶5 The procedural record following DHHS's revision petition includes only scheduling orders and hearing minutes but is nonetheless remarkable. On March 25, 1997, at the initial hearing on the revision petition, Crystal contested the requested revisions. A pretrial hearing was then scheduled for April 18, 1997. Crystal failed to appear, so the pretrial hearing was rescheduled for May. On May 21, 1997, Crystal did not appear and a status hearing was scheduled for July 28, 1997, with a review hearing set for August 27-29, 1997. At the July 28 status hearing, the parties scheduled a court appearance for August 18.

¶6 On August 18, 1997, Crystal appeared and accepted an amended "permanency plan" which would set forth the conditions for her children's return home. According to the August 18 scheduling order, the "extension was no longer contested" and the August 27-29 hearing was canceled. A dispositional hearing

was scheduled for August 29, 1997. Crystal did not appear on August 29 and the hearing was rescheduled for September 3, 1997. On September 3, Crystal appeared and the petition for extension was granted, a permanency plan including conditions for the children's return home was approved and oral TPR warnings were given to Crystal. On October 9, 1997, the court signed Orders for Extension of Dispositional Order finding that the children were still in need of protection or services and extending the foster care placement. The written orders included TPR warnings and conditions for the return of Rachel and Jonathan pursuant to the permanency plan.

¶7 On September 8, 1998, TPR petitions were filed for both children, alleging that they were in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2). Crystal contested the terminations and the matter was tried to a jury on April 21-23, 1999. The jury returned a verdict finding that grounds existed for the termination of Crystal's parental rights. On June 30, 1999, the court determined that it would be in Rachel's and Jonathan's best interests to terminate Crystal's parental rights and signed the order terminating those rights. Crystal appeals.

DISCUSSION

A. WISCONSIN STAT. § 48.356(2) Notice Requirements

¶8 We first address Crystal's contention that the evidence is insufficient as a matter of law for the jury to find that the children had been placed outside of their home in compliance with the requirements for a WIS. STAT. § 48.415(2) CHIPS TPR. Section 48.415(2)(a)1 provides that involuntary grounds for a TPR may be established by the following:

That the child has been adjudged to be a child ... in need of protection or services and placed, or continued in a

placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365 ... containing the notice required by s. 48.356(2)

¶9 WISCONSIN STAT. § 48.356(2) establishes the following notice requirement:

In addition to the notice required under sub. (1), any written order which places a child ... outside the home ... shall notify the parent ... of the information specified under sub. (1).

Section 48.356(1) specifies in relevant part that:

Whenever the court orders a child to be placed outside his or her home ... because the child ... has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363 or 48.365, the court shall orally inform the parent ... who appear[s] in court ... of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child ... to be returned to the home

¶10 The issue presented here—whether WIS. STAT. § 48.356(2) as referenced in WIS. STAT. § 48.415(2)(a) requires that every order affecting the out-of-home placement of a child must have a written TPR notice attached if CHIPS grounds are the basis for the TPR—has been resolved by our supreme court in *Marinette County v. Tammy C.*, 219 Wis. 2d 206, 214, 579 N.W.2d 635 (1998). *Tammy C.*, 219 Wis. 2d at 216, addresses Crystal’s concern as to when the required § 48.356 warning notices must be given. It holds that “[t]he language of both §§ 48.415(2)(a) and 48.356(2) show[s] that the legislature has chosen to require a notice warning parents of the potential for termination of their parental rights only when their children are taken from the home under a dispositional order or its extension or revision.” *Tammy C.*, 219 Wis. 2d at 217.

¶11 Applying *Tammy C.* here, the September 25, 1996 CHIPS dispositional orders did not take Rachel or Jonathan from the home, and, therefore, the WIS. STAT. § 48.356(2) conditions for return to the home were not required. DHHS later petitioned for a revision of the September 25, 1996 order to reflect the out-of-home placement of Crystal's children, and on August 18, 1997, Crystal appeared and accepted a permanency plan setting forth the required § 48.356(2) conditions for the children's return home. On October 9, 1997, the court signed an order for extension of the September 25, 1996 CHIPS dispositional order; the order extended the out-of-home placement of Rachel and Jonathan and adopted the permanency plan with the conditions for return home.

¶12 Crystal relies upon *D.F.R. v. Juneau County*, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), in arguing that WIS. STAT. § 48.356(2) mandated that the written conditions for Rachel's and Jonathan's return home be included in the court's authorization of the January 14, 1997 Notice of Change of Placement. However, that change of placement was not pursuant to a CHIPS dispositional order, or to the revision or extension of a CHIPS dispositional order, but resulted from Crystal's incarceration on December 22, 1996. As discussed in *Tammy C.*, it was a temporary physical custody placement rather than a dispositional order placing the children outside of the home. *See Tammy C.*, 219 Wis. 2d at 219, 223. "It is [the] potential permanent loss of parental rights which necessitates the requirement for a warning notice," not the potential for temporary out-of-home placement. *Id.* at 219-20.

¶13 Crystal misreads *D.F.R.* as to court orders that require the WIS. STAT. § 48.356(2) warnings. *D.F.R.* presents the following as factual background:

May 17, 1983: The Juneau County Department of Social Services (DSS) took temporary physical custody of the children, D.F. and D.H.

May 18, 1983: The trial court entered an order for non-secure temporary physical custody continuing temporary custody of D.F. in the department with placement in a foster home.

June 2, 1983: The trial court entered a further order continuing D.F.'s placement in the foster home.

June 30, 1983: A CHIPS dispositional order was entered placing D.F. in the home.

November 10, 1983: DSS took temporary physical custody of D.F. and D.H. and placed them in a foster home.

November 14, 1983: The trial court grants Notice of Change of Placement of temporary physical custody to foster care.

March 6, 1984: CHIPS dispositional orders for D.F. and D.H. entered placing them in foster care.

November 19, 1984: CHIPS dispositional orders of March 6, 1984, are extended six months.

May 31, 1985: CHIPS dispositional orders of November 19, 1984, are extended to July 28, 1985.

June 12, 1985: TPR petitions filed based on WIS. STAT. § 48.415(2) CHIPS grounds.

See D.F.R., 147 Wis. 2d at 489-90.

¶14 The *D.F.R.* court subjected only the two March 6, 1984 CHIPS dispositional orders and the November 19, 1984 and May 31, 1985 orders extending the March 6, 1984 orders to WIS. STAT. § 48.356(2) compliance. *See D.F.R.*, 147 Wis. 2d at 496. Contrary to Crystal's contentions, and consistent with the later *Tammy C.* analysis, the *D.F.R.* court did not require that all orders involving out-of-home placement contain warnings. The *Tammy C.* court determined that *D.F.R.* was not called into question by its holding that only

CHIPS dispositional orders, including revisions and extensions of those orders, require compliance with § 48.356(2). We must conclude that *D.F.R.* provides no support for Crystal's arguments.²

¶15 The only court order here requiring WIS. STAT. § 48.356(2) compliance as a prerequisite for a TPR on WIS. STAT. § 48.415(2) grounds is the October 9, 1997 CHIPS extension order that placed Rachel and Jonathan outside of their home. The order included a written permanency plan containing the conditions for Rachel's and Jonathan's return home. The court's January 14, 1997 authorization of the notice of change in placement was not a CHIPS dispositional order subject to § 48.356(2) compliance. Because Rachel and Jonathan had been outside of Crystal's home for the required cumulative period of time pursuant to a dispositional order containing the notice required by § 48.356(2) and because no other order required the notice of conditions for return of the children to Crystal's home, the jury's answer to question one on the special verdict form is supported by the record as a matter of law.

B. Admissibility of Photographs

¶16 Next, Crystal contends that the court erred in admitting into evidence photographs of her apartment taken in July and December 1995. The photographs, 126 in all, show Crystal's apartment in a disheveled state. Crystal claims that the photographs were not material to the TPR because they were taken in July and

² *Marinette County v. Tammy C.*, 219 Wis. 2d 206, 579 N.W.2d 635 (1998), discusses the reasons for distinguishing dispositional orders requiring WIS. STAT. § 48.356(2) warnings from temporary physical custody orders that do not. In sum, "[t]emporary physical custody orders are just that – temporary," while "[p]lacement outside the home pursuant to a dispositional order, in conjunction with parental unwillingness or inability to comply with the conditions of the dispositional order, can form a basis for termination of parental rights [under WIS. STAT. § 48.415(2)]." *Tammy C.*, 219 Wis. 2d at 219.

December 1995, two years before the court's October 9, 1997 order placing the conditions for her children's return. Crystal complains that the photographs were inflammatory and prejudicial in nature and should have been excluded.

¶17 Rulings on the admission or exclusion of evidence are discretionary determinations for the trial court. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will not overturn a discretionary decision unless there was an erroneous exercise of discretion. *See id.* This court will sustain a discretionary determination if the trial court reviewed the relevant facts, applied the appropriate law and reached a reasonable decision. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In addition, WIS. STAT. § 904.03 sets forth the general rule that evidence, although relevant, is excludable if its probative value is substantially outweighed by the danger of unfair prejudice.

¶18 The question of whether photographs are to be allowed is a discretionary matter for the trial court. *See State v. Sarinske*, 91 Wis. 2d 14, 41, 280 N.W.2d 725 (1979). The court should consider whether the photographs "aid the jury in securing a clear idea of a material situation when the photographs better show that situation than does the testimony of witnesses." *Neuenfeldt v. State*, 29 Wis. 2d 20, 32-33, 138 N.W.2d 252 (1965). Photographs should be excluded if they "are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations." *Id.* at 33 (citation omitted).

¶19 In addressing the photographs' potential for unfair prejudice, the court ruled as follows:

From the [photographs] I have reviewed they certainly show a messy home but it's not shocking to the conscience. It's not like a murder scene or a – an industrial site that is collapsed or something out of the experience. I think that many people have seen things similar to this. So while it might be – impress an observer I don't think that it's going to shock anyone.

The Public has a burden of proving that Crystal P. is not likely to meet the conditions of return within the next 12 months. The conditions include cleanliness and suitability of abode. One way to provide evidence to the jury about the likelihood of [Crystal] providing a suitable abode in the next 12 months is to look at her past track record about providing a suitable abode especially the recent track record. '95 is recent enough so that it's not – hasn't lost its relevance because of distance in time.

So I'm going to permit continued questioning about these photographs at this point, which is the issue that is before me. It's obviously good evidence, in many ways more objective testimony than the testimony report of an eyewitness that the house is a mess. These show exactly what is meant by that.

¶20 The court's ruling was not erroneous. First, the photographs were relevant to DHHS's TPR action. The TPR petition was based upon a continuing need of protection or services and required DHHS to prove that "there is a substantial likelihood that the parent will not meet [established] conditions within the 12-month period following the fact-finding hearing under s. 48.424." WIS. STAT. § 48.415(2)(a)3. Although the photographs depicted Crystal's apartment in 1995 and the conditions for return were not set until 1997, they provide a record addressing the same concerns about the cleanliness of Crystal's household that led to DHHS's original CHIPS petition.

¶21 The graphic nature of the photographs supplemented the verbal testimony of DHHS's witnesses regarding the conditions of Crystal's apartment. For example, Sarah Weber, a parent support worker, testified that she had

inspected Crystal's apartment weekly beginning in September 1997 and that "[w]e would go through periods, I guess you would say, where it was cluttered, dirty. And then there were times that she had it ... clean." Weber described Crystal's unkempt apartment as follows:

I'm talking a big pile of dishes that weren't done, stuff like big piles of clothes on the floor not folded, not put away, just on the floor, papers piled up. There were times that you couldn't walk around. There were times that possibly somebody could have tripped. There was cat litter, things like that.

While Weber's account is informative, we agree with the court that the photographs provided the jury with a clearer idea of what Weber meant by saying that Crystal's apartment was cluttered.

¶22 In addition, the evidence was not unfairly prejudicial or inflammatory. The photographs show Crystal's apartment with papers, clothes and trash littering the floor and furniture; unwashed dishes and food containers are piled up in the kitchen. One picture shows a young boy, ostensibly Jonathan, sleeping on a sofa bed surrounded by a mess of papers, books, clothes and food containers. While the apartment is certainly depicted as disheveled and dirty, we do not find the photographs particularly inflammatory or likely to arouse the jury's indignation or sympathy. The photographs simply detail the state of Crystal's apartment. We are satisfied that the court did not misuse its discretion in admitting this evidence.

By the Court.—Orders affirmed.

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

