

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 29, 2010**

A. John Voelker  
Acting 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. 2010AP1171**

**Cir. Ct. No. 2009TP23**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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

**WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**HEIDI W.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Wood County:  
JAMES M. MASON, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> Heidi W. appeals an order of the circuit court terminating her parental rights to Ariel W. entered following a jury trial on the issue of whether Ariel was a child in continuing need of protection or services. Heidi argues the court abused its discretion when it permitted the jury to view the CHIPS dispositional order in the jury room during its deliberations. We disagree and affirm.

### BACKGROUND

¶2 The relevant facts of this case are not disputed. On August 18, 2009, Wood County Department of Social Services (Wood County) petitioned for the involuntary termination of Heidi's parental rights to her then three-year-old child, Ariel, on the basis that Ariel was in continuing need of protection or services. *See* WIS. STAT. § 48.415(2).

¶3 To establish that Ariel was in continuing need of protection or services under WIS. STAT. § 48.415(2), the State bore the burden of proving: (1) Ariel had “been adjudged to be a child ... in need of protection or services and placed, or continued in a placement, outside ... her home pursuant to one or more court orders”; (2) “the agency responsible for the care of [Ariel] and the family ... has made a reasonable effort to provide the services ordered by the court”; (3) Heidi “failed to meet the conditions established for the safe return of the child to the home”; and (4) there was a substantial likelihood that Heidi would not meet

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. On the court's own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion by one day to July 29, 2010.

those conditions within the twelve-month period<sup>2</sup> following the fact-finding hearing. Section 48.415(2).

¶4 The parties stipulated that Ariel had been placed outside of her home because she was found to be in need of protection or services. The focus of the evidence presented at trial was therefore on the remaining three elements of proof.

¶5 Following the close of evidence, the court asked the parties whether they were requesting that any of the exhibits admitted at trial be sent back to the jury during its deliberations. Counsel for Wood County stated that in different circumstances he might ask that the CHIPS dispositional order be available to the jury during its deliberations because “it might help them because it lists what the conditions are.”<sup>3</sup> However, he expressed concern that the CHIPS dispositional

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<sup>2</sup> WISCONSIN STAT. § 48.415(2)(a)3. provides for a nine-month time period. However, the parties agreed to a twelve-month time period because the petition for termination of parental rights reflected a twelve-month time period, rather than the nine-month time period set forth in the statute.

<sup>3</sup> The CHIPS dispositional order set forth the following conditions:

[1] That Warren [W.] and Heidi [W.] shall complete a parenting education and home management program as requested by the social worker. Successful completion will be demonstrated by identifying age appropriate behavior of children; identifying physical, emotional, and health needs of children associated with their developmental levels; demonstrating an understanding of child care issues; responding correctly to emotional, physical and cognitive capabilities of children; reflecting knowledge of appropriate expectations; disciplining appropriately; and demonstrating an understanding of what a safe and clean home environment is.

[2] That Warren [W.] and Heidi [W.] shall complete a full alcohol and drug assessment and follow recommendations of that service provider which may include inpatient or outpatient treatment and/or individual counseling.

(continued)

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[3] That Warren [W.] and Heidi [W.] shall cooperate with the services of Professional Services Group or similar agency in their county of residence and comply with urine analyses, breathalyzers and demonstrate the ability to maintain his/her sobriety.

[4] That Warren [W.] and Heidi [W.] shall participate in domestic abuse counseling and not expose their children to any additional domestic violence. If Warren and Heidi decide to reconcile their relationship, they will need the approval of the social worker prior to the reconciliation.

[5] That Warren [W.] and Heidi [W.] shall remain free of any additional criminal behavior and ameliorate their current legal issues.

[6] That Warren [W.] and Heidi [W.] demonstrate the ability to maintain a safe and stable home for their children. This will include maintaining timely payment of housing costs, utilities and complying with Economic Support programs if eligible.

[7] That Warren [W.] and Heidi [W.] shall demonstrate the ability to meet the basic needs of Ariel by cooperation with the WIC program, and accessing routine and necessary medical treatment.

[8] That Warren [W.] and Heidi [W.] shall only allow individuals in their home and/or care for their children with prior approval from Social Services.

[9] That Warren [W.] and Heidi [W.] shall give the social worker prior notice of their intent to move and inform the social worker of their new address and phone number.

[10] That Warren [W.] and Heidi [W.] shall cooperate with the Wood County Department of Social Services, the social service agency in Warren's current county, all service providers, and follow ALL recommendations. This shall include announced and unannounced home visits by the social worker.

[11] That visitation with Ariel shall be supervised through the Family Center for both Warren [W.] and Heidi [W.] The visits shall remain supervised until such time the social worker will evaluate the safety of the child for unsupervised contact.

[12] That if Warren [W.] and Heidi [W.] violate the conditions of this court order, they shall be held in contempt of court.

order contained references to Warren W., Ariel's presumed, but apparently not biological, father and the redaction of those references might cause the jury to wonder what those redactions were. Heidi's counsel agreed with Wood County's concerns. The court ultimately decided that the CHIPS dispositional order would not go back to jury during its deliberations.

¶6 During its deliberations, the jury sent a note to the court asking to review the trial exhibits. Following a discussion with the parties, the court determined that the exhibits would not be given to the jury because they contained material extraneous to the trial that would be difficult to extricate from the exhibits, and it so advised the jury. After receiving the court's ruling, the jury foreperson clarified that the jury only wanted to see the list of conditions placed on Heidi in the CHIPS dispositional order. The court informed the jury that for the reasons previously articulated, the CHIPS dispositional order would not be sent to the jury room.

¶7 After the jury returned to its deliberations, the court asked the parties whether they still had the same concerns about giving the jury the CHIPS dispositional order. Wood County stated that the CHIPS dispositional order would be helpful to the jury and that it had no objection to providing it to them. Ariel's guardian ad litem had no objection to providing the CHIPS order to the jury, provided a limiting instruction was given. Heidi's counsel, on the other hand, stated he had "the same concerns" as previously articulated and that he did not believe the document would provide the jury with any more information than they already had.

¶8 After looking into a possible limiting instruction to give the jury, the court ruled that the jury would be given the CHIPS dispositional order, but that the

jury would be admonished that it was to ignore any information about Warren W. The court advised the jury that the CHIPS dispositional order “refers to a person named Warren [W.]” and that “Warren [W.] would be then, inferentially at least, the father of the child, Ariel.” The court further advised the jury:

insofar as those Court-ordered conditions refer to Warren [W.], disregard that matter. Do not bring Warren [W.] into this matter.

Heidi [W.] is entitled to a separate consideration of this matter as to her own performance with regard to those conditions.

So is the County entitled to a separate consideration of this matter with regard to the applicability and the performance by the County and the respondent upon those conditions.

Warren [W.] isn’t here. And, to the extent that he is not here, his concerns are not a matter of consideration for you and are not to be brought up in that regard.

And so you are going to be receiving [the CHIPS dispositional order] then. And you may consider that insofar as it weighs upon your deliberations in the outcome of this case and the answer and the answers that you insert in the form of verdict that was delivered to you.

With that very clear and strong admonition, Heidi [W.] is entitled to separate consideration. The County is entitled to separate consideration with regard to the allegations as to Heidi [W.]

The—Warren [W.] is not here. He is not required to be here for the purposes of that.

You are not to draw an inference to the reference to him in these conditions or from the fact that he isn’t here today.

¶9 The jury returned a special verdict in which it found: (1) that Wood County had made “a reasonable effort to provide the services ordered by the court”; (2) that Heidi had “failed to meet the conditions established for the safe

return of [Ariel]”; and (3) that there was a “substantial likelihood that Heidi [W. would] not meet these conditions” in the next year.

¶10 A disposition hearing was held on December 11, 2009, after which the circuit court terminated Heidi’s parental rights to Ariel. A written order was subsequently entered thereupon. Heidi appeals. Additional facts will be discussed as necessary below.

## DISCUSSION

¶11 Heidi contends the circuit court abused its discretion when it allowed the jury access to the CHIPS dispositional order during its deliberations.

¶12 The decision to send an exhibit to the jury room during deliberations is one that lies within the discretion of the circuit court. *State v. Anderson*, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. The court in *Anderson* explained that:

[a] circuit court erroneously exercises its discretion when it fails to exercise its discretion, when the facts do not support the circuit court’s decision, when the circuit court applies the wrong legal standard, or when the circuit court fails to use a demonstrated rational process to reach a reasonable conclusion.

*Id.*, ¶28. We generally look for reasons to sustain the circuit court’s discretionary decisions, *see Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and “may search the record to determine if it supports the court’s discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶13 In determining whether an exhibit should be sent into the jury room, the circuit court is guided by the following considerations: (1) whether the exhibit

will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *Anderson*, 291 Wis. 2d 673, ¶27; *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988). When a circuit court does not consider these factors prior to sending an exhibit to the jury, the court's decision constitutes a misuse of discretion. *See State v. Hines*, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993).

¶14 Heidi argues that the circuit court did not consider the appropriate factors prior to sending the CHIPS dispositional order to the jury and that the court therefore misused its discretion. Wood County disagrees. Although the record does not set forth the circuit court's consideration of the three factors set forth in *Anderson*, we conclude that, upon our independent review of the record, there are facts which would support the court's decision and, therefore, affirm. *See id.* at 860-61 (we will not reverse the circuit court if, upon an independent review of the record, we can perceive a reasonable basis for the court's decision).

¶15 We first consider whether the CHIPS dispositional order would assist the jury in the proper consideration of the case. One of the three findings for the jury to determine was whether Heidi had satisfied the conditions set forth in the CHIPS dispositional order. The conditions were numerous and many were detailed. Having the opportunity to view the CHIPS dispositional order and review the conditions as written would clearly provide the jury assistance in determining whether Heidi had met some or all of those conditions.

¶16 We next consider whether Heidi was unduly prejudiced by the submission of the CHIPS dispositional order to the jury. Heidi contends that the CHIPS dispositional order contained information not previously known to the jury



which was unduly prejudicial to her. According to Heidi, this information included the reason why Ariel was removed from her care—inadequate care—and the fact that she had received medication recommendations. Heidi does not, however, explain how or why this information was prejudicial. We will not consider conclusory and undeveloped arguments. See *State v. Butler*, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46.

¶17 Heidi also argues that the CHIPS dispositional order provided new information to the jury that she had been incarcerated and had received psychiatric evaluations, information she suggests could lead a jury to conclude that she had psychiatric problems or concerns and that she should not be permitted to parent her daughter. We disagree. The jury was aware that Heidi had seven prior convictions on her record and, with respect to the evidence that Heidi had undergone psychiatric evaluations, the jury could have assumed the opposite of what Heidi suggests—that the absence of additional evidence regarding her mental wellbeing meant she suffered from no psychiatric conditions which would affect her ability to parent Ariel.

¶18 Finally, Heidi argues that the written conditions set forth in the CHIPS dispositional order “included potentially misleading information that had not been testified to during the trial.” She claims this information included: (1) the requirement that she demonstrate the ability to properly discipline Ariel, which she claims could lead the jury to believe that she had abused Ariel; (2) the requirement that she demonstrate an understanding of a safe and clean home environment; (3) the requirement that she demonstrate the ability to maintain her sobriety, which she claims suggests that she struggled to maintain sobriety; (4) the requirement that she participate in domestic violence counseling, which she claims could have led the jury to believe that she acted violently in her home; (5) the requirement

that she ameliorate her current legal issues, which she claims could have led the jury to believe that her legal issues were significant or long-term, even though there was no testimony that they were; (6) the requirement that she maintain a safe and stable home, which she claims could have led the jury to believe that her home had not been safe, even though there was no testimony that it had not been; (7) the requirement that she access routine and necessary treatment, which she claims could have led the jury to believe that she had failed to do so, even though there was no testimony to that effect; (8) the requirement that she only allow individuals in her home or to care for Ariel with prior approval from social services, which she claims could have led the jury to believe that her home was unsafe or that she allowed unsafe individuals to watch her children; and (9) the requirement that her visitations with Ariel be supervised until the safety of unsupervised visitations could be evaluated by a social worker, which she claims implied that Ariel was unsafe in her home.

¶19 The jury was charged with determining whether Heidi had satisfied the conditions set forth in the CHIPS dispositional order. Included in those conditions were the requirements set forth in ¶18 above, which Heidi now maintains were prejudicial to show the jury. To answer the question, the jury would need to know all of the details of the conditions. The jury could hardly determine whether the conditions had been met without knowing what the conditions were.

¶20 While Heidi suggests the jury could draw negative inferences from the information, the jury could just as reasonably have drawn positive inferences. Furthermore, each of these provisions was listed as applying to both Heidi and Warren W. The jury could have concluded that some of those conditions were the result of Warren W.'s problems, rather than Heidi's. If the jury heard no

testimony about Heidi having these problems, and were instructed to disregard anything pertaining to Warren W., they could have simply disregarded the conditions that did not fit the testimony. “[T]he choice among competing reasonable inferences is for the [circuit] court to make, not this court.” *Wisconsin Chiropractic Ass’n v. State of Wis. Chiropractic Examining Bd.*, 2004 WI App 30, ¶30, 269 Wis. 2d 837, 676 N.W.2d 580. Accordingly, we conclude that providing the written conditions to the jury was not prejudicial.

¶21 Finally, we consider whether the CHIPS dispositional order could be subject to improper use by the jury. Heidi argues the jury “may have used the [CHIPS dispositional order] improperly” because it provided the jury with “significant new information without the benefit of any explanation or context for it.” We conclude that this alone is insufficient to suggest improper use.

¶22 Heidi claims the jury may have used the information that she had been incarcerated and had received psychiatric evaluations to conclude that she should not be allowed to parent Ariel, and that the language in the CHIPS order “was unduly prejudicial because it had a tendency to influence the outcome of the trial by improper means.” As we have already discussed, Heidi’s argument is pure speculation and finds no support in the record.

¶23 For the reasons discussed above, we conclude upon our independent review of the record that the facts support the circuit court’s discretionary decision to send the CHIPS dispositional order to the jury.

*By the Court.*—Order affirmed.

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



