COURT OF APPEALS
DECISION
DATED AND RELEASED

August 2, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0349

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In the Interest of Christopher K.,
A Child Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

GARY K.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

BROWN, J. Gary K. appeals a trial court order placing his child, Christopher K., in long-term foster care and ending the State's efforts toward reunification of the family. He mainly contends that the trial court misused its discretion because, under the ch. 48, STATS., "best interests of the child" objective, the State should have been ordered to continue pursuing

reunification of the family unit. We hold that while the guiding objective of ch. 48 is the best interests of the child and keeping the family unit intact is a presumed goal, that presumption may be overcome if it is in the child's best interest. Under the facts of this case, the trial court did not misuse its discretion in determining that reunification efforts be discontinued and that long-term foster care was in the child's best interest.

The facts are as follows. A CHIPS petition was filed on May 28, 1992, alleging Christopher K., a minor child, to be in need of protection or services pursuant to § 48.13(12), STATS., in that at eleven years old, he had sexual contact with a six-year-old boy. A dispositional hearing resulted in the issuance on July 6, 1992, of an order stating that the child's placement in foster care was to continue (the child was previously placed out of home on a different petition) and that various services be provided to the child, father, mother and sisters so that the child could be reunified with either the mother or father.

On May 28, 1993, the Walworth County Human Services Department filed a petition to change placement and extend the dispositional order, requesting that the child be placed back with Gary. Before the court heard the matter, the Credence Counseling Center filed an updated report on the child, and on August 5, 1993, a psychological evaluation of Gary was filed.

At the pretrial conference on August 30, 1993, the department withdrew its petition to change placement back to Gary, and the matter was continued to December 7, 1993, for a hearing on all change of placement motions. On September 10, 1993, Gary filed his own motion for change of

placement, requesting that the child be placed back home with him. At the hearing on December 7, 1993, before Judge John R. Race, all petitions requesting change of placement were denied and the child was continued in foster placement.

On June 24, 1994, the department filed a petition to revise and extend the dispositional order. At the hearing on July 21, 1994, the court granted a continuance at the request of Gary's attorney.

At the hearing on August 1, 1994, before Judge James L. Carlson, all parties agreed to the one-year extension of supervision with the department, but Gary contested the requested revision providing that the child be placed in long-term foster care and that any efforts to reunite the family be discontinued. At the hearing, the court heard testimony and determined that the request by the department for revision seeking long-term foster care placement was appropriate and granted that request. Further facts will be provided as necessary.

The issue is whether the trial court erroneously exercised its discretion in granting the State's request to revise the CHIPS dispositional order by placing the child in long-term foster care, thereby eliminating the State's obligation to make efforts toward reunification with Gary.

Disposition of a CHIPS petition lies within the discretion of the court. *See* ***R.E.H. v. State***, 101 Wis.2d 647, 653, 305 N.W.2d 162, 166 (Ct. App. 1981). "The exercise of discretion requires judicial application of relevant law to

the facts of record to reach a rational conclusion." ***State v. James P.***, 180 Wis.2d 677, 683, 510 N.W.2d 730, 732 (Ct. App. 1993).

Section 48.355(2)(b)6, STATS., mandates the trial court to make a finding "that the agency primarily responsible for the provision of services under a court order has made reasonable efforts to make it possible for the child to return to his or her home." Section 48.355(2c) sets forth a list of factors which the court is to consider in determining if reasonable efforts have been made. For purposes of this case, the pertinent factors are:

> (a) 1. A comprehensive assessment of the family's situation was completed, including determination of the likelihood of protecting the child's welfare effectively in the home.
>
> ….
>
> 5. A consideration of alternative ways of addressing the family's needs was provided, if services did not exist or existing services were not available to the family.

Id. Finally, § 48.38(5)(c), STATS., provides that upon reviewing the permanency plan, the court shall determine each of the following:

> 1. The continuing necessity for and the appropriateness of the placement.
>
> 2. The extent of compliance with the permanency plan by the agency and other service providers, the child's parents and the child.
>
> 3. The extent of any efforts to involve appropriate service providers in addition to the agency's staff in planning to meet the special needs of the child and the child's parents.

4. The progress toward eliminating the causes for the child's placement outside of his or her home and toward the returning of the child to his or her home or obtaining a permanent placement for the child.

5. The date by which it is likely that the child will be returned to his or her home, placed for adoption, placed under legal guardianship or otherwise permanently placed.

6. If the child has been placed outside of his or her home for two years or more, the appropriateness of the permanency plan and the circumstances which prevent the child from:

a. Being returned to his or her home;

b. Having a petition for the involuntary termination of parental rights filed on behalf of the child;

c. Being placed for adoption; or

d. Being placed in sustaining care.

7. Whether reasonable efforts were made by the agency to make it possible for the child to return to his or her home.

First, Gary contends that there is no reasonable basis for the trial court's ruling to cease reunification efforts. Gary states that the goal of ch. 48, STATS., is to do what is in the best interest of the child while considering the parents' and society's interests, keeping in mind that the best possible outcome is reunification with the family. Section 48.01, STATS. He argues that it is clear from the record that he continually wished for his son to be placed back in his custody and that he did everything that was requested of him by the

department. At the final hearing, the department, through Mary Schroeder, testified:

> The father (Gary) was extremely involved, sees him (Christopher) every single weekend ….
>
> ….
>
> Within the last two years, the parents have complied completely with the court's orders. We have had numerous things that we have asked of them and pretty much they have done whatever we have asked to their full extent.
>
> ….
>
> [H]e (Gary) also said in order to get my child back, I will do anything you say ….

Next, Gary points out that on May 28, 1993, the department indicated its belief via the change of placement request that he had in fact met his conditions of return and that with continued services, he would be capable of providing his son with adequate supervision and care.

Finally, he argues that even if there is a valid reason why he is unable at this time to provide sufficient care to his son, it is premature to cease reunification efforts because there is still hope of reunification. Gary relies on the testimony of Lois Seefeldt, a clinical specialist. Seefeldt testified that she devised a coparenting scheme at the request of the department. Under that scheme, Gary would move to Whitewater where the foster home is located. Christopher would remain in foster care but live for a week at a time with Gary (week on, week off, starting). When asked if she believed there is a possibility

that a coparenting scheme could lead to total reunification, she replied that there certainly would be a possibility and it would depend on the actions of Gary.

Gary argues that the trial court erred in its decision because § 48.355(2c)(a)5, STATS., requires the court to look into alternative ways of addressing the family's needs before keeping a child out of the home and abandoning the statutorily mandated goal of reunification. He contends that the trial court failed to sufficiently consider Seefeldt's parenting idea. Gary argues that the coparenting, with continuing supervision by the department and continuing assistance in parenting, could be the appropriate vehicle to reunify father and son. Further, Gary states that Seefeldt testified that when Christopher was asked how he felt about a coparenting scheme, he was very positive and thought it would be very good for his mom and/or dad to move to Whitewater and to really look at the coparenting. Gary asserts that there is no evidence suggesting that such an arrangement would be either harmful to Christopher or against his best interest.

Gary contends that § 48.01(g), STATS., stresses stability and permanence as being very important in the child's life. Gary argues that the action recommended by the department and adopted by the court does little to accomplish those goals while abandoning the statutory mandate of reunification. Gary points out that the department conceded that the long-term foster care they recommend is not necessarily permanent. The department testified that the court can legally review the permanency plan again at a later

date and change it if it believes that there have been significant changes in Christopher, that he has matured sufficiently so as not to require the same level of parenting skills currently required, or if Gary "did a wonderful job" with Christopher and there was no longer a reason for concern about Gary's home.

We hold that the trial court did not erroneously exercise its discretion in granting the State's request to revise the dispositional order by placing Christopher in long-term foster care. First, under ch. 48, STATS., the trial court has the authority to order long-term foster care placement. Section 48.38, STATS., dealing with permanency planning, authorizes the court to order long-term foster care placement. Section 48.38(4)(f) discusses the information required to be included in a permanency plan:

> The services that will be provided to the child, the child's family and the child's foster parent, the child's treatment foster parent or the operator of the facility where the child is living to carry out the dispositional order, including services planned to accomplish all of the following:
>
> 1. Ensure proper care and treatment of the child and promote stability in the placement.
>
> 2. Meet the child's physical, emotional, social, educational and vocational needs.
>
> 3. Improve the conditions of the parent's home to facilitate the return of the child to his or her home, or if appropriate, obtain an alternative permanent placement for the child.

Section 48.38(5)(c)4, 5, STATS., allows for the court to place a child in long-term foster care. It allows for home placement, adoption, legal guardianship or

otherwise permanent placement. These two subdivisions of the statute confirm that the trial court has the authority, within its discretion, to institute long-term foster care placement as a dispositional order.

Second, while family reunification is an established goal, the paramount concern is to place the child where it is in the child's best interest. Therefore, the efforts for reunification must take a back seat in those instances where after much effort to reunify the child with his or her parents, the trial court determines that it is no longer in the child's best interest to continue such efforts. This is such a case.

The trial judge stated: "Christopher's best interests now are as indicated, a stable living situation; one where he can be assured of support, close supervision, monitoring of behaviors associated with underlying matters such as sexual assault perpetrator and also with respect to attention deficit and needs for medications, such as Ritalin; that there be an assurance that that would be provided …."

There is a reasonable basis within the record by which the trial court could hold that placing Christopher in Gary's home would not be in Christopher's best interest because Gary would not be able to provide Christopher with these needs. In support of the trial court's holding is the testimony of Schroeder. Schroeder testified that the basic reason for the decision to request long-term foster care was that Christopher has been in foster care since 1989, the department has provided all types of services, and there was no progress by the parent. She testified that Gary has done everything asked of

him, even going through five different parenting classes, and he has exhausted the resources available. Schroeder told the court that Christopher is diagnosed with ADHD (attention deficit hyperactivity disorder) and he needs close supervision. She said Christopher is a special needs child who will be difficult whichever home he is in but that the foster parents are in the best position to maintain this behavior and to catch inappropriate behavior as soon as possible.

Also, in support of the trial court's holding is the testimony of Seefeldt, who testified that in working with Gary, it became evident that he had difficulties in grasping the full ramifications of Christopher's attention disorder, his need for structure, setting up scheduling, discipline and basic routines of living for the family. She said that Gary just did not seem to understand what he needed to do for Christopher. As an example, she testified that Christopher needs routine and a schedule he can depend upon, whereas Gary has carefree weekends with Christopher and that this does not work very well for Christopher. She further testified that Christopher seems to have more difficulties when he is at home with Gary. Based on the testimony of Schroeder and Seefeldt, there is a rational basis for holding that Gary cannot provide what is in Christopher's best interest and therefore Christopher needs to be placed elsewhere.

We particularly disagree with Gary's argument that the trial court erred in not satisfactorily considering the coparenting scheme before placing Christopher in long-term care and ending reunification efforts. There is sufficient evidence in the record indicating that the trial court considered this

alternative but in the exercise of its discretion concluded that pursuing it through a court order was not in the child's best interest. The department testified that it would be helpful for Christopher to know that he no longer has to choose between one parent or the other; that he will be at the foster home, and he no longer has to worry about which parent's home he is going to be at. The trial court considered that uncertainty about his home status has been a major point of stress in Christopher's life and the department opined that a lot of his acting out behavior was for this reason. Also, Schroeder testified that postponing the long-term foster placement would harm Christopher because he has been living in limbo, and it would be helpful for him to know what the future holds and that he will be staying in the same foster home. Finally, Seefeldt, the clinic specialist who devised the coparenting scheme, testified that although there was a possibility that the scheme would lead to reunification as opposed to long-term foster needs, the probability of that happening would not be very likely.

As to Gary's argument that the court's order does little to accomplish the goals of stability and permanence, we underscore the trial court's determination that long-term foster care will provide Christopher with the best stable living situation. Although Seefeldt testified that if Gary somehow changed and "did a wonderful job" in recognizing and handling Christopher's needs, the department would not be opposed to changing the long-term foster care placement, this does not defeat the stability and permanence Christopher would have at this time. The evidence and testimony by Seefeldt make clear that the probability of total reunification between Gary

and Christopher is slim. Therefore, the benefits Christopher would receive under a long-term foster care placement clearly outweigh ordering a coparenting scheme which would make Christopher uncertain about his future while only providing a small chance of reuniting him with Gary.

It is very clear from the record that Gary cares for Christopher dearly and has done everything possible so that he may be reunited with his son. However, it is also clear from the record that there is a reasonable basis for the trial court to conclude that he has not achieved the level of parenting skills required to be a full-time parent to Christopher, nor is he likely to achieve the level needed in the near future.

Based on the evidence and testimony above, we hold that the trial court did not erroneously exercise its discretion in granting the State's request to place Christopher in long-term foster care because there is a reasonable basis for holding that long-term foster care placement was in Christopher's best interest.

By the Court. – Order affirmed.

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