

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2014

Diane M. Fremgen
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. 2013AP2644-FT

Cir. Ct. No. 2013JC18

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF LUKE M. S., A PERSON UNDER THE AGE OF 18:

JOHN M. S.,

PETITIONER-APPELLANT,

V.

MARCY J. S.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
WILLIAM DOMINA, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ John M. S. filed a Petition for Protection or Services, pursuant to WIS. STAT. § 48.13(4), with regard to his son Luke M. S. John's ex-wife, Marcy J. S., who is Luke's mother, opposed the petition. The parties filed cross-motions for summary judgment. The circuit court dismissed John's petition on the ground that it was insufficient. We agree and affirm.

¶2 As relevant to this appeal, the petition states the following. John and Marcy are divorced and, pursuant to family court orders, share joint custody and placement of Luke. John and Marcy have "always struggled to co-parent and exercise [their] rights regarding joint-custody and shared placement in a cohesive and child-centered way. However, the problems have rarely manifested themselves in arguments, because [John] usually submit[s] to Marcy's demands in order to prevent argument." John and Marcy have a "volatile relationship," which has diminished their ability to co-parent and effectively communicate regarding Luke. In the six months prior to the filing of the petition, Luke "has been the repeated victim of bullying at school, which the school and Marcy have failed to take action on" and he "made statements to his counselor, friends, and possibly school teachers about 'wanting to die,' 'not wake-up,' or desiring to 'jump off' his school's second floor window." The petition states that Luke is "flip-flopping therapists, at the direction of Marcy, and at this moment may not even have one despite his immediate need for treatment."

¶3 In the petition, John further states that he is "gravely concerned for [Luke's] mental, physical and emotional well-being"; believes Luke "is in need of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

services to assess and address his emerging mental health issues ... and address whether his current educational environment is conducive to his social and mental health needs”; is unable to care for Luke because John does not have “the ability to unilaterally assess [Luke’s] needs and implement changes to his mental health treatment or schooling, primarily because Marcy is commandeering schooling and treatment choices and seems to be attributing fault for Luke’s mental health problems” to John. The petition asserts that Luke and the family need immediate intervention by the Department of Health and Human Services and the juvenile court “to assess Luke’s needs and determine a sustainable course of treatment and action, as well as facilitate better co-parenting.”

¶4 This matter came on for hearing on the parties’ motions for summary judgment. When addressing a motion for summary judgment on a petition for protection or services, a circuit court must first determine if the petition is sufficient. *State v. Courtney E.*, 184 Wis. 2d 592, 599, 516 N.W.2d 422 (1994). If the petition is insufficient, it must be dismissed. *Id.* at 600; WIS. STAT. § 48.255(3). To be sufficient, the petition “must provide ‘reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court,’” *Courtney E.*, 184 Wis. 2d at 600 (quoting § 48.255(1)(e)), and “contain facts ‘which are themselves sufficient or give rise to reasonable inferences which are sufficient to establish probable cause.’” *Id.* at 601 (citation omitted). The sufficiency of a petition is an issue of law we review de novo. See *Sheybogan Cnty. v. D.T.*, 167 Wis. 2d 276, 282-83, 481 N.W.2d 493 (Ct. App. 1992).

¶5 John’s petition seeks intervention based on WIS. STAT. § 48.13, specifically subsec. (4). Section 48.13 provides that

the court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

....

(4) Whose parent ... is unable or needs assistance to care for or provide necessary special treatment or care for the child.

Thus, to be sufficient, John's petition must provide reliable and credible information and contain facts alleging that (1) Luke "is in need of protection or services which can be ordered by the court" and (2) John "is unable or needs assistance to care for or provide necessary special treatment or care" for Luke. Sec. 48.13(4); *Courtney E.*, 184 Wis. 2d at 600-01. The petition fails on both requirements.

¶6 Our supreme court addressed the first requirement in *Courtney E.* In that case, the State filed a petition seeking protection or services for Courtney because she was pregnant and under sixteen years in age. *Courtney E.*, 184 Wis. 2d at 601. Our supreme court determined that despite the petition sufficiently alleging that Courtney had been the victim of sexual abuse, it was legally insufficient because it failed to contain information "to support the allegation that Courtney is in need of protection or services" because "[i]t is altogether possible, based on the face of the petition, that Courtney is receiving all of the protection and services that she needs from her family." *Id.* at 601-02. The court concluded that "a [WIS. STAT. §] 48.13 ... CHIPS petition is not sufficient unless it contains information which at least gives rise to a reasonable inference sufficient to establish probable cause that there is something that the court could order for the child *that is not already being provided.*" *Courtney E.*, 184 Wis. 2d at 602 (emphasis added). "[T]he petition must on its face provide a reason,

beyond her pregnancy and age, why Courtney is in need of *court-ordered* protection or services.” *Id.* (emphasis added).

¶7 The petition before us centers on Luke’s alleged therapy/treatment needs. Looking at the face of the petition, however, it appears these needs are being addressed. Despite the loaded characterization that Luke is “flip-flopping” therapists “at the direction of Marcy,” this is in fact a statement that Marcy is attending to Luke’s need for therapy/treatment. “Flip-flopping” leads to no inference other than at some point prior to the filing of the petition Marcy either changed therapists for Luke altogether or began having him see more than one therapist. The follow-up statement that “at this moment [Luke] may not even have [a therapist]” is pure conjecture and is contrary to the preceding factual statement that Luke is seeing at least one therapist. It can be reasonably inferred from the face of the petition that Luke may have mental or psychological health needs related to potential self-harm, bullying, and his parent’s divorce, but the petition fails to actually provide a reason to believe these needs are not being adequately addressed. Under *Courtney E.* more is required.

¶8 Under the second requirement, the petition must allege and provide reliable and credible information that John “is unable or needs assistance to care for or provide necessary special treatment or care” for Luke, or, broken down, that John is “unable or needs assistance to” (1) “care for” Luke or (2) “provide necessary special treatment or care for” Luke. WIS. STAT. § 48.13(4); WIS JI—CHILDREN 230, 232. Although § 48.13 does not define these phrases, the jury instructions provide guidance. See *State v. Olson*, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993) (“while jury instructions are not precedential, they are of persuasive authority”).

¶9 WISCONSIN JI—CHILDREN 230 explains that

“[u]nable or in need of assistance to care for” means that (parent) (guardian) is unable to provide the level of care necessary to *meet the needs* of the child *despite reasonable efforts of (parent) (guardian)*. In making this determination, you may consider all facts and circumstances bearing on *the child’s need for care* and (parent)’s (guardian)’s ability to provide that care, including age, physical conditions, health, and special needs. (Emphasis added.)

WISCONSIN JI-CHILDREN 232 indicates that “unable or in need of assistance to provide necessary special treatment or care for (child)” means that the child

is in need of special treatment or care and that the (parent) (guardian) is unable or needs assistance, *despite reasonable efforts by the (parent) (guardian)*, to provide that special treatment or care. “Special treatment or care” means professional services which *need to be provided* to (child) or (child)’s family to protect the well-being of the child ... or *to meet the special needs* of (child). (Emphasis added.)

¶10 As stated, the petition does not allege that Luke has needs which are not being met. Further, the petition fails to explain any “reasonable efforts” John has made to meet needs he believes Luke has. John states in the petition that he is unable to care for Luke because he does not have the ability to “unilaterally assess [Luke’s] needs and implement changes to his mental health treatment or schooling, primarily because Marcy is commandeering schooling and treatment choices.” This statement appears to be little more than John’s wish that he had sole custody of Luke so he could make unfettered decisions regarding Luke’s treatment and schooling. Yet, the petition does not allege that John made a reasonable (or any) effort to obtain this goal by seeking sole custody of Luke in family court, or why such an effort might not be sufficiently effective. Nor does the petition state reasonable efforts John himself has made to address in any way his concerns regarding bullying or Luke’s statements regarding self-harm.

¶11 On the face of the petition, the only need Luke has which is not being addressed is the need for two parents to express their love for him by working with each other in a cooperative manner focused on Luke's best interests. No court or government agency can provide that. Only John and Marcy can.

¶12 Because we affirm the circuit court's dismissal of the petition, we do not otherwise address the parties' arguments relating to their summary judgment motions.

By the Court.—Order affirmed.

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

