

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 7, 1997

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. 97-0505

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF PHILLIP G.K.,
A PERSON UNDER THE AGE OF 18:
MARY H.-P. AND TIMOTHY C.P.,**

PETITIONERS-APPELLANTS,

V.

STATE OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
RICHARD REHM, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

DEININGER, J.¹ Mary H.-P. appeals a dispositional order placing

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

her son, Phillip, age sixteen, in foster care after he had been adjudicated delinquent.² She makes four claims: (1) that Phillip should have been found to be a child in need of protection or services, rather than delinquent; (2) that Phillip should have been placed in her home instead of in foster care; (3) that her right to religious freedom was violated by a provision in the dispositional order requiring her to have direct contact with social workers; and (4) that the court's order that she contribute to Phillip's support while he is in foster care was improper. We find no merit in any of Mary's claims, and therefore we affirm the provisions of the dispositional order. We conclude, however, that the order as entered does not comply with the requirements of § 938.355, STATS., and we reverse the order and remand for entry of a proper order.

BACKGROUND

Phillip's parents were divorced several years ago, and each has remarried. Phillip resided with his father. The State filed a delinquency petition alleging two counts of attempted theft. Phillip pleaded no contest to one count and was adjudged delinquent. During the pendency of the action, Phillip was placed in shelter care after an altercation with his father.

² The caption and appellants' brief include both Mary and her husband, Timothy C.P., as appellants. We note that under § 938.02(13), STATS., a "parent" for purposes of Chapter 938 proceedings is a biological parent or a parent by adoption. A stepparent has no statutory right to notice of or participation in any Chapter 938 proceedings. Nonetheless, we previously denied the State's motion to dismiss Timothy's appeal, concluding that he may appeal "at least to the extent of challenging" the provision in the dispositional order restricting his involvement with the personnel supervising and treating Phillip. Since Timothy's interest in this matter is limited to this one issue, we will refer to appellants collectively as Mary.

The caption identifies the juvenile as "Phillip," while he is identified as "Philip" throughout the record. Neither party requested that the caption be modified. We will therefore refer to the juvenile as Phillip in this opinion.

The Columbia County Department of Human Services recommended to the court that Phillip be placed in a treatment foster home. The State, Phillip and his father concurred in the department's dispositional recommendation, but Mary did not. She and her husband, Phillip's stepfather, filed an "Alternative Dispositional Recommendation" requesting that Phillip be placed with them on certain conditions. The conditions were that Phillip's father be ordered to pay "any and all cost involved in this matter"; that Phillip's father pay Mary \$365 per month in child support, provide health insurance coverage and pay all out-of-pocket medical expenses incurred by Phillip; and that the father pay to Mary, within four weeks, approximately \$2000 for a delinquent property settlement, interest, and costs arising out of a previous family court matter. Mary testified at the dispositional hearing that "[w]e would be willing to take Philip [sic] if our conditions were met."

The trial court concluded "that it is not in the best interest of a child to be placed in a home that conditions the placement upon solely financial issues arising from different proceedings." The court adopted the department's dispositional recommendations, stating:

It is unfortunate that the current circumstances make it not in the best interest of Philip [sic] to place him in the home of either parent. He is not able to function currently in [his father's] home There is not an interest on the part of [Mary H.-P.] to have the child in her home but for economic considerations.

The court further ordered the parents "to make a contribution towards the expenses of the foster placement." Mary objected, stating she wished to submit financial information relating to her ability to pay. When asked by the court if she had a "financial disclosure statement at this time that reveals all of the

income and assets” of her family, Mary answered “no.” The court told her that if she wished to have “a hearing on that,” the court would do so to allow her to present a financial disclosure statement and evidence on the issue of her contribution to support. “In the interim,” however, the court ordered that “both parents contribute” to the child’s support. Mary indicated that she would request a hearing on the matter, but no request or any indication of further proceedings on the support issue are contained in the record.

ANALYSIS

A disposition following a finding of delinquency is committed to the sound discretion of the juvenile court. *In the Interest of James P.*, 180 Wis.2d 677, 682, 510 N.W.2d 730, 732 (Ct. App. 1993). We will not disturb the discretionary rulings of the trial court if the record shows that the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). We conclude, after reviewing this record, that the trial court did not erroneously exercise its discretion in entering the dispositional order from which Mary appeals.

Mary’s first claim is without merit. There was no basis for the court to find Phillip to be a child in need of protection or services, rather than delinquent. The petition alleged Phillip to be delinquent for violating a state criminal law and invoked the court’s jurisdiction under § 938.12, STATS., governing “juveniles alleged to be delinquent.” While parents are apparently “parties” to a delinquency proceeding,³ they are not empowered to contest the

³ See § 938.27(1), STATS., (authorizing court to summon parents into court unless “the parties” appear voluntarily).

allegations of the petition. Under § 938.30(4), STATS., it is the juvenile, and only the juvenile, who must plead to a delinquency petition. Phillip did so, tendering a no contest plea which was accepted by the court. We find no statutory basis for a parent to contest or appeal a finding of delinquency, and Mary cites none. (By contrast, § 938.30(3), permits “nonpetitioning parties” to contest certain petitions alleging the juvenile to be in need of protection or services. Section 48.30(3), STATS., contains similar language for petitions alleging that a child is in need of protection or services.)

Mary next challenges the court’s order that Phillip be placed in a treatment foster home. In making the order, the court considered the department’s report and recommendation, Mary’s written alternative recommendation and her testimony at the dispositional hearing. The department’s report reviewed Phillip’s prior police contacts and court involvement and its efforts to achieve an alternative to out-of-home placement for Phillip. A psychological evaluation of Phillip was also provided to the court.

Under § 938.335(3), STATS., Mary had the right, and she was given the opportunity, to present evidence and make “alternative dispositional recommendations.” The court specifically considered, and rejected, Mary’s conditional request that Phillip be placed with her:

The economic considerations outweigh the best interests of this child and have—have been an underlying theme of demands made by [Mary H.-P.]. And I find it not in the best interest of the child to place him in that home where the emphasis is not on his well-being personally, but on vindication of other issues that exist for [Mary H.-P.]. So that is not an alternative for this child at this time.

The court considered the seriousness of Phillip's present and past delinquent behavior as required by § 938.34, STATS.; concluded that he was "in great jeopardy for his future"; and ordered placement in a treatment foster home, as permitted under § 938.34(3)(c). The record thus demonstrates that in ordering Phillip to be placed in foster care, the trial court examined the relevant facts, applied a correct legal standard, and reached a reasonable conclusion which a reasonable judge could reach.

Section 938.355, STATS., sets forth numerous requirements for dispositional orders in delinquency proceedings. Among them is the requirement that an order placing a delinquent juvenile in foster care "include a finding that the juvenile's current residence will not safeguard the welfare of the juvenile or the community due to the serious nature of the act for which the juvenile was adjudicated delinquent." Section 938.355(1). Although the form dispositional order entered by the trial court includes this as a possible finding, the box selecting the finding was not checked. Similarly, § 938.355(2)(b)6., requires that the order include a finding regarding the department's reasonable efforts to prevent an out-of-home placement. The record indicates that the court had available to it sufficient information regarding the considerations under § 938.355(2c), required for this finding, and that the court did in fact consider them. The order is deficient, however, in that the finding which begins: "Placement in the home at this time would be contrary to the welfare and not in the best interest of the juvenile, and reasonable efforts to prevent the placement" is not completed by selecting among three possible alternatives.

We therefore reverse the dispositional order, and direct on remand that an order complying with the requirements of § 938.355, STATS., be entered. We do not contemplate that further court proceedings will be necessary. As we

noted above, the present record supports the disposition ordered and the findings that were required to be made. It is only the formal requirements of the written dispositional order that need to be supplemented, and this may be done by the entry of a proper order, with copies provided to all parties.

Mary next claims that her rights to religious freedom were violated by the dispositional order's requirement that:

Any contact with the department shall be between mother and department and not involve step-parents. Mother is to have direct contact with assigned social worker regarding her son's progress in treatment.

She claims that this provision violates her First Amendment Free Exercise⁴ rights because it interferes with her religious beliefs that she must make all decisions in consultation with her husband and that he must be their spokesperson. To support her argument, Mary relies on the Religious Freedom Restoration Act of 1993 (RFRA). However, RFRA has been declared unconstitutional as being in excess of Congress' powers. *City of Boerne v. Flores*, 65 U.S.L.W. 4612 (U.S. June 24, 1997).

The provision in the order requiring Mary to have direct contact with treatment and supervision workers is based on the department's report to the court that Mary's husband "refuses to allow" a social worker to have contact with her, thereby interfering "with the delivery and receiving of information regarding the welfare of the mother's child." The court adopted the recommended provision because it found "that this record shows a ... degree of impediment in

⁴ The First Amendment to the U.S. Constitution provides, in relevant part, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ..."

communication largely because [Mary H.-P.] has chosen to surrender her responsibilities and expression of concern to a third person”

We agree with the State that, even given the primacy of the First Amendment right to freely exercise one’s religion, a parent’s claim of infringement of his or her religious freedom “may be subject to limitation ... if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). The dispositional order does not prevent Mary from discussing Phillip’s circumstances, supervision and treatment progress with her husband, nor does it prevent her from receiving and following his advice on her role and obligations as a parent. What the “direct contact” provision is designed to do, and does, is ensure that Mary will have direct communications with the persons providing care and treatment to her son. Given the history of the dealings between the department and Mary and her husband, and the unfortunate family dynamics arising from the family court litigation between Mary and Phillip’s father, we conclude that the provision is necessary in order to accomplish Phillip’s rehabilitation and his potential future return to the home of one of his parents. It is thus not an impermissible interference with Mary’s religious freedom.

With respect to Mary’s final claim, we recognize that § 938.335(3r), STATS., permits a parent to present evidence relevant to child support at a dispositional hearing in a delinquency matter. Section 938.355(2)(b)4., STATS., requires that a dispositional order making an out-of-home placement designate the amount of support to be paid by the juvenile’s parent or parents, or refer them to the appropriate agency for a support determination. After Mary acknowledged that she did not have a complete financial statement prepared for presentation to the court at the dispositional hearing, the court advised her to prepare such a

statement and request a hearing on the matter, which the court assured her would be held. Mary's response was "I'll do that." There is no indication in the record that Mary followed up with a request, or what may have transpired at or as a result of any hearing on the support issue. Until such time as Mary properly raises and litigates the issue of her contribution to Phillip's support in the trial court, there is nothing for us to review.

We note that the trial court's oral order was simply "that both parents contribute to the support of the child while he is in foster placement." The form dispositional order that was entered contains standard provisions for ordering parental support, but these are blank. Thus, it is not clear from the record what the amount of Mary's support obligation is, or how it compares to Phillip's father's obligation. If these matters have not yet been determined and established by separate order, we suggest that the issue be determined and included in the dispositional order to be entered on remand.

In summary, we affirm the finding of delinquency, the out-of-home placement and the requirement of direct contact by Mary with treatment and supervision personnel, as ordered by the trial court. We reverse the dispositional order of January 13, 1997, and remand for entry of an order complying with the requirements of § 938.355, STATS.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

