COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2016 **Cir. Ct. No. 2005JC8**

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

IN THE INTEREST OF MATTHEW J.B., A PERSON UNDER THE AGE OF 18:

JENNIFER L. WESTON, GUARDIAN AD LITEM FOR MATTHEW J.B.,

APPELLANT,

V.

MATTHEW J. B., MARK J. B. AND LYNN M. B.,

RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: RICHARD T. BECKER, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] The Jefferson County Department of Human Services filed a petition alleging that Matthew J. B., born July, 16, 1989, was a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

child in need of protection and services under WIS. STAT. § 48.13(10) because of "injury caused [him] by other than accidental means and ongoing neglect issues in the home." After the circuit court heard the department's evidence in support of its petition, the court concluded that the evidence was insufficient to meet the standard for neglect under § 48.13(10) and dismissed the petition. Matthew's guardian ad litem appeals, contending that the court erred in dismissing the petition. Matthew, represented by counsel, responds that the circuit court properly determined that the evidence was insufficient. We agree with Matthew and affirm.[2]

BACKGROUND

¶2 WISCONSIN STAT. § 48.13(10) provides that the court has:

> **Jurisdiction over children alleged to be in need of protection or services.**
>
> ….
>
> (10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

¶3 At the hearing on the petition, the department's primary witness was Sandra Gaber, an intake worker for the department. Her testimony was as follows. On February 19, 2005, she was called to investigate an allegation of child abuse

[2] The Jefferson County Department of Social Services has informed the court that it is not appearing on this appeal because its position is the same as that advanced by the guardian ad litem. Neither of Matthew's parents, Mark J.B. or Lynn M.B., have filed responsive briefs or otherwise communicated with this court. This case was delayed in its submission to a judge for decision because of the procedures involved in notifying Mark and Lynn that they had not filed briefs and of the consequences of not doing so.

and Matthew was the reported victim. Matthew, then fifteen, lived with his father, Mark J.B., and also with Lisa, the woman with whom Mark had a long-term relationship, and her two children, one of whom has cerebral palsy. When Gaber saw Matthew she observed some marks on both sides of his neck, a scratch near his shoulder, and a mark on his lower back, which looked like a handprint mark.

¶4 Mark described to Gaber the incident that prompted the call, which Lisa had made. Mark told Gaber that Matthew was out of control and would not listen to him. That is when Mark hit him; he intended to hit him on the butt but he might have hit him on the lower back instead. He then grabbed Matthew by the back of the neck and directed him back upstairs. He acknowledged that he caused the handprint on Matthew's shoulder and the one on his lower back. Mark told Gaber that there had been problems between Lisa and Matthew that evening and he had to get things calmed down before he went to work. He said that that evening was typical of how things were at the home, that he had to get physical with Matthew in order to redirect him when he got out of control, and he then would grab Matthew by the arm or back of the neck. Mark denied that he had grabbed Matthew by the front of the neck.

¶5 Gaber learned from her interviews with Mark and Lisa that Matthew had special needs because of his low cognitive skills and behavior problems. They described him as having the capacity of a three-year old. He also has some physical disabilities and, Lisa said, he needed help going to the bathroom at home but not at school. They said he had significant problems with acting-out behavior and went into fits of rages when he was upset. Matthew had been living with his father for a couple years; he had previously lived with his mother, but had been removed from her care because of her sexual abuse of Matthew.

¶6 According to Gaber, either Mark or Lisa told her that in addition to physical discipline, Mark redirected Matthew or sent him to his room and also used counting to three and time outs to address his acting-out behavior. Mark told Gaber that he used physical contact to discipline Matthew only when other methods were not successful.

¶7 Gaber took the three children into custody to take them to a foster home. When she was in the process of taking them from the home, Mark and Lisa made sure they had clothes to take and were concerned about their medications and how they would be picked up at Walgreens to make sure the children had them. Mark and Lisa told her that the children would probably be fighting the entire ride, but they did not fight.

¶8 Lisa also testified at the hearing on the petition and described the February 19 incident. It began by Matthew making her angry by mimicking her, so she grabbed his arm and told him to go upstairs and go to bed. He went upstairs and was throwing and breaking things in his room and banging two plastic baseball bats on her and Mark's bedroom door. She took the bats away from him and went outside for a cigarette to cool down. When she came back in she saw Mark seated in the dining room with his hands around Matthew's neck. Lisa appeared to acknowledge that she had told the social worker and the police officers that Mark had choked Matthew, but at the hearing she did not agree that Mark was choking Matthew, explaining that it only looked like that at the time because there was no light on in the dining room and it was night. She saw Matthew head back upstairs, but first stopped on the way and spat in the eye of her son, who was lying on the couch. Mark left for work and she called a friend to come over because she had seen marks on Matthew's neck and was concerned; she wanted to see if he had more marks but did not want to do this alone with

Matthew. Her friend advised her to call the police because she was in the First Offender program, and Lisa did.

¶9 Lisa described herself as the primary caretaker of all three children. She testified that when Matthew throws fits he bites his right hand and breaks and throws things. She denied using physical discipline on him, saying she usually sent him up to his room, but she acknowledged she might have told the social worker that she spanked Matthew on his head as a form of discipline. She acknowledged that in December 2003 she disciplined Matthew by putting him outside in twenty-degree weather dressed in a t-shirt, pants, and socks; a neighbor reported this to the police and there was a referral to the department. She also acknowledged that she told the social worker that the home was not a safe environment because of Matthew's violent fits.

¶10 Lisa described Mark as the calming influence in the house and said she had never before this incident seen Mark engage in any physical abuse of Matthew and she would have reported it if she had seen it.

¶11 Lisa testified that she and Mark participated for three months in a program to help them deal with Matthew's behavior and they tried to implement what they were told; what she could remember were time outs and not to swear so much in the house. Also, she and Mark on their own found a psychologist and a psychiatrist to help them cope with Matthew's cognitive disabilities and treat him with medications. They have regularly attended those appointments and, as far as she is aware, she and Mark have participated in all the programs as directed by the department. She herself has seen a counselor since before Matthew came to live with them; she suffers from depression and anxiety and takes medication for those disorders.

¶12 Lisa's friend testified about coming over to the house in response to Lisa's phone call on February 19. Lisa told her that Mark had smacked Matthew. When the friend asked Matthew to raise his shirt, she saw a hand mark that had formed a bruise. Matthew told her that his dad had hit him and also put his hands around his neck to choke him. She saw bruises around his neck like circles, like marks fingers would leave. She corroborated Lisa's testimony that she told Lisa she needed to report this right away because Lisa was in the First Offender program. On cross-examination, Lisa's friend testified that she had visited Mark and Lisa frequently or they would come to her house. She saw their children on these visits and thought they behaved normally; the only physical disciplining she saw was possibly swatting the kids on the rear, with their clothes on, to make them sit down.

¶13 The foster mother in whose home Matthew resided after he was removed from his father's home testified that in her view he functions like a seven or eight-year old. She described his behavior as good. She had not had problems with his behavior; he and Lisa's children got along well; and she had not had to use any kind of physical force on him.

¶14 According to Gaber, the deputy sheriff who investigated the February 19 incident with her determined there was not enough evidence to establish a crime of physical abuse.

¶15 In making its ruling at the close of the department's evidence, the circuit court considered the jury instructions for WIS. STAT. § 48.13(10), WIS JI—

CHILDREN 250.[3] The court determined there was no evidence of a lack of food, clothing, medical or dental care, or shelter. The court also determined there was no evidence that the parent had refused for any reason to provide necessary care and no evidence that any such failure had endangered the child's physical health. The court observed that the method of disciplining Matthew may not have been

[3] WISCONSIN JI—CHILDREN 250 provides that the burden on the petitioner is to prove these two elements by evidence that is clear, satisfactory, and convincing to a reasonable certainty:

> The first element requires that you find that (parent) failed to provide necessary care as a result of neglect, refusal, or inability, or some combination of those factors. "Neglect" means a failure to provide which is neither intentional nor due to parental incapacity but rather is due to an inattentive state of mind. "Refusal" is a willful and intentional failure to provide. "Inability" means an incapacity on the part of the parent to perceive or to respond adequately to the needs of the child but does not include an incapacity which is solely the result of poverty.
>
> "Necessary care" means that care which is vital to the needs and the physical health of the child. Parents have the right and duty to protect, train, and discipline their children; to supervise their activities; to provide food, clothing, medical and dental care, and shelter. In determining what constitutes necessary care, you may consider all of the facts and circumstances bearing on the child's need for care, including his or her age, physical condition and special needs.
>
> The second element requires that the failure to provide care seriously endangered the (child)'s physical health. "Physical health" refers to bodily health and safety and does not include the mental or emotional health of the child. The physical health of the child is "seriously endangered" if the failure to provide care creates a significant risk that the child will be seriously harmed or injured. However, actual harm or injury need not have occurred. In determining whether the physical health of the child was seriously endangered, you may consider the natural and probable consequences of the failure to provide care. You may also consider the nature of any possible harm to the child and the level of risk that a particular harm will occur.

(Endnotes omitted.)

entirely appropriate, but also observed that was not the standard. The court pointed out that there was no evidence that the discipline had seriously endangered Matthew's physical health and there was no evidence of a pattern of causing bruises to him. The court also noted the testimony that no charges for child abuse were filed. The court commented that the testimony showed that the children were doing well in the foster home, but observed that this was not the standard for removing them from their home. The court's conclusion was that the State had not carried its burden of proving that the standard of WIS. STAT. § 48.13(10) was met by clear, satisfactory, and convincing evidence. Accordingly, it ordered that the petition be dismissed and Matthew be returned to his father's home.

ANALYSIS

¶16 The guardian ad litem first argues that the circuit erred because it ruled that, as a matter of law, the petition should have been filed under WIS. STAT. § 48.13(3), which governs child abuse,[4] rather than under § 48.13(10). This was error, the guardian ad litem argues, because the district attorney's office has the discretion whether to file charges for child abuse and whether to bring the petition under § 48.13(10) rather than § 48.13(3).

[4] WISCONSIN STAT. § 48.13(3) provides:

> 48.13 **Jurisdiction over children alleged to be in need of protection or services.**
>
> ….
>
> (3) Who has been the victim of abuse, as defined in s. 48.02 (1) (a), (b), (c), (d), (e) or (f), including injury that is self-inflicted or inflicted by another;

¶17 Whether the circuit court applied the correct legal standard is a question of law, which this court reviews de novo. ***Gallagher v. Grant-Lafayette Elec. Co-op.***, 2001 WI App 276, ¶15, 249 Wis. 2d 115, 637 N.W.2d 80 (citation omitted).

¶18 We disagree with the guardian ad litem's characterization of the circuit court's ruling. When read in context, the circuit court's comments are not a ruling that the petition could not, as a matter of law, be brought under WIS. STAT. § 48.13(10). Rather, the court was inferring from Gaber's testimony that the district attorney or the deputy sheriff did not believe Mark's conduct was serious enough to constitute child abuse. We will discuss the circuit court's role in drawing inferences from the evidence in subsequent paragraphs. At this point it suffices to say that we conclude the circuit court did not make the legal ruling the guardian ad litem asserts it did.

¶19 The guardian ad litem next argues that the circuit court applied an incorrect standard in dismissing the complaint. According to the guardian ad litem, the circuit court should not have dismissed the petition at the close of the department's case because there is evidence that supports the allegations in the petition. The guardian ad litem relies on ***Prahl v. Brosamle***, 98 Wis. 2d 130, 134, 295 N.W.2d 768 (Ct. App. 1980), which holds that a circuit court should not grant a motion to dismiss at the close of plaintiff's case if, under any reasonable view of the credible evidence and inferences from that evidence, a jury could find for the plaintiff.[5] Implicit in the guardian ad litem's argument is that our review of the

[5] ***Prahl v. Brosamle***, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980), was abrogated on other grounds by ***Wilson v. Lane***, 526 U.S. 603 (1999).

evidence should also be viewed in the light most favorable to the department. *See* ***id.***

¶20 Matthew disagrees with this standard of review. He argues that, because the circuit court was sitting as a finder of fact, we must consider the evidence, including all reasonable inferences from the evidence, in the light most favorable to the court's determination and defer to the circuit court's assessment of the weight of the evidence and the credibility of the witnesses. Matthew relies on ***Priske v. General Motors***, 89 Wis. 2d 642, 656, 279 N.W.2d 227 (1979), which sets forth the deferential standard used to review the determination of a fact finder, there a jury. Because the guardian ad litem did not file a reply brief, we do not know whether she disagrees with this standard of review nor how she would analyze the evidence under this standard of review.[6]

¶21 We conclude the case law supports Matthew's position on this point rather than the guardian ad litem's. The guardian ad litem's position overlooks the significant distinction between cases tried to a jury and cases, like this, in which the circuit court is the fact finder. When a case is tried to the court rather than to a jury, the court's dismissal at the close of the plaintiff's case constitutes a disposition of the case on its merits, and we review the dismissal as we do findings of fact made by the circuit court. ***Household Utils., Inc. v. Andrews Co.***, 71 Wis. 2d 17, 24-25, 236 N.W.2d 663 (1975). *See also* ***In re Estate of Koenigsmark***, 119 Wis. 2d 394, 397-98, 351 N.W.2d 169 (Ct. App. 1984). We do not reverse

[6] We may treat an appellant's failure to refute a proposition in a responsive brief as a concession. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). However, in this case we choose to decide the issue of the appropriate standard of review and to apply that standard to the evidence.

findings made by a circuit court sitting as a fact finder unless they are clearly erroneous. WIS. STAT. § 805.17(2). Thus, on this appeal we do not view the evidence in the light most favorable to the department. ***Household Utils., Inc.***, 71 Wis. 2d at 25. Rather, we accept the credibility assessments, the view of the evidence, and the reasonable inferences from the evidence made by the circuit court. *See* ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980).

¶22 Applying this standard we conclude that the circuit court could reasonably decide that the department did not present clear and convincing evidence that Mark had failed to provide necessary care to Matthew and such failure seriously endangered the child's physical health. The circuit court correctly noted that whether Matthew was doing well in foster care is not the standard. Similarly, whether Mark and Lisa could or should be doing a better job to meet Matthew's special needs is not the proper standard. The guardian ad litem's argument that neither Mark nor Lisa provides adequately for Matthew's special needs is couched in terms of a standard not contained in the statute. Care for Matthew's special needs is "necessary care" only if it "is vital to [his] needs and physical health," WIS JI—CHILDREN 250, and failure to provide that care must "seriously endanger [his] physical health." WIS. STAT. § 48.13(10).

¶23 Viewing the evidence and reasonable inferences from the evidence most favorably to the circuit court's determination, a reasonable fact finder could find that, while Mark did use physical contact to discipline Matthew, he did so only when other methods did not work and only as necessary to control him. A reasonable fact finder could also find that, while the physical discipline on this occasion left bruises on Matthew, Mark was not attempting to choke Matthew and the physical discipline did not seriously endanger Matthew's physical health. A

reasonable fact finder could also decide that Lisa's inappropriate method of disciplining Matthew in December 2003 had not been repeated and her current method of discipline did not seriously endanger Matthew's physical health. If a fact finder viewed the evidence in this way, it could reasonably decide that, even if the use of physical discipline on Matthew constituted a failure to provide necessary care—an issue we need not decide—there was not clear and convincing evidence that the failure to do so seriously endangered Matthew's physical health. While there may be competing reasonable inferences from the evidence, or different credibility determinations the circuit court might have made, that is not a basis for reversal under the correct standard of review. ***Rivera***, 95 Wis. 2d at 388.

¶24 Because the evidence, viewed most favorably to the circuit court's determination, supports that determination and the circuit court's findings of fact were not clearly erroneous, we affirm the circuit court's dismissal of the petition.

By the Court.—Order affirmed.

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