

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 01-0434

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF JENNIFER N. K.,
A PERSON UNDER THE AGE OF 18:**

WINNEBAGO COUNTY,

PETITIONER-RESPONDENT,

V.

KURT J. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
ROBERT A. HAWLEY, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Kurt J.K. appeals from a CHIPS dispositional order of the circuit court placing his daughter Jennifer N.K. with her maternal grandparents. Kurt's arguments primarily focus on the sufficiency of the evidence justifying this placement. Kurt also argues that something more than the best interests of the child must justify placement of the child outside of the parental home. We disagree with Kurt's arguments and affirm the order of the circuit court.

FACTS

¶2 On November 28, 2000, the Winnebago County Department of Human Services filed a petition requesting that Jennifer, as a victim of child abuse, be found in need of protection or services pursuant to WIS. STAT. § 48.13(3). Jennifer's parents, Debbie S. and Kurt, were divorced and Jennifer lived with Debbie and her stepfather in Oshkosh; Kurt lived in Kenosha and had visitation rights with Jennifer and her two sisters. The petition alleged that Jennifer's stepfather had attempted to strangle her, causing her bodily injury.

¶3 A court trial regarding the CHIPS allegations was held on January 12, 2001. Jennifer was found to be in need of protection and services. The court placed Jennifer with her maternal grandparents pending disposition, pursuant to a November 22, 2000 temporary physical custody order.² Jennifer's maternal grandparents lived in the Oshkosh area, near Debbie.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² One week earlier, on January 5, 2001, Debbie and Kurt filled out and signed a Petition, Stipulation and Order Amending Judgment Affecting Family changing Jennifer's primary placement to Kurt. However, this order was not signed by a judge or a family court commissioner and it is not clear if this petition was ever filed with the family court.

¶4 A dispositional report was filed by a social worker with the circuit court on January 23, 2001. The report detailed a history of physical abuse of Jennifer in her mother's home by her stepfather. The report noted that Jennifer, almost sixteen years old, is a sophomore at Omro High School, where she is an A/B student. Jennifer is employed, has never been a behavioral problem and has had few school absences. The report indicated that Jennifer wished to reside with her grandparents and recommended continued placement with Jennifer's maternal grandparents while her parents retained legal custody.

¶5 The dispositional hearing was held on January 26, 2001. Jennifer, Kurt, Debbie and Jennifer's maternal grandparents all appeared and provided statements to the court. The social worker, corporation counsel and Jennifer requested continued placement at her maternal grandparents' home. Jennifer herself stated:

[I'm] [j]ust sick of everybody fighting over something. That the only thing that this court system has taught me is I should have kept my mouth shut when I was being abused. I feel that because I spoke out everything is being taken away from me. Since I was little because my parents didn't get along, I had to move; and because they got divorced, I had to move; and because my mom remarried, I had to move; and now because her husband can't control his own actions, I have to move. And I just wish that I could finish what I've started. I have a year and a half of high school left because we are changing back to [block] scheduling and I feel that if I have that opportunity to actually take more classes in one year that I could continue my education and go to college earlier before the rest of my class just so I can go on with my own life and prove that I'm not going to repeat the same things that everybody else has done in my life.

Jennifer's maternal grandparents also wanted her placed with them. Debbie essentially agreed to this placement. Kurt requested placement with him.

¶6 The circuit court ordered continued placement with Jennifer's maternal grandparents. A dispositional order was signed on January 30, 2001, and filed with the court on February 5, 2001. Kurt filed a motion for reconsideration, which was denied. Kurt appeals from the dispositional order.

DISCUSSION

¶7 Disposition of a CHIPS petition lies within the discretion of the circuit court. *R.E.H. v. State*, 101 Wis. 2d 647, 653, 305 N.W.2d 162 (Ct. App. 1981). We will not overturn a discretionary decision unless it is apparent that the court's discretion was exercised arbitrarily or on the basis of completely irrelevant factors. *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 181, 311 N.W.2d 673 (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 (Ct. App. 1993).

¶8 While, as in all discretionary acts of a court, reasonable persons may sometimes differ in the outcome, all that this court need to find to sustain a discretionary act is that the circuit court considered the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Factual findings of the court will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2). When we test the sufficiency of the facts of record to sustain a decision, we do not search for facts contrary to it; instead, we will look for reasons to sustain the circuit court's decision. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶9 Citing to *Barstad v. Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1984), and *Troxel v. Granville*, 530 U.S. 57 (2000), Kurt contends that in the instant case, “the facts do not support a finding of compelling circumstances to award placement to a third party” and “a court must find more than best interest of the child to award placement to a third party as opposed to a parent.”

¶10 Kurt misunderstands the appropriate standards in the type of case at hand. *Barstad* and *Troxel* both dealt with custody disputes, not placement in a CHIPS proceeding. This placement is within the context of a CHIPS proceeding where Jennifer has already been found to be in need of protection and services. Kurt does not appeal that CHIPS finding and so principles of CHIPS case law, not custody case law, apply.

¶11 The rules of WIS. STAT. ch. 48, the Children’s Code, govern this action. WISCONSIN STAT. § 48.355(1)³ allows the court to determine the appropriate placement for a child; at the same time, it requires that the court balance several competing interests: (1) maintaining and protecting the child’s well-being; (2) employing means which are the least restrictive of parental rights, while assuring care and treatment of the child; and (3) preserving the family unit when consistent with the child’s best interests. The best interests of the child is

³ WISCONSIN STAT. § 48.355 addresses dispositional orders and states, in relevant part:

(1) INTENT. In any order under s. 48.345 ... the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the well-being of the child ... which are the least restrictive of the rights of the parent and child ... which assure the care, treatment or rehabilitation of the child and the family ... consistent with the protection of the public.

the polestar of all determinations under ch. 48. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993).

¶12 WISCONSIN STAT. § 48.345 addresses the disposition of a child adjudged in need of protection or services and states, in relevant part:

If the judge finds that the child is in need of protection or services ... the judge shall enter an order deciding one or more of the dispositions of the case as provided in this section under a care and treatment plan The dispositions under this section are as follows:

....

(3) Designate one of the following as the placement for the child:

(a) The home of a parent or other relative of the child The judge shall consider the wishes of the child in making that determination.

¶13 Under WIS. STAT. § 48.64(4)(c), the all-encompassing standard is the child's best interests. *Richard D. v. Rebecca G.*, 228 Wis. 2d 658, 673, 599 N.W.2d 90 (Ct. App. 1999). The statute's mandates are plain: "The court shall determine the case so as to promote the best interests of the child." *Id.* This is also the central focus of the Children's Code as a whole. *Id.*; WIS. STAT. § 48.01(1).

¶14 Kurt argues that there is no evidence that he is an unfit parent or that he could not provide a safe home for Jennifer. However, a parent need not be unfit for the best-interests standard to apply. See *Richard D.*, 228 Wis. 2d at 664. Safety is not the primary factor the court needs to consider. *Id.* at 673-74. Safety and best interests are not synonyms; a child can be safe in an environment that is not in his or her best interests. *Id.* The best interests of the child standard is to be defined in relation to the child, and not to be used as a euphemism for the fitness

of a parent's home. *Sallie T. v. Milwaukee County DHHS*, 219 Wis. 2d 296, 311, 581 N.W.2d 182 (1998).

¶15 Here, the trial court found the following:

Well, Jennifer there's no doubt in my mind that you've been a victim of abuse and in a lot of different ways. You come from an abusive family at the outset, your father and mother, now with your new stepfather and your present mother who's gotten herself back in essentially the same situation. She doesn't recognize it but I see it in court probably every single week, that goes from one abusive situation to the next.

So I do find you're a classic child of, victim of abuse and in an abusive situation, be that physically, emotionally, verbally, however you want to phrase it. And ... contrary to what your father says, there does come a point in time where I think a juvenile even as young as 15 with the maturity that you have exhibited here, the maturity of doing well in school, willing to follow the court rules and willing to take a job, your voice has to ring loud and clear above your parents' voice who I find to be in some respects dysfunctional.

To rip you out of a school that you're doing well in, in a community that you're doing well in and that you're very well respected, that you have a job and you have friends, that's all very important in high school I feel and it rises sometimes above the relationship that you would have on a daily basis albeit with your mother or with your father.

So it's for all of those reasons I find that it is in your best interest as a victim of abuse, of physical, emotional, verbal, verbal abuse that you are to be placed with your maternal grandparents

¶16 The circuit court applied the correct standard; the best interests of the child is the overriding standard in this and all CHIPS situations. Jennifer asked to stay with her maternal grandparents. Jennifer is almost sixteen years old and a sophomore at Omro High School, where she is an A/B student. She is employed, has never been a behavioral problem and has had few school absences.

Based upon these relevant factors, it was not an arbitrary exercise of discretion to place Jennifer in her maternal grandparents' home. We therefore affirm the CHIPS dispositional order.

By the Court.—Order affirmed.

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

