

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 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. 01-0503

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF MEGAN D.,
A PERSON UNDER THE AGE OF 18:**

DUNN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JEFFERY S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Affirmed.*

¶1 PETERSON, J.¹ Jeffery S. appeals an order terminating his parental rights to his daughter, Megan D. Jeffrey argues: (1) the trial court erroneously exercised its discretion by admitting evidence of his prior criminal convictions; (2) the evidence introduced at the fact-finding hearing was insufficient to satisfy the ground of continuing need for protection or services; and (3) the trial court erroneously exercised its discretion by terminating his parental rights as being in the best interest of the child. WIS. STAT. § 48.415(2). We disagree and affirm the order.

BACKGROUND

¶2 Megan was removed from her home in March of 1998 when she was one year old. She was found to be a child in need of protection and services (CHIPS). The CHIPS dispositional order stated six conditions for Jeffrey to meet: (1) keep all expenses paid and up to date; (2) have adequate housing; (3) have no law enforcement problems; (4) engage in regular visits with Megan; (5) undergo alcohol assessment; and (6) pay child support if employed.

¶3 On June 22, 2000, the Dunn County Department of Human Services petitioned for termination of Jeffrey's parental rights on the grounds of continuing need of protection or services. The petition alleged that Jeffrey had not complied with the CHIPS dispositional order and that there was a substantial likelihood that he would not meet those conditions within twelve months. Jeffrey had been in

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

prison since the spring of 1998 for absconding from probation.² Jeffrey contested the petition and the matter was set for trial.

¶4 Before trial, Jeffrey moved to exclude evidence of his prior criminal history and a restraining order brought by his parents against him in 1996 and again in 1998. The trial court denied his motion.

¶5 At trial, Delores Wickham, a social worker, testified that Jeffrey had been in prison for much of Megan's life and that he had failed to comply with the CHIPS dispositional order. She stated that Jeffrey was not cooperative with his caseworkers. She further stated Jeffrey had only a sparse work history, and that he had offered nothing to show he could provide for Megan.

¶6 Wickham further testified that Megan had a close relationship with her half-brother, Aaron.³ According to Wickham, the relationship between siblings was strong. Wickham eventually concluded that it would be unlikely for Jeffrey to substantially fulfill the CHIPS dispositional order within twelve months.

¶7 Gail S., Jeffrey's mother, also testified. She stated that she and her husband obtained a restraining order against Jeffrey because they were afraid of him. She testified that she had endured years of harassment and threatening letters from Jeffrey, demanding thousands of dollars. However, she did say that Jeffrey was a good father.

² Jeffrey's scheduled release was in October of 2000.

³ Aaron is not Jeffrey's son.

¶8 The jury concluded that the County had established the alleged termination grounds. The dispositional hearing was held on October 20, 2000. The trial court terminated Jeffrey's parental rights. This appeal followed.

DISCUSSION

I. PRIOR CRIMINAL HISTORY

¶9 Jeffrey argues that the trial court erroneously exercised its discretion by allowing evidence of his prior criminal history and previous restraining orders. Jeffrey contends that the probative value of his prior criminal history is outweighed by its prejudicial effect. He further contends that his prior criminal history is irrelevant because his criminal convictions occurred before Megan was born and did not involve any emotional or physical abuse of Megan.

¶10 The admissibility of evidence is within the trial court's discretion. *See State v. Briggs*, 214 Wis. 2d 281, 292, 571 N.W.2d 881 (Ct. App. 1997). The issue of relevancy "must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct." *State v. Pharr*, 115 Wis. 2d 334, 344, 340 N.W.2d 498 (1983) (quoted source omitted). The trial court's decision will be upheld unless it constitutes an erroneous exercise of discretion. *Id.* at 345.

¶11 At trial, the court allowed the jury to hear evidence relating to Jeffrey's prior criminal history. Wickham made reference to Jeffrey's prior convictions and circumstances surrounding his absconding from probation. Jeffrey himself was asked about his prior convictions and the events surrounding the restraining order. Jeffrey's mother also testified about the restraining order.

The State used this evidence to portray Jeffrey as a parent who would be unable to provide a stable home.

¶12 Jeffrey argues that his prior convictions for burglary and worthless checks were in no way related to his ability to be a parent. He contends that the trial court violated *State v. Smith*, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996).⁴

¶13 The State contends that it offered evidence of Jeffrey's prior convictions to show that Jeffrey does not have the ability to be a parent, rather than to impeach his credibility. WISCONSIN STAT. § 904.05(2) provides that when the character or a trait of character of a person is an essential element of the charge, claim, or defense, proof may be made of specific instances of conduct. Two elements of WIS. STAT. § 48.415(2) are whether Jeffrey has failed to demonstrate substantial progress toward meeting the conditions of return of the child and whether there is a substantial likelihood that he will not meet these conditions in the future. These elements specifically go to the issue of whether Jeffrey will be able to provide a stable environment for Megan.

¶14 Jeffrey's absence from Megan was due to his incarceration for absconding from probation. A trial court cannot ignore the circumstances of why Jeffrey was not physically available. Whether Jeffrey committed crimes in the past is not relevant to whether he is a bad person. However, evidence of Jeffrey's prior criminal history and the harassment of his parents are relevant to his ability

⁴ In *Smith*, our supreme court stated, "Wisconsin law is very clear that if evidence of prior convictions is admitted, witnesses may be asked if they have been convicted of a crime and if the answer is yes, the number of convictions." *State v. Smith*, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996).

to care for Megan. Evidence of criminal activities that could put Jeffrey at risk of incarceration hinders his parenting ability. His actions also hamper his ability to contribute to Megan's care and expense. Therefore, we conclude that the trial court properly exercised its discretion in admitting evidence of Jeffrey's criminal history and the restraining order obtained by his parents.

II. SUFFICIENCY OF THE EVIDENCE

¶15 Next, Jeffrey argues that the evidence introduced at the fact-finding hearing was insufficient as a matter of law to satisfy the ground of continuing need for protection or services, pursuant to WIS. STAT. § 48.415(2).

¶16 “Grounds for termination of parental rights must be proven by clear and convincing evidence.” *Ann M.M. v. Rob S.*, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). The burden is on the State to establish by clear and convincing evidence that the parent has not met the conditions to establish the return of the child. *In re T.M.S.*, 152 Wis. 2d 345, 358 n.11, 448 N.W.2d 282 (Ct. App. 1989).

¶17 We examine the evidence and reasonable inferences drawn from the evidence in a light most favorable to the verdict. *State v. Pankow*, 144 Wis. 2d 23, 30, 422 N.W.2d 913 (Ct. App. 1988). We will only substitute our judgment for the trier of fact's when the fact finder relied upon evidence that was inherently or patently incredible. *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶18 Continuing need of protection and services requires:

That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn

child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

WIS. STAT. § 48.415(2)(a)3.

¶19 At trial, the jury heard evidence that Jeffrey had been in prison for much of Megan's life. The evidence established that Jeffrey was unable to meet a number of the conditions of the CHIPS dispositional order. The State showed that Jeffrey was unable to provide adequate living arrangements for Megan and that he was unable to financially provide for her. The State also showed that Jeffrey did not regularly visit Megan. Jeffrey wrote Megan letters, but he only contacted her once by phone and did not pay child support, even though he was making money working in prison. There was testimony that Jeffrey failed to contact social workers to discover what programs were available to him and that he failed to timely send the proper information to social workers. Finally, there was testimony from Jeffrey's parents that Jeffrey had a history of threatening his parents with violence unless they provided him with money.

¶20 Based upon this evidence, the jury could reasonably determine that Jeffrey failed to comply with the CHIPS dispositional order and that there was a substantial likelihood that he would not meet the conditions within the following twelve months.

III. BEST INTERESTS OF THE CHILD

¶21 Last, Jeffrey argues that the trial court erroneously exercised its discretion by determining that it was in Megan's best interest to terminate his

parental rights. He contends that, pursuant to WIS. STAT. § 48.01(1)(a), the court must preserve family unity wherever possible.

¶22 It is well established that the determination of the child's best interests is committed to the trial court's discretion. *In re Brandon S.S.*, 179 Wis.2d 114, 150, 507 N.W.2d 94 (1993). The court properly exercises its discretion when it employs a rational thought process based on an examination of the facts and application of the correct standard of law. *Id.*

¶23 The trial court must apply the standard and factors set forth in WIS. STAT. § 48.426 when determining the disposition. The best interests of the child are paramount. WIS. STAT. § 48.426(2). The child's best interests are determined by examining, among other things, the likelihood of the child's adoption after termination, the child's age and health, whether the child has substantial relationships with the parent or other family members and if it would be harmful to sever those relationships, the wishes of the child, how long the child has been separated from the parent, and whether a new environment will provide a more stable and permanent family relationship. WIS. STAT. § 48.426(3).

¶24 Here the trial court correctly considered these factors in reaching its decision, while considering Megan's best interest. Jeffrey contends that the trial court disregarded the fact that he had family members who wanted to adopt Megan. However, this argument ignores the fact that Megan was in foster care for thirty-three out of the first forty-two months of her life. WISCONSIN STAT. § 48.01(1)(a) requires that one of its goals is to "preserve the unity of the family, wherever appropriate." Because of Megan's age and the amount of time she has spent in foster care, the trial court did not err by determining that preservation of the family was not a controlling factor. There was no family to preserve.

¶25 Next, Jeffery argues that he should have been given six more months to prove himself a fit parent and to fulfill the requirements of the CHIPS dispositional order. However, Jeffery had since June of 1998 to fulfill the order. There is no reason to believe that Jeffrey would have complied with the order had the trial court given him another six months. The trial court properly determined that further delay did not promote stability and therefore this proposal was not in Megan's best interest.

¶26 Jeffrey further argues that because Megan is only three years old, it would not harm her to allow Jeffrey another six months to prove he is a fit parent. Again, the trial court found that Jeffrey did not have a substantial relationship with Megan and properly determined that waiting for another six months would be in Jeffrey's best interest, not Megan's.

¶27 Finally, Jeffrey argues that the trial court improperly stressed Megan's relationship with her half-brother when there was no evidence to support the existence of such a relationship. He contends that the trial court improperly considered Megan's relationship with her aunt and uncle and their desire to adopt her.

¶28 The trial court did not make this determination in a vacuum. Wickham testified that Megan and Aaron had a strong bond with one another and that it was important to keep them together. While Megan did have a relationship with her aunt and uncle, the trial court determined that it would not be in Megan's best interest to sever the relationship with her half-brother Aaron.⁵

⁵ Megan's aunt and uncle wished to adopt her, but they did not want to adopt Aaron after he expressed his wishes to stay in his current foster home. Therefore, allowing Megan's aunt and uncle to adopt her would sever her bond with her half-brother.

¶29 The record establishes that the trial court considered the appropriate factors and did not erroneously exercise its discretion by determining that it was in Megan's best interest to terminate Jeffrey's parental rights.

By the Court.—Order affirmed.

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

