

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2001

Cornelia G. Clark
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.

No. 01-2095

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
DANIEL M.E., A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPT. OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

DAWN M. E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
JOHN D. MCKAY, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Dawn M.E. appeals an order terminating her parental rights to her son, Daniel M.E.² She contends that the evidence was insufficient to support the jury finding grounds to terminate her parental rights. Dawn also argues that the trial court erroneously exercised its discretion when it terminated her parental rights. This court disagrees and affirms the order.

BACKGROUND

¶2 Daniel was born to Dawn on January 6, 1993. He was removed from Dawn's home on September 4, 1997. A CHIPS³ order was entered in February 1998 and extended in 1999 and 2000. The order notified Dawn of the conditions under which her parental rights could be terminated, including Daniel's continuing need of protection or services as defined in WIS. STAT. § 48.415(2).⁴

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

² Daniel's father, Matthew P., voluntarily terminated his parental rights. The termination of his rights is not at issue in this matter.

³ CHIPS is an acronym for child in need of protection or services. See WIS. STAT. § 48.415(2). A CHIPS order is issued pursuant to WIS. STAT. § 48.13.

⁴ WISCONSIN STAT. § 48.415(2) provides:

Grounds for termination of parental rights shall be one of the following:

....

(2) CONTINUING NEED OF PROTECTION OR SERVICES ... shall be established by proving any of the following:

(a)1. That the child has been adjudged to be a child ... in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363 [or] 48.365 ... containing the notice required by s. 48.356(2)

....

(continued)

The order also outlined conditions Dawn had to meet for Daniel's return to her care. It required Dawn (1) to participate in medical and psychological treatment and follow the recommendations of her providers; (2) to be less preoccupied with Lyme disease, whether or not she and Daniel have the disease; (3) to complete a parenting education course including an implementation phase; (4) to demonstrate ongoing mental health stability and not allow her mental health issues to interfere with her ability to parent Daniel; (5) to have age appropriate expectations of Daniel and exhibit appropriate parenting; and (6) to maintain a stable lifestyle and a healthy home environment.

¶3 On October 12, 2000, the Brown County Department of Human Services filed a petition for the termination of Dawn's parental rights. The department alleged as grounds that Daniel was in continuing need of protection and services. The specific grounds the department needed to prove under WIS. STAT. § 48.415(2) were (1) that Daniel was adjudged to be in need of protection and services and placed outside his home for six months or longer pursuant to a court order; (2) that the department made a reasonable effort to provide the court ordered services; (3) that Dawn failed to meet the conditions established for the Daniel's safe return to her home; and (4) that there was a substantial likelihood

2.b. That the agency responsible for the care of the child and the family ... has made a reasonable effort to provide the services ordered by the court.

3. That the child has been outside the home for a cumulative total period of six months or longer pursuant to such orders ... 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.

that Dawn would not meet the conditions within the twelve-month period after the trial.

¶4 On April 19-20, 2001, the matter was tried to a jury. Dawn's social workers testified that the primary goal they set for Dawn was to make progress with her mental health issues. They also required Dawn to provide stability, supervision and disciplinary structure for Daniel. Finally, the social workers expected Dawn to complete parenting education and show her ability to apply what she learned.

¶5 Dawn's court-appointed psychiatrist testified that he diagnosed her with a delusional disorder and paranoia. She exhibited delusional thinking, delusional obsessions about her and Daniel's health, anxiety, depression and paranoia. Her social worker testified that Dawn rejected at least four therapists before agreeing to continue treatment with one of them. The social worker also testified that Dawn's ongoing mental health problems prevented her from being able to parent Daniel.

¶6 Dawn's primary care physician, Dr. Ronald Molony, testified that Dawn had established a pattern of not following through with recommended care. Although Molony determined that neither Dawn nor Daniel had Lyme disease, he nonetheless observed that she continued to obsess about her and Daniel's health. Dawn's physician, therapist and social worker all testified that her preoccupation with Lyme disease prevented her from dealing constructively with any other issues. Also, despite medical evidence to the contrary, Dawn insisted at provider meetings that she suffered from heart disease. Also, a social worker testified that Dawn obsessed about Daniel's height and weight and even brought a scale to

visitation to weigh Daniel and brought food for him to take back to his foster home.

¶7 A social worker testified that, initially, Dawn refused to take medication to treat her mental health problems. Providers offered Dawn incentives to convince her to begin taking her medication, which she eventually agreed to do if Human Services awarded her visitation with Daniel outside the agency. Dawn told her social workers she was taking her medication, but she lied about her usage and her condition did not improve. Finally, Dawn agreed to participate in the Outagamie Supportive Apartment Program (OSAP) that came to her home daily and administered her medications only after Human Services offered her the possibility of unsupervised visits.

¶8 Dawn's psychotherapy likewise was ineffective. During three years of counseling, Dawn's therapist testified she made no significant progress. In therapy, Dawn refused to admit or accept that she had a delusional disorder. Therefore, she was unable to set treatment goals with her therapist or make progress. Her therapist testified that Dawn's mental health remains unstable and will continue to interfere with her ability to parent Daniel. Dawn's therapist stated that the situation will not improve any more than it already has, even with another year of treatment. Dawn's psychiatrist testified that she needs treatment for at least two more years before any further prognosis would be considered.

¶9 A social worker testified that Dawn repeatedly refused to work with social workers, service providers, and physical and mental health professionals. The social worker reported that Dawn was reclusive, refused to answer the door for social workers and other providers, missed scheduled appointments, failed to return phone calls and left her mail in the mailbox for weeks at a time. Another

social worker said Dawn made very little progress in the first year of the CHIPS order because the time was primarily spent attempting to persuade her to accept services.

¶10 Social workers testified that often garbage, dirty dishes, old food, clothes, paper and other junk so cluttered Dawn's house that it was difficult to walk through it. Dawn complained to them about a lack of "energy" and would not clean the house. A social worker testified that Dawn could not manage her finances. In fact, she was evicted for nonpayment of rent.

¶11 After more than twelve consecutive months of weekly and sometimes biweekly assistance, Family Training discharged Dawn from its parenting education program. The parenting instructors testified they concluded that their services were ineffective because Dawn could verbalize what she was taught, but could not—or would not—implement it. The parenting instructors also testified they could do nothing further to make Dawn's home safe for Daniel without her cooperation.

¶12 A social worker testified that Daniel decided what activities he and Dawn were going to engage in during visits, and that he told Dawn what to say and when to say it. She also saw that Dawn allowed Daniel to be in control, even when service providers gave Dawn specific suggestions for responding to Daniel's refusal to cooperate with her. For example, the social worker testified that, during visits at her home, Dawn allowed Daniel to play outside, unsupervised, and near busy streets. Often, she did not know where he was. Dawn refused to go out and check on him, even when prodded by a social worker.

¶13 Dawn stabilized and began to make real progress in March, April and May of 1999 after starting OSAP. Social workers observed that Dawn began

to show significant insight: Her personal hygiene and attitude noticeably improved; she was organized and engaged; the shades of her residence were open; she answered the door; the house was clean; and her attitude was upbeat. She even chaired provider meetings and wrote a letter thanking her psychiatrist. Dawn's social workers were optimistic.

¶14 During May of 1999, however, service providers and social workers began to notice deterioration. They questioned whether Dawn was indeed taking all of her medication, even though OSAP was still monitoring her intake. The providers testified that they switched her medications to liquid form in an effort to better assure compliance. OSAP confirmed to a social worker that Dawn was taking her medications, yet some of her old patterns started to reappear and Dawn began to struggle again.

¶15 A social worker testified that, despite Dawn's deterioration from her high point, a psychological evaluation and bonding assessment in early 2000 determined that a reunification might be possible with a number of supportive services in place. Daniel was returned to Dawn's custody on February 4, 2000. The social workers reluctantly agreed because they felt Dawn deserved a chance to prove that she had learned from parenting educators and could implement what she had learned.

¶16 Almost immediately, the reunification failed. A social worker testified that Dawn lost her job and began complaining that she and Daniel were sick. Dawn refused to answer the door for or make contact with social workers and other service providers. Despite prior improvements, her social worker observed that the house again was cluttered and dirty. Most importantly, several providers testified that Dawn refused to discipline Daniel. A social worker said

Dawn refused to move the television from Daniel's room even though he stayed up late watching age-inappropriate shows. Several providers testified that Dawn did not know where Daniel was when he left the home, and she would leave the apartment without knowing where he was. A parenting instructor observed Daniel riding his bike unsupervised across a busy street. The parenting instructor witnessed Dawn, upon Daniel's request, give Daniel age-inappropriate and potentially dangerous items to play with unsupervised, like a screwdriver, hammer and nails.

¶17 A parenting instructor reported that Daniel's behavior also deteriorated rapidly after returning to his mother's home. A social worker testified that Daniel became increasingly aggressive and "out of control" at school. During home visits, Daniel was physically aggressive toward other children and the parenting instructors (kicking and throwing things). He also was verbally abusive toward Dawn in the presence of parenting instructors. Dawn claimed to a social worker and testified at trial that Daniel only misbehaved at home when the social workers were present.

¶18 On March 23, 2000, because of multiple safety concerns, the court removed Daniel from Dawn's care. Dawn resumed supervised visitation with Daniel. Social workers testified that Dawn grew increasingly worried about Daniel's weight and health, and she became increasingly reclusive. They said she continued to attend her therapy sessions, but avoided contact with social workers and other providers. Social workers believed she was not taking her medication and, indeed, Dawn told her therapist she did not think she needed to take her medication any longer.

¶19 Each service provider and social worker who testified agreed when asked that another year of services and treatment would not change the situation. The social workers both testified that they could not think of another service that would help Dawn meet the CHIPS conditions within a year. After three years, neither her mental condition nor her relationship with Daniel had fundamentally changed. She had been unable “to address her mental health issues in such a way that it would enable her to parent Daniel.” In short, Dawn was not likely to complete the conditions for return in the next twelve months.

¶20 On April 20, 2001, after a two-day trial, the jury found that (1) Daniel was in continued need of protection and services and had been placed outside the home for six months or longer pursuant to a court order; (2) the department made reasonable efforts to provide the court-ordered services; (3) Dawn failed to meet the conditions established by the court for Daniel’s safe return to the home; and (4) there is a substantial likelihood that Dawn will not meet these conditions within one year after the termination of parental rights hearing.

¶21 The trial court, consistent with the jury’s verdict, exercised its discretion to terminate Dawn’s parental rights at a dispositional hearing on May 15, 2001.

DISCUSSION

I. SUFFICIENCY OF EVIDENCE

¶22 This court will uphold a jury verdict if there is any credible evidence to support it. *Kinship Inspection Serv. v. Newcomer*, 231 Wis. 2d 559, 570, 605 N.W.2d 579 (Ct. App. 1999). The credibility of the witnesses and the weight

afforded to their testimony are left to the jury. *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). This court must search the record to find evidence supporting the verdict and accept all reasonable inferences drawn by the jury. *Heideman v. American Family Ins. Group*, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991). This court does not search for evidence to sustain a verdict the jury could have reached, but did not. *Richards*, 200 Wis. 2d at 671.

¶23 A verdict supported by sufficient evidence may not be overturned “unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” WIS. STAT. § 805.14(1). The record in this case contains ample evidence to support the jury’s finding.

¶24 Dawn argues that there was no credible evidence to support the jury’s verdict finding that Daniel was a child in need of protection and services and that there was not a substantial likelihood that she would meet the conditions of the order within one year of the trial. Specifically, Dawn makes three contentions. First, she asserts that there were “other explanations for Daniel’s behavior around social workers” that “were never looked at or explored.” Second, Dawn claims there was no credible evidence showing that she was a danger to Daniel. Finally, Dawn argues that there was insufficient evidence to support the finding that she would not meet the conditions of the order within one year if she diligently treated her mental illness. This court rejects these arguments.

¶25 Dawn’s arguments on sufficiency of the evidence do not address the proper standard of review. Rather, she argues factual disputes resolved by the jury

and asks this court to draw inferences from the record. It is not this court's function to reweigh the evidence heard at trial. If more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶26 Dawn's third argument addresses one aspect of the fourth verdict question, whether there is a substantial likelihood that Dawn would meet the conditions within a year. The overriding themes in the case were Dawn's inability and unwillingness to follow through with services, develop an appropriate relationship with her son and provide a healthy home environment. Significant evidence presented to the jury demonstrates these themes and supported the jury's answers to the verdict questions.

¶27 Abundant evidence supports the jury verdict as to each of the four special verdict questions. The evidence is uncontested as to the first jury question. It is undisputed that a court deemed Daniel in need of protection and services in February 1998 and, by order, placed Daniel outside Dawn's home. Daniel has been placed outside Dawn's home for six months under a CHIPS order. Dawn received both verbal and written termination of parental rights warnings.

¶28 The record similarly supports the jury's finding that the department made reasonable efforts to provide Dawn with court-ordered services. Social workers held service provider meetings at least monthly during the duration of the CHIPS order, fifty-three in all. The department provided services including supervision of visits, budgeting and home care, mental health care, administration of prescribed medication, in-home parenting education and psychological

evaluation. One social worker rated the amount of time she personally spent with Dawn as an eleven on a scale of one to ten. Another social worker testified that every service that “we could think of was offered to Dawn and provided to her.” She noted that she had never been involved in a case where more intensive supervision and services were provided.

¶29 Dawn contends that no evidence explored possible reasons for Daniel’s behavior around social workers other than her parenting. The record shows that the department focused on Dawn’s conduct with Daniel, not Daniel’s behavior. A social worker had to intervene when Dawn questioned Daniel about his weight and health, weighed him on a scale she brought and gave him bags of groceries to take back to his foster home. Another social worker observed Daniel controlling the home on two occasions and believed that Dawn was afraid to discipline or parent him. She noted that the house was dangerously cluttered when Daniel lived with Dawn. A home consultant, who supervised Dawn’s visits with Daniel, testified that (1) Daniel controlled the visits; (2) Dawn did not follow the rules of the supervised visits; and (3) Dawn did not supervise Daniel when he was playing outside. A parenting instructor had safety and supervision concerns with Dawn. In fact, the parenting program terminated Dawn because Daniel was at risk and their services were ineffective.

¶30 The record shows that the problem was not that Daniel acted out when social workers were present. Rather, the evidence demonstrated that Dawn could not appropriately parent Daniel. Although Dawn argues that no credible evidence showed she was a danger to Daniel, the evidence regarding her failure to supervise and control him was abundant and credible. The evidence supports the inference that Dawn was a danger to Daniel.

¶31 The department attempted reunification in February 2000. Despite the department giving Dawn explicit expectations and placing service providers in her home seven days a week, within five weeks it was clear to social workers that Dawn “was unwilling to be a parent to Danny.” The condition of the home deteriorated after Daniel returned to Dawn’s care. Social workers testified that Dawn left her job shortly after Daniel returned, there were reports that Daniel was unsupervised, and Dawn would not allow service providers into the home.

¶32 Dawn’s failure to meet the conditions necessary for the safe return of Daniel to her home is demonstrated by the failed forty-five day placement in her home. The social workers described three things Dawn had to do to have Daniel returned to her care. Dawn had to (1) deal with her mental health issues and become less occupied with Lyme disease; (2) show stability, structure, supervision and consistency in parenting Daniel; and (3) participate in a parenting program and demonstrate an ability to follow through in actually parenting Daniel.

¶33 According to the lead social worker on her case, Dawn had not addressed her mental health issues so as to be able to parent Daniel. The social worker testified that Dawn did not meet the objectives for stability and structure. The Family Training Program terminated Dawn because their services were ineffective when she refused to follow through with the parenting skills she was taught.

¶34 Dawn argues that no evidence showed she would be unable to meet the conditions in the next twelve months. She contends that she did everything she had been told, but was not given the proper medication to control her mental health problems. The record contradicts this argument. Dawn herself resisted any

change to her medication. Contrary to Dawn's argument, there was diligence in the treatment of her mental illness, including changing her medication.

¶35 Moreover, almost every social worker, service provider and physical or mental health professional who testified at trial concluded that Dawn was not likely to make progress in the next twelve months. The social workers both testified that they could not think of another service that would help Dawn meet the CHIPS conditions within a year. In fact, Dawn's psychiatrist offered his prognosis that Dawn would continue to need treatment "at least for the next two years or so." The jury reasonably believed the opinions of the providers who testified. *See id.*

¶36 The evidence presented at trial, as summarized above, supports the jury's verdict that Dawn failed to meet the conditions set forth in the CHIPS order. The jury had sufficient evidence upon which to base its decision that there were grounds to terminate Dawn's parental rights.

II. ERRONEOUS EXERCISE OF DISCRETION

¶37 Once grounds are established to terminate parental rights, the decision whether to actually terminate those rights is vested in the trial court's sound discretion. *In re Brandon S.S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). Although a court need not terminate parental rights after a jury finds grounds for termination exist, it may do so if it determines that termination of the parental rights is in the child's best interests. *See* WIS. STAT. §§ 48.424(3), 48.426; 48.427(2) and (3).

¶38 "[T]he trial court 'must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of

the child.” *In re J.L.W.*, 102 Wis. 2d 118, 131, 306 N.W.2d 46 (1981) (citation omitted). This court will not reverse the trial court’s decision absent an erroneous exercise of discretion. *In re Michael I.O.*, 203 Wis. 2d 148, 152-53, 551 N.W.2d 855 (Ct. App. 1996).

¶39 WISCONSIN STAT. § 48.426(3) specifies the factors a court must consider in determining whether the best interests of a child require termination of parental rights. It provides:

FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(a) The likelihood of the child’s adoption after termination.

(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(c) Whether the child has substantial relationships with the parents or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.

¶40 The court considered each of the statutory factors and decided to terminate Dawn’s parental rights. It had no doubt that the child’s adoption after termination could take place. Although there had been some dispute about Daniel’s health, the court found that “there is no medical conspiracy, and there is not a dearth of expertise in this state regarding the conditions as they relate to the

age and health of this child.” It recognized a substantial relationship between mother and son but found that the relationship has been “fraught with problems” and “out of kilter.” The court found that “[t]he wishes of the child are a difficult thing to assess” and deemed it “likely that this child would say what he had to say to whom he had to say it” Also, the court agreed with the guardian ad litem that “[i]t may not be the most appropriate question to ask a child who ... has been somewhere between the ages of five and eight.” Next, the court noted the “substantial period of separation” and the failed attempt at reunification. Finally, the court considered whether the child would obtain a more stable and permanent family relationship as a result of termination. It found that:

[T]he prior placements haven’t worked out very well, particularly with his mother. At least that’s the observation of the Court. [Dawn] disagrees with that, but we wouldn’t be here if there hadn’t for three and a half years been a court order in place requiring the meeting of certain conditions, which, from the perspective of the jury, have not been met. And this Court agrees with that.

The overriding factor, the overriding standard in this case is the best interests of Daniel M.E[.], not Dawn E[.] at all.

¶41 The court’s discretionary decision to terminate Dawn’s parental rights demonstrates a rational process that is justified by the record. *Michael I.O.*, 203 Wis. 2d at 152. The trial court emphasized that “[t]he overriding factor, the overriding standard in this case is the best interests of Daniel M.E[.], not Dawn E[.] at all.” It found that (1) Dawn is an unfit parent to Daniel and (2) “[i]t is in the best interest of this child that the parental rights of the mother be terminated.”

¶42 A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). This court does not substitute its judgment for that of the trial court on matters

committed to that court's discretion. *Id.* at 590. After reviewing the record and the trial court's decisional process, this court concludes that the trial court did indeed consider the standard and factors set forth in WIS. STAT. § 48.426 and reasonably applied them to the salient facts before it. The trial court did not erroneously exercise its discretion when it terminated Dawn's parental rights.

By the Court.—Order affirmed.

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

