

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2002

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.

Appeal No. 02-0817

Cir. Ct. No. 00-JC-223

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 an extension of a CHIPS dispositional order continuing supervision of his daughter Jennifer N. K. Kurt

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.

argues that the trial court erroneously found that Winnebago County had made reasonable efforts to return Jennifer to her home; that the conditions of return did not address the conduct that led to the out-of-home placement; that no admissible evidence was presented that Jennifer was in need of protection or services; and that the trial court must find more than the best interests of the child to place the child with a third party as opposed to a parent. We affirm the order of the trial 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. After the trial, Jennifer was found to be in need of protection and services. The court placed Jennifer with her maternal grandparents, who live in the Oshkosh area, pending disposition.

¶4 A dispositional report by a social worker was filed with the trial court on January 23, 2001. The report detailed a history of physical abuse of Jennifer within her mother's home by her stepfather. The report noted that Jennifer was almost sixteen years old and was a sophomore at Omro High School where she was an A/B student. Jennifer was employed, was vice-president of her sophomore class, had never been a behavioral problem and 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. The trial court imposed a one-year CHIPS order and ordered physical placement with the maternal grandparents in Oshkosh while legal custody remained with Kurt and Debbie. Kurt appealed the dispositional order. We upheld the dispositional order on August 15, 2001.

¶6 On December 17, 2001, the County filed a request for an extension of the CHIPS order. A hearing was held on this extension request on February 20, 2002. Jennifer's therapist, the principal from her school, the social worker assigned to the case and Kurt all testified. The trial court ordered that the CHIPS order be extended for one year. The trial court stated:

I do have to say that from the last hearing that I have had I can honestly say that I really don't think there's been much of a change. By that I mean change as far as the placement goes, this hearing is only for the best interests of Jennifer.... I still find, Jennifer, that it's in your best interest to continue this placement. You're doing well in school.... I hope that essentially you will be able to bridge the relationship that has been broken down between you and your father. I'm not going to order him into ... individual psychotherapy. I'm hoping that by his participation in this hearing and some of the things that you have said, that he recognizes that that would be important, would be beneficial to him I do find there is still the need ... here for supervision, that she's still a child in need of protection or services because of the depression, because of the dysfunctional family situation, because of the present placement, that it does cause a certain amount of conflict among the participants. And I think I would be remiss, okay, she's going to be 17 and throw up our hands and everybody go their way. I don't really find that the situation is such that its relationships are stable. I think the relationship between mom and the daughter is greatly improved from the last time. I think there has been albeit

improvement here a little bit of wariness by [Kurt] but not to the point where I'm going to cut her off any kind of supervision at least for the next year.

Kurt appeals this extension order.

DISCUSSION

¶7 Extension of a CHIPS order is a discretionary decision for the trial court. *Sallie T. v. Milwaukee County Dep't of Health and Human Servs.*, 219 Wis. 2d 296, 305, 501 N.W.2d 182 (1998). 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 we need determine to sustain a discretionary act is that the trial 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. *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 trial court's decision. See *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶9 Kurt argues that the trial court erroneously found that the County had made reasonable efforts to return Jennifer home. Whether a department made reasonable efforts to return a child to the parental home is a finding of fact that will not be reversed unless clearly erroneous. *See State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶10 One of the conditions of Jennifer's return to Kurt's home is that Jennifer "express a desire to reside" with Kurt. In the extension request, the social worker wrote:

In regards to Kurt, Jennifer has not wanted to set up any type of regular visitation with him. According to Jennifer, during phone conversations Kurt would only discuss the appeals regarding her placement and continually ask her to come live with him. She states at one point she had to get her cellular phone number changed because Kurt kept calling her, and in her opinion, harassing her. The relationship between Kurt and Jennifer is very negative and Jennifer has no desire to live with her father. The Department has encouraged Jennifer on many occasions, that she needed to set up some visitations with her father. Jennifer has stated that she does not want to visit with her father because it only turns into arguing about her placement with her grandparents.

¶11 The social worker also wrote:

[Kurt] continues to be very upset in regards to Jennifer's placement with her maternal grandparents and this extension request. It was explained to Kurt that if he, Jennifer and Debbie could come up with a mutually agreed upon plan regarding Jennifer's placement, then an extension may not be necessary. Kurt requested that Jennifer live with his mother in Oshkosh, however, Jennifer did not agree with this plan. A mutual agreement regarding Jennifer's placement could not be reached and therefore, the Department is proceeding with an extension, which we feel is in Jennifer's best interest.

[Kurt] has appealed the dispositional order to the Appellate Court and the State Supreme Court and both times Judge Hawley's decision was upheld. Kurt has also contacted

many agencies regarding his dissatisfaction regarding the Winnebago County Department of Human Services Even though [Kurt] has pursued all these avenues to get his daughter back in his care, he fails to realize that the person he needs to communicate with, and communicate positively with, is his daughter. Through these appeals and phone calls, it appears that Jennifer has become more resistive to wanting to spend any time with her father and more resistive to his goal of having her live with him.

....

At this time the Department does not see [Kurt] as unfit or that placement with him would be unsafe. However, one of the conditions for return is that Jennifer would express a desire to live with [Kurt]. Jennifer has not expressed a desire to live with Kurt, and therefore the need for [Kurt] to follow other conditions for return is a moot point, until Jennifer has decided she wants to live with him.

¶12 At the hearing, Jennifer’s social worker testified that

Jennifer does see her therapist regularly to address the anger issues and other issues that she has between [Kurt’s] relationship. I have also encouraged Jennifer to arrange some type of visitation with [Kurt] regularly. I have left that up to Jennifer as to when she is feeling comfortable and when she’s feeling safe to do visits with [Kurt].

¶13 The therapist testified at length about Jennifer’s difficulties in her relationships with her parents. Jennifer’s therapist testified that Jennifer suffers from depression and that her depression was “exacerbated” by a newspaper article that appeared in a local newspaper at Kurt’s instigation. The therapist testified that Jennifer and Kurt’s relationship is “[v]ery, very stressful” and Jennifer is “fearful of her dad.” According to the therapist, one major goal of Jennifer’s therapy was to regain trust within the family, specifically to reduce the hostility between Jennifer and her father.

¶14 In the extension request, the Department concluded that “by forcing Jennifer to move to her father’s home when there is so much hostility in their

relationship would be setting this placement up to fail and would therefore not be in Jennifer's best interest."

¶15 The trial court specifically incorporated the Department's report into its decision, thus concluding that the condition that Jennifer express a desire to live with Kurt had not been met and that the Department made reasonable efforts to return Jennifer to a parental home. This finding of fact is not clearly erroneous and the extension of the CHIPS order was a proper exercise of the trial court's discretion.

¶16 Kurt also argues that the conditions of the return "must be substantive [sic] and address the conduct" that led to the out-of-home placement. However, these conditions of return were established on January 26, 2001, in the original dispositional order and were not appealed. Thus, the issue of whether the conditions of return are appropriate is not properly before us.

¶17 In addition, Kurt argues that no admissible evidence was presented that Jennifer was in need of protection or services or that there were services the trial court could order. Again, this issue is not properly before us. Jennifer was found in need of protection and services after a trial on January 12, 2001, and this issue was not appealed. Whether or not the earlier CHIPS adjudication was sufficient is not an issue in an appeal of the CHIPS extension order.

¶18 Finally, 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 argues that "a court must find more than best interest of the child to award placement to a third party as opposed to a fit parent."

¶19 As in his previous appeal, Kurt misunderstands the appropriate standards in the type of case at hand. *Barstad* and *Troxel* do not address extension of or placement in a CHIPS proceeding; they are custody cases. In a CHIPS action, the rules of WIS. STAT. ch. 48, the Children’s Code, govern.

¶20 WISCONSIN STAT. § 48.365 allows for extensions of CHIPS orders; however, pursuant to § 48.365(7), nothing in this section “may be construed to allow any changes in placement. Changes in placement may take place only under § 48.357.” WISCONSIN STAT. § 48.357 addresses changes in placement. Section 48.357(2m) states:

The child, the parent, guardian or legal custodian of the child, the expectant mother, the unborn child by the unborn child’s guardian ad litem or any person or agency primarily bound by the dispositional order, other than the person or agency responsible for implementing the order, may request a change in placement under this subsection. The request shall contain the name and address of the place of the new placement requested and shall state what new information is available which affects the advisability of the current placement. This request shall be submitted to the court. In addition, the court may propose a change in placement on its own motion. The court shall hold a hearing on the matter prior to ordering any change in placement under this subsection if the request states that new information is available which affects the advisability of the current placement, unless written waivers of objection to the proposed change in placement are signed by all persons entitled to receive notice under sub. (1), other than a court-appointed special advocate, and the court approves. If a hearing is scheduled, the court shall notify the child, the parent, guardian and legal custodian of the child, any foster parent, treatment foster parent or other physical custodian described in s. 48.62(2) of the child, the child’s court-appointed special advocate, all parties who are bound by the dispositional order and, if the child is the expectant mother of an unborn child under s. 48.133, the unborn child by the unborn child’s guardian ad litem, or shall notify the adult expectant mother, the unborn child by the unborn child’s guardian ad litem and all parties who are bound by the dispositional order, at least 3 days prior to the hearing. A copy of the request or proposal for the change

in placement shall be attached to the notice. If all the parties consent, the court may proceed immediately with the hearing.

¶21 Kurt did not file a motion for a change of placement; he only filed a motion for dismissal of the petition for the extension.² In that motion, he did challenge Jennifer's placement with her maternal grandparents and requested her placement with him. However, this motion cannot be said to meet the requirements of WIS. STAT. § 48.357(2m) for a motion for change of placement. Thus, all objections to Jennifer's placement were done within the context of the extension hearing. As we noted above, the trial court was well within its discretion when it extended the CHIPS order.

¶22 Furthermore, Kurt himself admitted at the extension hearing that it would not be appropriate for Jennifer to be placed with him: "It's not that I want to force my daughter to come to Kenosha at this point.... I have some real questions about the appropriateness of it at this point [T]he problem that I have is I know I'd have a very miserable child if I brought her to Kenosha." Kurt acknowledged that changing schools would be "very traumatic" for Jennifer and insisted that he would "not physically remove [Jennifer] from the grandparents."

¶23 Kurt instead proposed that Jennifer live with his mother, her paternal grandmother. But again, this was an extension hearing requested pursuant to WIS. STAT. § 48.365 and under subsec. (7), nothing in this statute "may be construed to allow any changes in placement. Changes in placement may take place only under

² The Department did not file a motion for change of placement, only a motion for an extension of the CHIPS order.

§ 48.357.” In order to obtain a change of placement to his mother’s home, Kurt must comply with the requirements of § 48.365(2m). He did not.

CONCLUSION

¶24 The best interest of the child is the polestar of all determinations under WIS. STAT. ch. 48. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993). The trial court determined that it was in Jennifer’s best interest to extend the CHIPS dispositional order. This determination is supported by the facts of record and is a proper exercise of discretion. Jennifer’s CHIPS status and the conditions of return are not properly before us and a change in placement to the paternal grandmother’s home was never properly brought under WIS. STAT. § 48.365(2m). We therefore affirm the order of the trial court.

By the Court.—Order affirmed.

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