COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-3107
03-3108

Cir. Ct. Nos. 03TP000001
03TP000002

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CRYSTAL L.M., A PERSON UNDER THE AGE OF 18:

MANITOWOC COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DIANE M.,

RESPONDENT-APPELLANT,

FRANK M., SR.,

RESPONDENT-CO-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO FRANK M., JR., A PERSON UNDER THE AGE OF 18:

MANITOWOC COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DIANE M.,

RESPONDENT-APPELLANT,

FRANK M., SR.,

RESPONDENT-CO-APPELLANT.

APPEAL from orders of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Reversed.*

¶1 ANDERSON, P.J.[1] Diane M. and Frank M., Sr. appeal trial court orders terminating their parental rights and denying postjudgment relief. Diane argues that the trial court erred by permitting the guardian ad litem (GAL) to introduce evidence regarding another child of Diane's who was not part of these proceedings and resided in another county. Diane also argues that the evidence was not sufficient to support the jury verdict. We agree that the evidence was insufficient to support the jury verdict with regard to Diane and reverse the trial court's decision to terminate Diane's parental rights. Frank argues that after his children were placed out of the home pursuant to WIS. STAT. ch. 48 child in need of protection or services (CHIPS) orders, he was denied due process when the trial court failed to appoint counsel for him. We choose not to address this argument because, like Diane, the evidence was insufficient to support the jury verdict with

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[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4. By order, we extended the time to release this opinion pursuant to WIS. STAT. RULE 809.82.

regard to Frank. We therefore reverse the trial court's decision to terminate Frank's parental rights.

¶2 The relevant facts are undisputed. On January 27, 2003, termination of parental rights (TPR) petitions were filed against Frank and Diane regarding their children, Crystal L.M. and Frank M., Jr. The ground alleged by the Manitowoc County Department of Human Services (the Department) was that Crystal and Frank Jr. had a "continuing need of protection or services." *See* WIS. STAT. § 48.415(2)(a). [2]

¶3 In June 2003, the trial court conducted a fact-finding jury trial to determine whether statutory grounds existed for terminating the parental rights of

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[2] WISCONSIN STAT. § 48.415 provides in relevant part:

> **48.415 Grounds for involuntary termination of parental rights.**
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> ….
>
> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn 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, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

Diane and Frank.[3] At the time of trial, Crystal was ten years old and Frank Jr. was seven and one-half years old.

¶4 First to testify for the Department was Jennifer Witczak, a social worker for the Department. In 1998, Witczak became involved with the case when the Department received a referral from the Child Protective Services Unit relating to both Crystal and Frank Jr. stating that they had been left outside unattended. At this time, the children were living in Frank's home, which he shared with Nancy Hartfield. After receiving the referral and files for the two children, the Department provided services to Frank and Diane.

¶5 The in-house services consisted of parent aide services and day care services while Frank was working. Parent aide services entailed a parent aide coming to the home to discuss basic discipline, nutrition, hygiene issues, budgeting and "anything relating to parenting a child."

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[3] WISCONSIN STAT. § 48.424 provides in relevant part:

> **48.424 Fact-finding hearing.**
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> ….
>
> **(3)** If the facts are determined by a jury, the jury may only decide whether any grounds for the termination of parental rights have been proven. The court shall decide what disposition is in the best interest of the child.
>
> **(4)** If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427.

¶6 In 1998, Witczak had opportunity to observe Frank parenting the two children during her bimonthly home visits. She said, "[t]here really wasn't much interaction between Frank and the children. They were often watching T.V. or they were in their room and it was mainly Nancy, his live-in girlfriend, [who] did the main parenting. Especially during my home visits, Frank would be talking with me."

¶7 In February 1999, the Department placed Frank and Nancy on an informal agreement with specific recommendations, such as never leaving the children unattended. The informal agreement came after an incident in December 1998 that involved Frank and Nancy going to the local gas station and leaving the children, ages five and three, unattended. Witczak acknowledged that Frank and Nancy had "good intentions of buying St. Nick candy, but yet they left the children alone in the apartment for an unknown period of time."

¶8 Also in February 1999, the court issued an order regarding Diane, relating at first only to Crystal. It came after the Department had filed a petition concerning an incident in which Diane had left Crystal unsupervised.

¶9 Because Diane lived in Winnebago county, Winnebago county agreed to provide Diane courtesy services for Manitowoc county and it provided most or all of Diane's services (i.e., a family training program, etc.), except supervised visitation. Witczak kept apprised of Diane's progress by meeting with her and the Winnebago county social worker on a monthly basis.

¶10 In August 1999, Frank and Nancy's informal agreement was changed to a formal agreement after a referral was received stating that Crystal was found riding her bike, unsupervised, with her pajamas on. At the time Crystal

was found, Frank had left Nancy in charge of the children. Having received this referral, the Department filed a CHIPS petition and, as a result, the children, ages six and four, were taken from Frank's home and placed in a foster home. During the filing of the CHIPS petition and the removal of the children from Frank's home, Diane was not made a part of the process.

¶11 Thereafter, a court order memorializing the formal agreement became effective November 2, 1999, and stated:

> A. Prior to the return of Crystal and Frank [M. Jr.], the following conditions will be completed:
>
> [1.] Frank [M., Sr.] will not leave his children in the care of Nancy Hartfield at any time.
>
> [2.] Frank [M., Sr.] will not leave his children alone without adult supervision at any time.
>
> 3. Frank [M., Sr.] and anyone sharing his dwelling will cooperate with the parent aide and follow all recommendations.
>
> 4. Frank [M., Sr.] will cooperate with the visitation schedule established by the social worker.
>
> 5. Frank [M., Sr.] and anyone sharing his dwelling will attend and participate in counseling and follow all recommendations.
>
> [6.] Frank [M., Sr.] and anyone sharing his dwelling will cooperate with the social worker, Jennifer Witczak, or her successor, by attending all scheduled appointments, providing all release of information, providing accurate information relating to his living conditions and following all recommendations.

¶12 At first, after the children's removal, Frank was allowed in-home visitation with his children twice a week. He had one supervised visit and one unsupervised visit. Supervised visits lasted one hour. During the visit, Frank was expected to prepare a meal for the children, clean up after them, and interact with

them. During these visits, Witczak said Frank would "continually ask me … what he would need to do to have [his children] returned. And I would go through the recommendations at each time, what needed to be done."

¶13 Visitation was moved to the Department's visitation site after Frank continued to allow Nancy to care for the children in his absence. After initially not participating in the process, Nancy began attending parenting classes with Frank in 2000. When visitation was moved out of Frank's home, he and Diane were each expected to alternate bringing a prepared meal to the Department's visitation room.

¶14 Witczak periodically met with Frank before a site visit and he continued to ask her what he had to do to get his children back. She said she then consulted with the developmentally delayed supervisor, who instructed her to be clear and concrete about the recommendations. Witczak said she believed she was clear and concrete; however, Frank still continued to question what he had to do to get his children back. Witczak reported that during visitations, Frank did not take direction well from the parent aide with regard to how to discipline the children. She said that instead of interacting with his children, Frank often times interacted with the supervising adult in the room, asking more questions about when his children were coming home and/or discussing his social life and work.

¶15 In 2000, the court entered a consolidation order joining Frank's and Diane's cases and extending the 1999 orders. The only change in the order from the original orders was that Diane and Frank were to cooperate with a psychological evaluation.

¶16 Frank continued his cooperation with the visitation schedule and never missed a visitation (he did not visit one week per year when he had his vacation week; he informed the Department in advance that he had vacation and would not be coming). He began counseling in May 2000, paying for services through his insurance. However, after six months, it ended because Frank did not want to take the advice of the counselor (i.e., get into couples' counseling). Thereafter, Frank reinstated counseling for a while but eventually it ended due to "noncompliance."

¶17 Witczak said it was her opinion that Frank was not in compliance because he had not continued counseling, he had not attended a second parenting class that she had recommended (although she acknowledged he had already attended one parenting class) and, he initially refused to sign releases for the children to participate in school activities (although she acknowledged he did eventually sign them).

¶18 It was also Witczak's opinion that Diane was not in compliance because:

> We requested [that Diane and Mark, who lived with Diane] attend parenting classes relating to Crystal and [Frank Jr.] and they would sign up for three to four classes at time.
>
> And these classes would overlap in time. And, also, they were not pertaining to the children's ages. They were pertaining to children either zero to three or older than seven. So they were not cooperating with the recommendations that we were offering.

¶19 Additionally, Diane was sometimes late for visitations. Witczak highlighted one period in the four years of visitations in which Diane did not

attend visitations for three months, apparently because she did not have a valid driver's license, although assistance with transportation was offered.

¶20 In 2001, the children, ages eight and six, had not lived with either parent in two years and the court again extended the order. Witczak said it was extended because "neither Diane nor Frank completed—fully completed the recommendation for return of the children home safely."

¶21 In 2002, the children, ages nine and seven, had not lived with either parent in three years and the order was extended again for the "same" noncompliance reasons.

¶22 Witczak concluded her direct testimony stating she did not believe that within the upcoming year Diane or Frank could comply with the conditions of the order to have the children returned. Specifically, she stated:

> I believe that with the four years of working with them with the same recommendations and the attempts to have them complete the recommendations fully, and fully understand the basic parenting, basic everyday living skills, they have not been able to do that to ensure safety of these two children. And I do not believe within a year that they would be able to change that.

¶23 On cross-examination, additional evidence came to light. Witczak acknowledged that the parent aide reported occasions when Frank did play and interact with his children appropriately and did jump in and assist the children with their homework.

¶24 Witczak explained that the parent aide's style of teaching was "modeling":

> [Witczak] For example, if the children are throwing toys and Frank is just sitting there watching the children throw

> toys, [the parent aide will] get up and say, "Frank you need to tell J.R. to stop throwing his toys." Give him a warning, possibly use the 1, 2, 3 technique, things of that nature, so that's what would be occurring during the visit.
>
> [Frank's attorney] So the modeling technique is predominantly a person telling Frank how to do it?
>
> [Witczak] Assisting Frank, yes.
>
> [Frank's attorney] Explaining verbally though, correct?
>
> [Witczak] Yes.

¶25 Witczak testified that she sought advice from a staff member who handles developmentally disabled children for the Department in regard to services for Frank. The staff member told Witczak that her recommendation for teaching parenting skills to a developmentally delayed parent, such as Frank, was to use a "modeling" method. Witczak said she was told to be very basic and concrete and to write it out if Frank needed written out what was expected of him.

¶26 Witczak then specifically explained the advice: she "didn't want us to just sit there and say[, 'G]et up and take the toys away.['] She wanted us to model. So each time we would model, it would be a repetition for [Frank]. So that after a while, he would be able to do it himself."

¶27 Besides the parent aide's "modeling" method, the Department gave Frank the services of a parenting course that employed the "instructional" method, a method in which documents are given to the participant to take home, read and apply. Witczak acknowledged that this course was expected of Frank, even though she had personal knowledge that Frank could "[n]ot [read] very well."

¶28 Witczak was asked what, for the Department, signifies that a person is finished with counseling. Witczak stated: "That they make significant

progress." She acknowledged, however, that in order to make significant progress, one needs to be able to understand what levels or what areas one has to make progress in.

¶29 Witczak stated that the type of parenting class that Diane needed to complete typically meets one hour per week and runs for nine weeks. She said she did not believe there was a possibility that Diane would complete a course within the next twelve months because, in the past, Diane had signed up for too many parenting classes, many at the same time and on the same date and "she can't organize the classes."

¶30 Witczak testified that at some point, the children's therapist recommended that the once a week visitation schedule be reduced "because the children's reactions right before and after were very difficult to control." Upon this recommendation, the Department reduced the visitation schedule to biweekly and then finally to one one-hour visit per month.

¶31 Witczak indicated that Frank did not participate enough in the childrens' school. However, she acknowledged that Frank did attend one Individual Education Plan (IEP) meeting for Frank Jr. and that he did call the school on several occasions for the children's report cards. She also acknowledged that she asked Frank not to attend a play for Crystal, and Frank respected that request.

¶32 Mary Storm, a social service aide, was called as the Department's second witness. She testified that her job consisted of teaching parenting skills and budgeting, and supervising visitations. She began working with Frank and Diane in September 2000 and continued doing so for two and one-half years.

During this thirty-month period, Frank and Diane were allowed approximately thirty one-hour visits with their children—initially the visits were weekly, then biweekly, then monthly.

¶33 Storm testified that she gave a one-on-one parenting class to Frank. (This is the second parenting class recommended and taken by Frank.) She explained:

> [W]hen I give a parenting class one-on-one, I use, it's called, a book called *The Nurturing Book*. It's a very simplified version of parenting. It's just the basics of using choice an[d] consequences, timeouts, how to praise, inappropriate praising and appropriate praising, a little bit about problem solving.

¶34 In explaining how she prepared for providing parenting classes to Frank, Storm stated:

> Specifically, with Frank, because he is a special needs parent, I would consult with our DD unit, it's Developmentally Delayed, and get some ideas from them as to what I need to do to be able to better teach him.

Storm went on to explain the specific recommendations she was given regarding a developmentally delayed parent:

> Be very consistent with him, don't try too many things at once, just stick with one thing until that is accomplished, then maybe go to another, do role modeling and be very repetitious.

¶35 Storm stated that she believed she followed these recommendations and that, despite her efforts, she did not think Frank had made much progress. She said that they had not gotten beyond trying to discipline the children and trying to keep some structure during visits.

¶36 Storm acknowledged that Frank completed all of his assignments for the parenting class. She acknowledged that Frank tries to apply the principles she is trying to teach him, but that he needs a lot of reminding and assistance from her.

¶37 Storm discussed her supervision of the visitations as well:

> I would say that Frank had difficulty in doing something on his own, but was very compliant when I initiated like a timeout, or a praising, he would follow that and he would follow through with that…. He was okay in giving—giving warnings, but had difficulty following through with consequences if they continued that behavior.

Storm further explained:

> [Frank] has a very good record of making his visits, being on time for his visits. He and Diane take turns in bringing a meal and he usually doesn't have a problem in bringing a meal….
>
> He does need my assistance in disciplining and praising, but he does follow through with that once I suggested it. He also struggles with being appropriate in the conversations he has with his children.…
>
> He has talked to them about court and adult type subjects, but he is good about stopping when I ask him to stop.

¶38 Storm gave examples of several specific visits in which Frank struggled with his parenting skills. She said that on one visit, Frank "got so involved in his [art] project that he wasn't able to focus on what the children were doing…. And J.R. was … using a lot of glue and spreading it on over to the table where I had to intervene." She said at another visit, the children were throwing food and eating away from the table and Frank did not give them a consequence for this.

¶39 Storm also testified to progress made by Frank. She stated that sometime in 2002, he was paying a little more attention, but still needed her assistance. She also said that in 2003, although she had to continue to intercede with discipline, meal times went "okay." She said Frank enjoyed playing with his children and did things such as sitting at the table and coloring with them.

¶40 Storm answered "No" when asked whether she believed Frank has the ability to begin to comply with the recommendations or will be able to comply within the next twelve months.

¶41 Storm next testified regarding Diane's parenting:

> It still continued to be a struggle for [Diane] to implement rules. Although, she tried to provide a little more structure, but she had a difficult time following through with any type of consequence. But she would initiate more of what the behavior should be with the kids.
>
> ….
>
> Diane kind of held back. The kids got extremely excited to see her and Diane was more of—she almost seemed a little embarrassed of that display of affection and she did not reciprocate it.

¶42 Storm testified to some specific visits. The first was a visit in September 2000. She stated that Diane was ten minutes late for the visit and that during the visit, "Diane was extremely quiet throughout the visit, didn't talk to [the children] much. Needed my encouragement to play with them. Didn't implement rules during mealtime, didn't make them eat before they would play. They would eat a little bit, go off and play, come back and eat."

¶43 The next visit she discussed was a November 2000 visit: "Discipline wasn't implemented at that visit. There were problems during eating time and J.R.

wanted to eat dessert before his meal and Diane was going to let him." Storm then related that on the February 7, 2001 visit, Diane arrived forty-five minutes late and scolded the children for being too loud when they saw her.

¶44 Storm testified to positive interaction between Diane and her children as well. She said that throughout the visits, Diane interacted with the children: "[Diane] sat at the table, she would play games, color, talk to the kids and ask them about school." She stated that although she did not recall a time when Diane followed through with a consequence, Diane did give warnings to the children.

¶45 Storm answered "No" when asked whether she believed Diane has the ability to begin to comply with her recommendations or will come into compliance within the next twelve months.

¶46 On cross-examination, more evidence came to bear. Storm testified that she did not have any training in teaching developmentally disabled individuals. She testified that she talked to Department staff experienced in dealing with the developmentally disabled and received advice on how to deal with a developmentally disabled individual.

¶47 After acknowledging that the staff member told her to teach a developmentally disabled individual one thing until it is accomplished, Storm admitted that she did not, in fact, follow this recommendation:

> [Frank's attorney] What was the first thing you taught Frank?
>
> [Storm] Well, during visits, we were focusing on discipline.

[Frank's attorney] And in time, Frank did learn how to give warnings for a timeout, correct?

[Storm] Correct.

[Frank's attorney] And he learned how to actually give a timeout to his children, correct?

[Storm] Correct.

[Frank's attorney] What was the next thing you focused on teaching Frank?

[Storm] To be more consistent with that, without my assistance.

[Frank's attorney] Okay. And he accomplished that at some point in time?

[Storm] No.

[Frank's attorney] Still in the process of doing that, correct?

[Storm] Yes.

[Frank's attorney] So we have accomplished one of the things, but you were also working on other things with Frank at the same time though, weren't you? Bringing meals to the visits, correct.

[Storm] Correct.

[Frank's attorney] You were also working with Frank on how to learn to interact more appropriately with his children?

[Storm] Correct.

[Frank's attorney] That's three things so far, right?

[Storm] Yes.

[Frank's attorney] That was completely contrary to what you were told to do, to teach someone who is developmentally disabled, isn't it?

[Storm] Yes.

> [Frank's attorney] Okay. Despite that, though, Frank did make some progress in interacting with his children, correct?
>
> [Storm] I can't really say that he did make progress. Because even in 2003, he had some inappropriate discussions and was very—
>
> [Frank's attorney] But they were less frequent than what they had been in 2000, 2001 and 2002, correct?
>
> [Storm] Yes.

¶48 Storm further testified that Frank completed all the parenting course assignments that she requested of him. Storm stated that in 2000, Frank had some difficulty controlling the children during mealtime, but in 2001 and 2002, Frank progressed and became better at being able to control the children during mealtime. Storm said that Frank did not miss a visitation and arrived on time for visitations, that he decreased his inappropriate talk with the children, that he began to give warnings to the children for discipline and that he occasionally increased his level of interaction with the children.

¶49 Storm testified that in the approximate thirty visits she had with Frank and the children, she did not see as much progress as she would have liked to see. She testified that at the six-month mark, she was not seeing Frank's skills change in the way she wanted, but nonetheless continued with her current method of instruction. She testified that she continued with this method throughout the entire two and one-half year period even though she knew after six months this style was not working well. She testified that she was not aware of any other parenting assistance approach that could have been employed as an alternative.

¶50 Storm acknowledged that the children's affection and bond toward their parents had not changed.

¶51 After Storm, the Department called Katie Normington, a former social worker from Winnebago county. She stated that Winnebago county first began providing services to Diane in 1999 when it agreed to courtesy supervision for Manitowoc county related to Crystal and Frank Jr.

¶52 Normington listed the services that Diane has received: home consults, brief parenting classes, public health nurse services, "Family Nurturing Program" and "Early Intervention Services." Additionally, Diane has worked with "Residential Care for the Developmentally Disabled" on a site living program and to target financial issues as well. She said that Diane has received counseling services and is currently seeing a counselor through Family Services. Some of the services were provided free of charge by Winnebago county and some Diane had to pay for herself.

¶53 Normington testified that Diane's home demonstrates an "unsafe living environment" for the children. She stated that while on a home visit, it was discovered that Diane had poisonous substances in reach of the children and that there were rusty nails, electrical equipment and appliances visible. She stated that at different times garbage covered a room, molding food was in the kitchen and dishes were stacked two feet high.

¶54 In September 2000, Diane had a child, Mark M., Jr., with Frank's brother Mark. Afterwards, Winnebago county provided services to Diane in relation to Mark Jr., along with the courtesy services provided in relation to Crystal and Frank Jr. Normington reported that Mark Jr. was removed from Diane's home in July 2001 and placed in a foster home because he had been left alone once and because the home was considered an unsafe living environment.

¶55 Normington acknowledged that since Mark Jr.'s foster home placement, Diane has taken parenting training that focused on the needs of toddlers and infants *and* has taken classes relating to the ages of her older children. Normington acknowledged that Diane has participated in services to assist her with her parenting ability. She acknowledged that Diane earned completion certificates for some of these classes.

¶56 Normington said that Diane has not demonstrated that she has retained what she's learned or that she uses the education garnered from the classes. She said she thinks Diane has a motivation problem and that she does not believe that Diane will have the capacity to parent her children. Normington acknowledged that Diane is developmentally delayed, but stated, "I think at times [Diane] has the capacity to do a lot more and she chooses not to."

¶57 The last witness to testify for the Department was Donald Derozier, a clinical psychologist. Derozier met individually with Diane and Frank for one to two hours. He also administered several tests to each of them.

¶58 Derozier first discussed Frank. He said that Frank presented as "friendly, cooperative" and "as a person who talked comfortably about himself. In fact, almost all issues tended to center around himself. I saw him as rather egocentric in that regard. He also had poor oral hygiene, smelled of tobacco the day I saw him, had several missing teeth." Derozier said Frank has a very high positive image of himself. He said that Frank "puts his best foot forward" and described this approach in the negative as "righteousness."

¶59 Frank scored "less than the acceptable level" on the parent awareness test, "less than adequate" in the area of his ability to communicate to

children at different ages and "well below average" on understanding children's feelings and on seeking feedback. Frank did "quite well" on the diagnosis scales, fell within normal limits and did not show any major psychiatric disturbance. On the personality disorder test, Frank displayed "the tendency to put his best foot forward to be seen in a positive light, not admitting his personal shortcomings."

¶60 Derozier concluded, "Frank didn't show that he could meet the average standard" for the kind of things one thinks of as necessary for parenting older children. Derozier said it was his opinion that Frank was not capable of effective parenting. Derozier said he believed that Frank would not be psychologically harmed having his parental rights terminated. He said termination of parental rights "would appear appropriate based on [Frank's] profile."

¶61 Derozier then testified regarding his evaluation of Diane. He said Diane presented as pleasant and calm. He said that Diane had "marginal hygiene." He stated that she had "halitosis, smoker's breath, that kind of thing."

¶62 Diane's IQ placed her in the mild mental retardation range, though this does not mean she is mentally retarded. Diane scored in the average range on the intelligence test. She scored at the fourth grade level in reading and spelling; fifth grade is considered literacy. On the parent awareness skills survey, Diane did not score within the competent range. Derozier stated that Diane's relative strength was in saying that she would apply what he termed "cookbook intervention." He explained:

> These are things that [Diane] has, learned, such as distraction techniques, providing alternatives. In fact, she used the terms that are standard terms in child supervision and therapy.

> So she had picked up, again, some of the concepts from previous supervised interaction. And yet these cookbook things were not flexible enough to meet the emerging needs of children. Consequently, she didn't really possess them.

¶63 Derozier said with regard to Diane's ability to parent:

> Diane, again, has good intentions at times and at times can use skills that are available to her. And at other times, I don't think she has a clue as to what is expected and doesn't possess the skills. I think, again, she knows at one level, in her own heart, she would love to be with the children; but at the level of her head, she recognizes the needs they have are being better met elsewhere.

¶64 Derozier concluded that termination of parental rights would "not cause [Diane] any major emotional or psychological damage and would probably be in the best interest of the children in question."

¶65 After Derozier was finished testifying, Diane's attorney called Diane's current therapist, Pauline Vandenberg. Vandenberg stated that she had a bachelor's degree in psychology and human development and a master's degree from the Adler School of Professional Psychology in Chicago. Vandenberg established that she had been seeing Diane for approximately nine months. Vandenberg stated that Diane came to her wanting to expand on her parenting skills. Vandenberg reported that Diane did "[v]ery well" in her sessions. She explained:

> From the very beginning Diane consistently and regularly scheduled appointment times and kept them. Always on time, always appropriate in session, always appropriate in her interaction with other staff…. [Diane was] [r]espectful, attentive, followed through with—I refer to it as homework assignments.

Vandenberg described the various types of parenting skills and counseling she continues to work on with Diane. Vandenberg stated that if Diane were to have

the children live in her home, she believed they would be in a "healthy environment" and "would not be at risk of harm or neglect."

¶66 Next, Frank's attorney called Frank's former neighbor, Blanche Kornely. Kornely lived in the same building with Frank for two years while he had his children living in his home. She testified that she had plenty of opportunity to observe Frank with his two children and that he was a "very loving father." She described times he and the kids would play in the yard and interact. She concluded that she had absolutely no concerns regarding Frank's parenting.

¶67 Finally, Diane and Frank testified on their own behalves. Then, after closing arguments and instructions, the court turned the case over to the jury.

¶68 The jury was given special verdicts relating to each parent's parental rights for each child. The questions were the same in each of the four verdicts. The questions for the jury were:

> 1. Has [child's name] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?
>
> ….
>
> 2. Did the Manitowoc County Human Services Department make a reasonable effort to provide the services ordered by the court?
>
> ….
>
> If you answered question 2 "yes," answer the following question:
>
> 3. Has [parent's name] failed to meet the conditions established for the safe return of [child's name] to [parent's name] home?

> ….
>
> If you answered question 3 "yes," answer the following question:
>
> 4. Is there a substantial likelihood that [parent's name] will not meet these conditions within the twelve-month period following the conclusion of this hearing?

¶69 The court answered the first question in the affirmative for the jury on all of the special verdicts. The jury answered the remaining three questions "yes," on all of the special verdicts, thereby finding that Crystal and Frank Jr. remained children in need of protection or services. The court found both Frank and Diane unfit. After the court held a dispositional hearing in August 2003, it terminated both parents' parental rights. Diane and Frank appeal.

¶70 Termination of parental rights is governed by Subchapter VIII of Chapter 48 of the Wisconsin Statutes, the Children's Code. The "best interests of the child" represents a consistent legislative objective throughout the Children's Code. WISCONSIN STAT. § 48.01(1) provides in part: "In construing this chapter, the best interests of the child ... shall always be of paramount consideration." ***Id.***; ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶21, 255 Wis. 2d 170, 183, 648 N.W.2d 402.

¶71 However, the supreme court recently clarified that despite this broad language, the "best interests of the child" standard *does not* dominate every step of every proceeding, because other vital interests must be accommodated. ***Julie A.B.***, 255 Wis. 2d 170, ¶22:

> When the government seeks to terminate parental rights, the best interests of the child standard does not "prevail" until the affected parent has been found unfit pursuant to WIS. STAT. § 48.424(4). "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably

> warrants deference and, absent a powerful countervailing interest, protection.'" This fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."

Julie A.B., 255 Wis. 2d 170, ¶22 (citations and footnote omitted).

¶72 "'Termination of parental rights' means that, pursuant to a court order, all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed." WIS. STAT. § 48.40(2). Plainly, the consequences of termination are profound. ***Julie A.B.***, 255 Wis. 2d 170, ¶23.

¶73 After the petition has been filed and the preliminaries have been completed, a contested termination proceeding involves a two-step procedure. ***Id.***, ¶24. The first step is the fact-finding hearing "to determine whether grounds exist for the termination of parental rights." WIS. STAT. § 48.424(1). "During this step, the parent's rights are paramount." ***Julie A.B.***, 255 Wis. 2d 170, ¶24 (citation omitted). During this step, the burden is on the government, and the parent enjoys a full complement of procedural rights. ***Id.***

¶74 Because termination of parental rights interferes with a fundamental liberty interest, we apply strict scrutiny and require the government to show that termination is narrowly tailored to serve a compelling governmental interest. ***Monroe County DHS v. Kelli B.***, 2003 WI App 88, ¶8, 263 Wis. 2d 413, 662 N.W.2d 360, *review granted*, 2003 WI 91, 262 Wis. 2d 500, 665 N.W.2d 375 (No. 03-0062).

¶75 At the close of the fact-finding hearing, the jury or the court determines "whether any grounds for the termination of parental rights have been proven." WIS. STAT. § 48.424(3). If the jury or court determines that the facts alleged in the petition have not been proven, the court dismisses the petition. Conversely, "[i]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." Sec. 48.424(4).

¶76 Notwithstanding a jury verdict, the court may dismiss a petition if it finds that the evidence does not sustain any one of the jury's individual findings. ***Julie A.B.***, 255 Wis. 2d 170, ¶27. This is consistent with the sufficiency-of-evidence principles in WIS. STAT. § 805.14. ***Julie A.B.***, 255 Wis. 2d 170, ¶27. The trial 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. "[I]f … the evidence for any one of the … findings does not support the jury finding, that would be reason to dismiss the petition because a 'finding' of unfitness *cannot be sustained* if one of the … required findings is not … supported by 'clear and convincing evidence.'" ***Id.***, ¶27 n.10 (emphasis added).

¶77 In brief, once a jury has found the existence of grounds for termination, the trial court is statutorily mandated to find the parent(s) unfit. WIS. STAT. § 48.424(4). *However*, the trial court's statutory mandate to find the parent(s) unfit does not relieve it of its discretionary duty to ensure that there is evidence to support each of the four findings the jury has made to reach its ultimate finding of the existence of grounds for termination. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶27 n.10.

¶78 After strictly scrutinizing the record, we hold that the trial court erred by not dismissing both TPR petitions because one of the findings the jury made to reach the ultimate finding that grounds for termination existed is not supported by clear and convincing evidence. Therefore, under ***Julie A.B.***, a finding of unfitness "cannot be sustained." *See* ***id.***, ¶27 n.10.

¶79 Specifically, the evidence is insufficient to support the jury finding that the Department made "reasonable efforts" to provide to Frank and Diane the services the court ordered. According to WIS. STAT. § 48.415(2)(a)2.b, the Department must make a "reasonable effort" to provide the services ordered by the court. "'[R]easonable effort' means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child ... the level of cooperation of the parent ... and other relevant circumstances of the case." Sec. 48.415(2)(a)2.a.

¶80 The Department's social worker and its parent aide testified that Frank and Diane are special needs parents with developmental disabilities. Yet, the record demonstrates that their efforts to provide appropriate services to Frank and Diane were unreasonable.

¶81 Witczak testified that she spoke with the person who handles developmentally disabled children for the Department in regard to services for Frank. However, the record is void of evidence that a person who handles developmentally disabled *children* is qualified to advise how to teach a developmentally disabled *adult* parenting skills. We cannot say this is clear and convincing evidence of an "earnest and conscientious effort to take good faith

steps to provide the services ordered by the court, which takes into consideration the characteristics of the parent…." *See* WIS. STAT. § 48.415(2)(a)2.a.

¶82 Nonetheless, assuming arguendo, that a children's developmentally disabled specialist is qualified to render advice for how to teach developmentally disabled adults, the evidence still does not establish that this advice was reasonably, conscientiously followed. Instead, the record establishes the contrary.

¶83 Witczak testified that the developmentally disabled specialist recommended only one appropriate method to use when teaching parenting skills to the developmentally disabled parent—the "modeling" method. Witczak said she was advised that repetitive modeling is necessary so that "after a while, [the parent] would be able to do it himself." Witczak specifically said the specialist "didn't want us to just sit there and say[, 'G]et up and take the toys away.[']" Witczak's testimony reveals that she knew the ill-advised, verbal-only method was being used and yet she curiously called it the "modeling" method. Recall the following:

> [Witczak] For example, if the children are throwing toys and Frank is just sitting there watching the children throw toys, [the parent aide will] get up and say, "Frank you need to tell [Frank Jr.] to stop throwing his toys." Give him a warning, possibly use the 1, 2, 3 technique, things of that nature, so that's what would be occurring during the visit.
>
> [Frank's attorney] So the modeling technique is predominantly a person telling Frank how to do it?
>
> [Witczak] Assisting Frank, yes.
>
> [Frank's attorney] Explaining verbally though, correct?
>
> [Witczak] Yes.

¶84 Moreover, besides getting the "modeling" method wrong, the Department recommended, and Frank took, a parenting course that employed a method ill-suited to his developmentally disabled needs. The course was taught with the "instructional" method, a method in which documents are given to the participant to take home, read and apply. Witczak acknowledged that the Department recommended this course even though she had personal knowledge that Frank could "[n]ot [read] very well."

¶85 With regard to Diane, Witczak's main criticism appeared to be that Diane signed up for too many parenting classes, some which overlapped. She said this shows that Diane lacks organizational ability. She concluded that this meant Diane was not in compliance with the recommendations and would not be in compliance within twelve months. Diane is a developmentally disabled adult. Diane was under two court orders; one in Winnebago county for Mark Jr. and one in Manitowoc county for Crystal and Frank Jr. She was expected to attend age appropriate parenting classes for all three of her children. Her overbooking, while it surely sabotaged her effort, is demonstration of sincere effort to comply.

¶86 Witczak seems to conveniently ignore Diane's developmental limitations in making her sweeping assessment of Diane's noncompliance. While we agree that Diane lacked the organizational skills to accomplish scheduling herself into compliance, the Department has a duty to provide services keeping in mind the particular parent's abilities. And, the Department did not do so. Witczak had monthly staff meetings with Diane and the social worker in Winnebago county. We are at a loss as to why, knowing that Diane was struggling to organize her parenting class schedule, the county social workers did not offer to assist.

There is no evidence that they made a reasonable effort to provide services to Diane under the circumstances of her particular situation.

¶87 Similarly, Storm's testimony reveals that she carelessly ignored the advice of the developmentally disabled specialist. In explaining how she prepared for providing parenting classes to Frank, Storm stated:

> Specifically, with Frank, because he is a special needs parent, I would consult with our DD unit, it's Developmentally Delayed, and get some ideas from them as to what I need to do to be able to better teach him.

Storm said she was told to "[b]e very consistent with him, don't try too many things at once, just stick with one thing until that is accomplished, then maybe go to another, do role modeling and be very repetitious." Despite this advice, Storm testified that she attempted to teach Frank at least three different skills at once. Recall the following (emphasis added):

> [Frank's attorney] That's three things so far, right?
>
> [Storm] Yes.
>
> [Frank's attorney] That was *completely contrary to what you were told to do, to teach someone who is developmentally disabled, isn't it?*
>
> [Storm] Yes.

¶88 Storm additionally testified that after six months of trying to teach Frank in the method she and Witczak labeled "modeling" (which the evidence shows was not, in fact, "modeling"), Frank was not learning satisfactorily. Despite recognizing this, Storm made no effort to change her style of teaching over the next two years. Moreover, there is no evidence that Storm made any effort to discern whether the lack of progress was due to her inappropriate teaching method for developmentally disabled parents.

¶89 We acknowledge that the record reveals noncompliance on the part of Frank and Diane and we liberally included this evidence in our recitation of the facts. We took pains to do so in order to underscore the importance of the trial court's duty during the first stage of a TPR determination. The trial court must be vigilant in safeguarding the process and ensuring that the rights of the parents remain paramount during this stage. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶24. During this step, the burden is on the government. ***Id.*** In a case such as this, a jury might get distracted or overwhelmed and mistake the quantity of the government's evidence for quality. Thus, it is up to the trial court to ensure that there is evidence to support each of the findings the jury has made to reach its ultimate finding of the existence of grounds for termination. *See* ***id.***, ¶27 n.10.

¶90 The trial court erred in not dismissing the TPR petitions because the Department failed to employ "reasonable efforts" to provide services to Frank and Diane. Instead, it removed their children from their homes for over four years without properly providing services in the manner *its own developmentally disabled specialist* instructed was necessary for developmentally disabled parents. We note that despite the Department's failure, it appears that Diane and Frank made some progress in their parenting skills. The Department was charged with making "reasonable efforts" to foster Frank and Diane's parenting skills in a manner suited for their special needs and to provide other services tailored to their

developmentally disabled status so that they would have real opportunity for reunification with their children.[4]

¶91 Our determination that the trial court erred by not dismissing the TPR petitions is dispositive and we need not address Frank's due process claim or Diane's prejudice claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶92 Nevertheless, this court recognizes that Frank and Diane will likely be faced with continuing CHIPS issues in which the question of court-appointed counsel may resurface. Thus, we take this opportunity to emphasize to the appellants that the need to appoint counsel in a CHIPS case is determined by the trial court on a case-by-case basis. ***Joni B. v. State***, 202 Wis. 2d 1, 18, 549 N.W.2d 411 (1996). Additionally, we point out that "if the parent [facing a CHIPS petition] does not request appointment of counsel and the court perceives no particularized need for counsel in the case before it, the court need not address

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[4] We question just *what* outcome the Department hoped to achieve with its "efforts." At the dispositional hearing on August 13, 2003, a Department social worker, Lane Kinzel, testified that he was assigned to work on this case along side Witczak. He testified that the Department's goal changed from reunification to adoption "about two years ago."

Two years ago would be August 2001. The court order first became effective in November 1999; the TPR petition was filed on January 27, 2003. This means that for almost half of the time Frank and Diane were attempting to comply with the court order, the Department *at the very least* could not have been making a "reasonable effort" to provide services to facilitate the return of Crystal and Frank Jr. to Diane and Frank's homes.

We refrain from speculating on the Department's motivation with regard to this case from August 2001. However, we caution the government to pay close attention to its statutory mandate to conscientiously make "reasonable efforts" to provide parents the services they need for reunification. "It would be in no one's best interest, least of all the child's, if the finality of an adoption were later challenged on the basis of a … flawed prior CHIPS or termination proceeding." ***Joni B. v. State***, 202 Wis. 2d 1, 16, 549 N.W.2d 411 (1996).

the issue." ***Id.*** Given this law, it follows that a parent will increase his or her chances of receiving a court-appointed attorney simply by asking for one.

By the Court.—Orders reversed.

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