

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 29, 2013**

Diane M. Fremgen  
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. 2012AP2801**

**Cir. Ct. No. 2011JC35**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN THE INTEREST OF CODY S., A PERSON UNDER THE AGE OF 18:**

**POLK COUNTY,**

**PETITIONER-RESPONDENT,**

**V.**

**DONNA S.,**

**RESPONDENT,**

**NORMAN S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Polk County:  
JAMES D. BABBITT, Judge. *Reversed.*

¶1 MANGERSON, J.<sup>1</sup> Norman S. appeals an order adjudging his child, Cody S., to be in need of protection or services. Norman argues insufficient evidence supports the jury’s determination that he is unable to provide necessary care so as to seriously endanger Cody’s physical health. We agree and reverse.

### **BACKGROUND**

¶2 Cody was born to Norman and Donna S. on November 9, 2011. On November 16, Polk County filed a petition alleging Cody was a child in need of protection or services (“CHIPS”).<sup>2</sup> Specifically, the petition alleged Norman and Donna were “unable to provide adequate care and supervision,” contrary to WIS. STAT. § 48.13(10). Norman and Donna contested the petition, and the court held a jury trial.

¶3 At trial, Craig Miller testified he is Norman’s guardian of the person and of the estate. Miller makes decisions about where Norman “resides, medical services, [and] social services” and ensures Norman’s needs are being met. Miller, however, does not take care of Norman’s daily affairs. Norman lives independently, and Miller sends Norman money to purchase anything he may need. Miller could not identify any reason why Norman could not have his children in his home. He has never seen Norman act inappropriately.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Pursuant to a temporary physical custody order, Polk County took custody of Cody at the hospital and placed Cody in foster care.

¶4 Betty Peer testified she is Donna’s guardian of the person and of the estate.<sup>3</sup> Peer makes decisions about where Donna lives and “other things if [Donna] asks,” which is not very often. Donna is also a licensed driver and has a vehicle. Peer talks to Donna “sometimes several times a day and sometimes a few times a month, ... it depends on what’s going on in her life.” Peer had last visited Donna more than one month ago.

¶5 Cody’s foster father, Edward J., testified he met Norman and Donna before Cody was born. Norman and Donna attend every visit with Cody and love Cody. When Norman and Donna arrive for a visit, they typically have a gift for Cody, and Norman likes to hold Cody right away. Norman and Donna change Cody’s diapers and do basic care during visits. Visits are always supervised, and the only unsafe condition Edward has ever observed is Norman sometimes does not support Cody’s head adequately when holding him; however, Donna holds Cody appropriately. Edward has been to Norman and Donna’s home one time because Norman needed assistance disposing of their cat after it died. Edward’s only concern about the condition of Norman and Donna’s house was some mold in the basement that Norman showed him.

¶6 David H. testified he is the foster father of Norman and Donna’s other child, Melina. Norman and Donna’s visits with Melina are sometimes combined with Cody’s visits, and the visits “go well.” Norman and Donna show love and concern for both Cody and Melina. When asked if he had ever observed

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<sup>3</sup> Donna S. does not appeal. However, we include facts regarding Donna’s ability to provide care for Cody because in *State v. Gregory L.S.*, 2002 WI App 101, ¶42, 253 Wis. 2d 563, 643 N.W.2d 890, we stated the facts of the case may be such that the child is in need of protection or services based solely on one parent’s actions, or inaction.

Norman and Donna do something that caused concern, David described an incident at a party he and his wife hosted. Norman and Donna attended and were supposed to be watching Melina and another child. Melina, who was two years old at the time, darted off into the crowd and Donna chased Melina, leaving the other child behind, who started crying.

¶7 Social worker Terri Jacobson testified she investigated Norman and Donna, and recommended Melina be placed outside the home.<sup>4</sup>

¶8 Linda Mills-Krebsbach testified she is the Polk County clinical coordinator and works with Donna in a community support program. Mills-Krebsbach provides mental health services to Donna and reported that Donna is cooperative, keeps appointments, and asks for assistance when needed.<sup>5</sup>

¶9 Polk County Human Services program manager Karen Confer testified Norman and Donna have completed parenting classes and attend visits regularly. She also testified Norman and Donna have been at every court hearing, attended all their children's appointments, and have wanted the children in their care.

¶10 Norman's and Donna's caseworker Sonja Jensen testified she recommended Cody be found a child in need of protection or services based on her experience and because she was "concern[ed]" about Norman's and Donna's "ability to understand age-appropriate development for children in order to

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<sup>4</sup> Jacobson did not testify about what her investigation revealed or why she recommended Melina be placed outside the home.

<sup>5</sup> Although Mills-Krebsbach testified she provided mental health services, she did not testify as to whether Donna suffers from a mental illness.

provide that structure and environment that they need to grow socially, emotionally, and developmentally on task.” Jensen confirmed Norman and Donna have a bedroom set up for Cody, attend visits and doctor appointments, have taken parenting classes, and attend every court hearing.

¶11 Norman testified he loved Cody and wanted Cody to live with him. He explained he has adult children and babysits his grandchildren. Norman has also completed parenting classes, would ask people for help if needed, and believed he is able to care for Cody. Norman admitted he has a developmental disability, which he explained as, “I just can’t read ... [because] I read backwards.” He also has difficulty remembering time and numbers. When asked, he could not remember how many children he had.

¶12 Donna testified Norman has eight children—five adult children and three children with her. She explained she and Norman babysit Norman’s grandchildren on the weekends. Donna testified she has a developmental disability too, but can care for Cody. She graduated from high school. Donna also has spoken to the landlord several times about the mold in the basement, and he has repeatedly promised to fix it.

¶13 The jury found Norman and Donna were unable to care for Cody so as to seriously endanger Cody’s physical health. Following a dispositional hearing, the circuit court determined Cody was a child in need of protection or services and entered a CHIPS order.

## DISCUSSION

¶14 On appeal, Norman argues the evidence presented at trial was insufficient to establish he was unable to provide necessary care so as to seriously endanger Cody's physical health. *See* WIS. STAT. § 48.13(10). When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. *State v. Quinsanna D.*, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury's verdict if there is any credible evidence to support it. *Id.* We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. *Id.* Further, although only Norman appeals, we consider the evidence against both parents because in *State v. Gregory L.S.*, 2002 WI App 101, ¶42, 253 Wis. 2d 563, 643 N.W.2d 890, we stated the facts of the case may be such that the child is in need of protection or services based solely on one parent's actions, or inaction.

¶15 To prove a child is in need of protection or services under WIS. STAT. § 48.13(10), the County must prove, by clear and convincing evidence, that the parent neglected, refused, or was unable for reasons other than poverty to provide necessary care for the child, and that the failure to provide seriously endangered the child's physical health. *See* WIS. STAT. §§ 48.13(10),<sup>6</sup> 48.31(1);

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<sup>6</sup> WISCONSIN STAT. § 48.13 provides:

[T]he court has exclusive original jurisdiction over a child alleged to be in need of protection or services ... and:

....

(10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

*see also* WIS JI—CHILDREN 250 (2012). Actual harm or injury to the child need not have occurred. WIS JI—CHILDREN 250 (2012); *see also* **Z.E. v. State**, 163 Wis. 2d 270, 274-75, 471 N.W.2d 519 (Ct. App. 1991) (approving § 48.13(10)'s pattern jury instruction). The fact-finder may consider the natural and probable consequences of failure to provide, the nature of any possible harm, and the level of risk that harm will occur. WIS JI—CHILDREN 250 (2012).

¶16 Norman contends the evidence presented at trial was insufficient because “Norman does not need help from his guardian with day-to-day matters and no expert testimony regarding Norman’s disability or cognitive functioning was presented at the trial.” As background to Norman’s appellate argument, we observe both the CHIPS petition and dispositional report to the court alleged that Norman and Donna were unable to provide necessary care for Cody because they both have “significant” developmental disabilities and cognitive limitations. The CHIPS petition and dispositional report referenced test scores, diagnoses, psychiatric and neurological evaluations, and medical opinions. Significantly, medical experts have opined that Norman’s and Donna’s developmental disabilities and cognitive limitations make them incapable of being able to raise children.

¶17 However, the County never presented this evidence at trial. Instead, the evidence supporting the parents’ inability to provide necessary care so as to seriously endanger Cody’s physical health was (1) they both had guardians; (2) a social worker was “concern[ed]” about the parents’ “ability to understand age-appropriate development for children in order to provide that structure and environment that they need to grow socially, emotionally, and developmentally on task”; (3) Norman had a developmental disability, which he stated meant he could not read, and had memory deficits; (4) Donna had a learning disability, which she

described as a bruise on the side of her head which caused her to learn differently; and (5) the house they rented had mold in the basement.

¶18 We conclude this evidence is insufficient to establish by clear and convincing evidence that the parents were unable to provide necessary care so as to seriously endanger Cody's physical health. Although we recognize that, from a legal perspective, Norman and Donna could have only received their guardians if a circuit court found them to be "incompetent," which means they suffer from an "impairment" that makes them "unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety," *see* WIS. STAT. § 54.10(3)(a)2., the jury in this case was not advised of the legal significance of a guardian or a guardianship. It heard only that the parents each had a "guardian" who made important decisions for the parents but was not otherwise involved in their daily lives. The evidence that the parents had guardians, without more, does not support an inference that they are unable to provide necessary care so as to seriously endanger Cody's physical health.

¶19 As for Norman's and Donna's developmental disabilities, Norman was the only witness who testified about the extent of his disability and stated simply that he could not read and had trouble with numbers and time. Similarly, Donna was the only witness who testified about her learning disability and stated only that she learned differently. It does not follow that a parent who is illiterate or one who has a learning disability is incapable of providing necessary care to a child.

¶20 Further, the social worker's "concern" about the parents' inability to understand age-appropriate development does not suggest that Norman's or



Donna's care would seriously endanger Cody's physical health. The social worker's concern focused on Cody's social and emotional development and did not include any physical dangers. Finally, Norman's guardian and Donna both testified they have talked to the landlord about fixing the mold in the basement. In short, based on this evidence and all reasonable inferences derived therefrom, no trier of fact acting reasonably could have found the parents were unable to provide necessary care so as to seriously endanger Cody's physical health. *See* WIS. STAT. § 48.13(10). We therefore reverse the CHIPS order.

¶21 Finally, Norman appears to argue that, as a matter of law, Cody cannot be found to be a child in need of protection or services because Norman has never had the opportunity to provide care to Cody. He suggests that, before a CHIPS petition may be filed, he must be given an opportunity to provide care and the County must wait and see if his care, or lack thereof, seriously endangers Cody's physical health. We disagree. The County's CHIPS petition alleged that Norman's and Donna's developmental disabilities and cognitive limitations prevented them from being able to care for Cody. The County did not need to wait to file the CHIPS petition until Cody was actually harmed from his parents' inability to provide care. *See* WIS JI—CHILDREN 250 (2012) (“[A]ctual harm or injury need not have occurred.”); *see also* *Z.E.*, 163 Wis. 2d at 274-75.

*By the Court.*—Order reversed.

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

