

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2007

David R. Schranker
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 Nos. 2006AP1201
2006AP1202
2006AP1204**

**Cir. Ct. Nos. 2003JC0278
2003JC0279
2003JC0281**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

2006AP1201

IN THE INTEREST OF AVIA A., A PERSON UNDER THE AGE OF 18:

DANE COUNTY,

PETITIONER-RESPONDENT,

v.

ROBERT A.,

RESPONDENT-APPELLANT.

2006AP1202

IN THE INTEREST OF ESSENCE A. A PERSON UNDER THE AGE OF 18:

DANE COUNTY,

PETITIONER-RESPONDENT,

v.

ROBERT A.,

RESPONDENT-APPELLANT.

2006AP1204

IN THE INTEREST OF CAPRICE A., A PERSON UNDER THE AGE OF 18:

DANE COUNTY,

PETITIONER-RESPONDENT,

v.

ROBERT A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Robert A. appeals the orders adjudicating his three daughters to be children in need of protection and services and placing them in the home of Camille Y.² He contends the court erred by: (1) allowing him to proceed without an attorney at the disposition hearing, thereby depriving him of the right to put on a proper defense; (2) not allowing him to withdraw his plea of no contest to the amended allegations in the petitions; (3) placing his daughters with Camille despite facts that showed she was unsuitable; and (4) allowing his appellate counsel to withdraw. We reject each of these claims of error and affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² We have consolidated the three cases for purposes of this appeal.

BACKGROUND

¶2 On December 23, 2003, the Dane County Department of Human Services filed petitions alleging that Robert's three daughters, Avia A. (d/o/b 9/16/95), Caprice A. (d/o/b 8/01/93), and Essence A. (d/o/b 8/24/1990) were in need of protection and services based on the sexual abuse of Essence by Robert. The court appointed an attorney for Robert, who subsequently asked that attorney to withdraw. The court granted that attorney permission to withdraw and appointed another attorney.

¶3 On October 14, 2004, the district attorney agreed to amend the petitions to drop the sexual abuse allegation and substitute an allegation of physical abuse. The district attorney specifically stated that at the disposition hearing the State would offer evidence regarding the sexual abuse and ask the court to "make findings and dispositional orders that [] address that problem, as well." After a colloquy with the court, Robert entered a plea of no contest to the amended allegation of physical abuse.

¶4 The cases were set for a dispositional hearing on November 9, 2004. On the preceding day Robert's attorney moved to withdraw from representation. On November 9, 2004, after an in-camera conversation with Robert and his attorney, the court denied the request to withdraw. However, for other reasons, the disposition hearing did not take place that day but was continued until December 1, 2004. During the November 9, 2004 hearing, Robert stated he "[was] thinking about withdrawing [his] plea" because he did not understand what was going on. The court stated that the record did not support that assertion but, if a motion to withdraw his plea were filed, the court would consider it. However, the court made clear that it would not hear the motion before December 1, 2004.

¶5 By December 1, 2004, the court had received a letter from Robert asking that he be permitted to withdraw his plea; however, the attorneys for the other parties had not received a copy. The court stated that it would not hear the motion on that day.

¶6 Before the disposition hearing began, the court took up the motion of Robert's attorney to withdraw on the ground that Robert had fired her. Robert confirmed that he did not want her to represent him. When the court asked Robert whether he wanted his counsel's assistance if the disposition hearing were to proceed on that date or wanted to represent himself, Robert said he did not want any assistance from her, but he did not feel capable of representing himself. After the court determined that Robert was competent to represent himself, the court gave Robert another opportunity to choose to have his counsel remain in case he needed assistance, and he declined to have her remain.

¶7 The disposition hearing proceeded with Robert representing himself. At the close of the hearing, the court adjudged each of the three children to be in need of protection and services and ordered that each be placed in the home of Camille.

¶8 Robert, acting pro se, filed a notice of appeal in each case; each appeal was subsequently dismissed as premature. While those appeals were pending, Robert requested the appointment of an attorney to assist him on appeal, and counsel was appointed. That attorney subsequently moved to withdraw on the ground that there was no appealable issue and he could not ethically file a notice of appeal. The court granted the motion.

DISCUSSION

¶9 We first address Robert’s contention that the court erred in permitting him to proceed without counsel at the disposition hearing.

¶10 A parent in a CHIPS proceeding has neither a statutory nor an absolute constitutional right to appointed counsel; however, fundamental fairness requires that the circuit court be given discretion to decide on a case-by-case basis whether due process requires appointment in a particular case. *Joni B. v. State*, 202 Wis. 2d 1, 18, 549 N.W.2d 411 (1996); *see also* WIS. STAT. § 48.23(3). A court “should only appoint counsel after concluding either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment.” *Joni B.*, 202 Wis. 2d at 18. A non-exhaustive list of factors the supreme court recommends for consideration are:

- the person characteristics of the parent, such as age, mental capacity, education, and former contact with the court;
- the parent’s demonstrated level of interest in the proceedings and desire to participate;
- whether the petition alleges incidents of abuse or neglect which could lead to criminal prosecution;
- the complexity of the case, including the likelihood of the introduction of medical or psychological evidence;
- the probability of out-of-home placement and potential duration of separation, based on the allegations in the petition and the social worker’s recommendation.

Joni B., 202 Wis. 2d at 19.

¶11 We conclude the circuit court properly exercised its discretion here. One attorney was initially appointed for Robert and when that attorney withdrew

at Robert's request, another attorney was appointed. It was only when Robert wanted this second attorney to cease representing him that the court declined to appoint a third attorney for the disposition hearing. In making that decision, the court was very careful to make sure that Robert understood that it would not appoint a third attorney, to give him a chance to reconsider his termination of his relationship with the attorney, and to give him the option of having the attorney remain only to assist him if he needed it.

¶12 The court also considered all of the factors suggested in *Joni B.*, which were specifically brought to the court's attention. It first considered Robert's ability to represent himself. It reviewed two letters just received from Robert, one a demand for discovery for the disposition hearing and the other asking to withdraw his plea, and ascertained from Robert that he had written them himself. The court concluded that the letters showed that he had a command of the English language and "really a fairly sophisticated notion of the kind of rights that a person might have, at least in a criminal case...." The court ascertained that he had some high school education, was of at least average intelligence, and, based on its observations of how he had conducted himself in a number of proceedings, he was resourceful, had a fairly good understanding of the legal principles, and "uses that for his purposes very effectively."

¶13 The court also considered that there had been related criminal proceedings. The court stated that it had been "very careful not to place him in a position of having to give up his right to remain silent in the criminal case in order to defend against this case, which is a civil matter"; but since a judgment had now been entered in the criminal matter pursuant to Robert's plea and there was no pending motion to withdraw that plea, the court did not believe the criminal matter

would affect Robert's ability to defend himself. The court then reviewed the issues that were likely to arise at the disposition hearing, assessed them as not particularly complicated, not involving psychological evidence, and involving facts of the kind that ordinary people, including Robert, could understand and present. As for the probability of an out-of-home placement, the court observed there was a high probability of that, since the children had already been in an out-of-home placement for a long time, Robert was incarcerated, and the girls' mother had not made herself available for the hearing. The court did not view these facts regarding an out-of-home placement as favoring a delay in the disposition hearing to appoint a third attorney for Robert. Finally, the court expressed its view that Robert had been and was manipulating the issue of appointment of counsel for purposes of delay, and this factor also favored going ahead as scheduled without appointing another attorney.

¶14 In short, the court applied the correct law to the facts of record and gave a very thorough explanation of its reasoning. We are satisfied that it properly exercised its discretion.

¶15 We next consider Robert's contention that the court erred in not permitting him to withdraw his plea. The record does not support Robert's implicit factual premise that the court denied his motion. At the November 9, 2004 hearing, he stated only that he was "thinking about" it, and the court expressly stated that it would consider such a motion if it were filed. Although he subsequently filed a written motion with the court, he did not serve the other parties before the December 1, 2004 disposition hearing. This is inadequate notice under WIS. STAT. § 801.15(4). Therefore, the court properly declined to hear the motion on December 1, 2004. Robert does not assert that he subsequently asked

for a ruling or a hearing date on the motion, and we see no indication of that in the record. We therefore conclude the circuit court did not deny his motion and did not err in declining to hear his motion on or before December 1, 2004.

¶16 Robert's third argument is that the court erred in placing his daughters with their half-sister, Camille. He asserts that the court did not consider evidence of a forgery conviction against Camille and that she is not a suitable caregiver because her boyfriend has a criminal history and has alleged that Camille herself was a suspect in a robbery homicide.

¶17 Disposition in a CHIPS case lies within the court's discretion. *See R.E.H. v. State*, 101 Wis. 2d 647, 653, 305 N.W.2d 162 (Ct. App. 1981). Evidentiary rulings are also generally committed to the circuit court's discretion. *La Crosse County Dep't of Human Servs. v. Tara P.*, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. We do not reverse discretionary decisions if the court applied the relevant law to the facts of record and reached a reasonable conclusion. *State v. James P.*, 180 Wis. 2d 677, 683, 510 N.W.2d 730 (Ct. App. 1993). To the extent the court makes factual findings in arriving at a discretionary decision, we accept them unless they are clearly erroneous and we defer to the circuit court's assessment of credibility. *See WIS. STAT. § 805.17(2)*.

¶18 The court's ruling excluding a letter related to Camille's 1995 criminal conviction for forgery and theft was a proper exercise of the court's discretion. The court listened to Robert's argument, reviewed the letter, and concluded that events that occurred in 1995 were too remote in time to bear on the decision of whether Camille's home was an appropriate placement now.

¶19 Although Robert alleged that Camille was involved in a homicide, there was no corroboration of his accusation and the social worker testified that she had made inquiries to the investigating detective who said Camille was not a suspect in any violent crime. The social worker also testified that she was aware of Camille's boyfriend's criminal record, and he was in prison at the time.

¶20 The social worker presented positive testimony on Camille's care of the children, conduct, and cooperation with the department. The social worker also testified that the children had expressed a wish to stay with Camille and that if they were not placed with her, they would probably have to reside in different foster homes.

¶21 We are satisfied that a reasonable court could decide on this record that placement with Camille was in the children's best interests. *See* WIS. STAT. §§ 48.01(1) and 48.355(1).

¶22 Finally, we address Robert's contention that the court erred in allowing the appointed appellate counsel to withdraw. Appellate counsel's motion to withdraw provided significant detail on the steps he had taken to assess the merits of an appeal, which included reviewing transcripts, and on Robert's refusal to cooperate with his requests for specifying what issues he, Robert, believed were meritorious, since Robert disagreed with him. There is no transcript of the hearing on the motion, but the minute sheet indicates that Robert made statements on the reappointment of counsel.

¶23 As already noted, Robert does not have an absolute right to the appointment of counsel in this case, *Joni B.*, 202 Wis. 2d at 18, and he had already had appellate counsel appointed. In the absence of a transcript, we assume it

supports the circuit court's exercise of discretion. *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 524, 504 N.W.2d 621 (Ct. App. 1993). Thus, we assume that the transcript would support appellate counsel's version of the events that led him to file the motion to withdraw and would present no reasons why fundamental fairness would necessitate appointing another attorney.

CONCLUSION

¶24 We affirm the orders adjudicating Avia, Caprice, and Essence, children in need of protection and services and placing them with Camille.

By the Court.—Orders affirmed.

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