COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP278-FT **Cir. Ct. No. 2006JC110**

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

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAVID E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Reversed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.[1] David E. appeals a CHIPS (child in need of protection or services) order pertaining to his daughter, Chyanne E.E. David's principal argument is that he was entitled to a fact-finding hearing despite Chyanne's mother's admission to allegations in the CHIPS petition. We agree with this argument, but reject other arguments that David makes. We reverse the order, and remand for further proceedings.

Background

¶2 The La Crosse County Department of Human Services petitioned to have Chyanne adjudicated in need of protection or services under WIS. STAT. § 48.13(10) and (10m). Under § 48.13(10), the court may obtain CHIPS jurisdiction over a child "[w]hose parent … 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." Under § 48.13(10m), the court may obtain CHIPS jurisdiction over a child

> [w]hose parent … is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent … has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17, decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 The Department alleged in the petition that Chyanne was the newborn daughter of David and Crystal T. and that the parents also had a one-year-old child, Jesse, who was placed in foster care under a CHIPS dispositional order. The petition further alleged, among other things, that both David and Crystal were unable to independently parent due to a variety of issues.

¶4 At a plea hearing, the parents denied the allegations in the petition and requested a jury trial.[2]

¶5 David subsequently moved to dismiss the allegation with respect to WIS. STAT. § 48.13(10m). He argued that § 48.13(10m) requires evidence that "another child" was neglected "in the home" and that Jesse, the "other child" in this case, was placed directly into foster care at birth.

¶6 At a subsequent hearing, and before the court addressed David's motion, Crystal changed her plea and admitted to grounds under WIS. STAT. § 48.13(10m). Based on Crystal's admission, the court found Chyanne in need of protection or services and dismissed the allegation under § 48.13(10) with respect to Crystal. Neither David nor his counsel was present at Crystal's plea-change hearing, but learned of it the next day.[3]

¶7 In subsequent proceedings, the Department maintained that, under ***State v. Gregory L.S.***, 2002 WI App 101, 253 Wis. 2d 563, 643 N.W.2d 890, Crystal's admission to grounds under WIS. STAT. § 48.13(10m) rendered a fact-

[2] We do not find a transcript of this plea hearing in the record, but this fact is not disputed.

[3] Crystal's plea-change hearing was held at the psychiatric ward of Gundersen Lutheran Medical Center in La Crosse.

finding hearing unnecessary. David objected, arguing that ***Gregory L.S.*** was not controlling because, unlike the non-admitting parent in that case, he was disputing the factual allegations in the petition, including the allegations pertaining to Crystal. The circuit court agreed with the Department. The court concluded that, under ***Gregory L.S.***, the court's acceptance of Crystal's plea conclusively established that Chyanne was in need of protection or services.

¶8 The circuit court also denied David's motion to dismiss the grounds under WIS. STAT. § 48.13(10m). The court reasoned that the phrase "in the home" is intended to refer to a relationship or family situation within which the substantial risk of danger to one child can be logically inferred from a parent's conduct toward another child. The court found that David, Crystal, Jesse, and Chyanne were part of a "family situation" and that § 48.13(10m) could, therefore, be applied to Chyanne.

¶9 After a dispositional hearing, the circuit court issued an order directing that Chyanne be placed in foster care and imposing various conditions for return on David and Crystal. We reference additional facts as needed below.

Discussion

Whether David Was Entitled To A Fact-Finding Hearing

¶10 David argues that he was entitled to a fact-finding hearing despite Crystal's admission because he disputed whether he and Crystal neglected Chyanne and endangered Chyanne's health. David relies primarily on WIS. STAT. § 48.30 for this argument.

¶11 WISCONSIN STAT. § 48.30 makes plain that "*any* party" may "contest" a CHIPS petition. WIS. STAT. § 48.30(1) (emphasis added). The statute

further states that if a petition "is contested," the court "*shall* set a date for the fact-finding hearing." WIS. STAT. § 48.30(7) (emphasis added).[4] There is no disagreement that David is "any party," and there is no serious dispute that David contests the petition.

¶12 Unfortunately, the Department does not address WIS. STAT. § 48.30(7). Instead, the Department relies solely on ***Gregory L.S.*** According to the Department, ***Gregory L.S.*** is controlling and precludes David from receiving a fact-finding hearing because Crystal's admission to grounds under WIS. STAT. § 48.13(10m) established that Chyanne is in need of protection or services. As already indicated, the circuit court adopted the Department's argument, agreeing with the Department that ***Gregory L.S.*** is dispositive. However, ***Gregory L.S.*** does not address David's situation.

¶13 In ***Gregory L.S.***, the parents were divorced and the children's mother received primary physical placement. ***Gregory L.S.***, 253 Wis. 2d 563, ¶6. The

[4] WISCONSIN STAT. § 48.30 provides, more fully, as follows:

> **(1)** Except as provided in this subsection, the hearing to determine whether *any* party wishes to *contest* an allegation that the child or unborn child is in need of protection or services shall [meet certain scheduling requirements].
>
> ….
>
> **(6)**(a) If a petition is *not contested*, the court shall set a date for the dispositional hearing ….
>
> ….
>
> **(7)** If the petition is *contested*, the court shall set a date for the fact-finding hearing ….

(Emphasis added.)

State filed a CHIPS petition, alleging that the children were in need of protection or services because the mother "'neglects, refuses or is unable … to provide necessary care … so as to seriously endanger the physical health'" of the children. ***Id.***, ¶8 (citing WIS. STAT. § 48.13(10)). The children were then placed with the father, who denied the CHIPS allegations and requested a jury trial. ***Id.***, ¶¶10-12.

¶14 The father in ***Gregory L.S.*** moved for summary judgment, arguing that, because the children had been placed with him and there were no allegations that he was unable to provide for their needs, the circuit court lacked CHIPS jurisdiction over the children. ***Id.***, ¶13. The State also moved for summary judgment, arguing that only one parent need be proven unfit in a CHIPS petition and that the mother planned to admit to the allegations. ***Id.***, ¶14. The State further argued that the father's care for the children did not justify dismissal of the CHIPS petition because the fact finder must consider the circumstances as they existed on the date the children were removed from the mother's home. ***Id.***

¶15 The circuit court granted judgment to the State, and the mother admitted to the allegations as planned. ***Id.***, ¶¶15-16. The father then filed a motion to dismiss the petitions, arguing that the State could not establish that there was any service or material necessity the court could order that he was not already providing. ***Id.***, ¶18. The circuit court considered the motion at the dispositional phase, disagreed with the father, and denied the motion. *See* ***id.***, ¶19.

¶16 On appeal, we explained that the State was entitled to summary judgment under WIS. STAT. § 48.13(10) only if the facts were undisputed as to three elements: (1) the mother neglected the children; (2) the children's health was seriously endangered; and (3) the children are in need of protection or services that the court can order. ***Id.***, ¶25. Notably, for purposes here, we stated

that "[*n*]*o one disputes that the first two elements were satisfied.*" ***Id.*** (emphasis added). Rather, the dispute on appeal focused on the third element. We said: "The crucial issue is whether the court's determination … should consider the children's needs as of the date of the fact-finding hearing, as [the father] asserts." ***Id.***, ¶26. The State argued that the determination should be made based on the circumstances existing at the time the children were removed from the home. ***Id.***

¶17 Our ensuing discussion in ***Gregory L.S.*** focused on the question of what is the relevant point in time for purposes of determining whether children are in need of protection or services that the court can order. ***Id.***, ¶¶26-41. We held that the determination should be made based on the facts as they existed at the time the petition was filed. ***Id.***, ¶¶29, 41. Applying that holding, we concluded that summary judgment for the State was proper because it was "undisputed" that, as of the petition filing date, the children were in need of out-of-home placement and their mother required counseling and mental health and substance abuse assessments. ***Id.***, ¶41.

¶18 Thus, the dispute in ***Gregory L.S.*** pertained to *which* were the pertinent facts—the facts as of the date of the children's removal from the home, the facts as of the date the petition was filed, or the facts as of the date of the fact-finding hearing. The father in ***Gregory L.S.*** did not dispute the underlying factual allegations in the petition. Moreover, he did not dispute the ultimate fact that the mother neglected the children so as to seriously endanger the children's health. Here, David disputes precisely these allegations. He disputes, as a factual matter, whether he or Crystal neglected Chyanne so as to seriously endanger Chyanne's health. There was no dispute by either parent in ***Gregory L.S.*** that at least one parent—there, the mother—neglected the children so as to seriously endanger their health.

¶19 The Department seizes upon the following statement at the end of our decision in ***Gregory L.S.***:

> The result of our holding is a recognition that children can be adjudicated to be in need of protection or services even when only one parent has neglected the children…. Where, as here, the children were neglected and seriously endangered by one parent, they may be adjudicated in need of protection or services.

Id., ¶42. The Department's reading is based on faulty logic. The statement recognizes that a child may be adjudicated CHIPS even when only one parent has endangered a child. It does not follow that one parent's admission that he or she endangered a child binds the other parent.

¶20 The Department also argues that uncontested facts in the dispositional report support a finding that Chyanne was in need of protection or services. In making this argument, the Department relies on a statement by David's counsel at the dispositional hearing that "I don't have any real problem with the report other than to just restate on the record my client's objections to this disposition." We are not persuaded.

¶21 First, David was simply maintaining his previous objections to a disposition without fact finding; he was not admitting facts that would have made fact finding unnecessary.[5] Thus, the Department's characterization of the facts in

[5] David's counsel's full statement was as follows:

> Judge, I don't have any real problem with the report other than to just restate on the record my client's objections to this disposition. I think we hashed that out quite well at the last hearing about what his objections were, and the Court had made a ruling about that.

(continued)

the dispositional report as "uncontested" is not borne out by the record. Second, the Department does not explain why it would be appropriate to consider facts in the dispositional report in addressing whether David may receive a fact-finding hearing.

¶22 We note that the Department declined the opportunity to file a summary judgment motion in the circuit court. We understand the Department's position to be that, under ***Gregory L.S.***, Crystal's admission necessarily precluded David from receiving a fact-finding hearing regardless whether David could point to evidence that might undercut the allegations in the petition. We reject this argument and, therefore, reverse and remand so that David may have the opportunity for a fact-finding hearing.

David's Other Arguments

¶23 David argues that the factual allegations in the petition are insufficient as a matter of law to establish grounds for CHIPS jurisdiction. As we understand it, his main argument is a purely legal one and pertains to the meaning of "in the home" in WIS. STAT. § 48.13(10m).[6] As indicated above, § 48.13(10m) allows the court to obtain CHIPS jurisdiction over a child "[w]hose parent … is at

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> I guess subject to that objection to this disposition, I don't see and my client hasn't really indicated to me that he has any problems with the conditions. They seem to be very similar to the conditions that, that were on [another child].

[6] David also argues that the allegations in the petition, even if true, are not specific enough to support a finding that he or Crystal neglected Jesse or Chyanne. David cites no authority, however, illuminating how specific the allegations needed to be. Accordingly, we consider this argument undeveloped and address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent … has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health *of another child in the home*" (emphasis added).

¶24 David argues that Jesse, the only possible "[]other child" here, was taken from David and Crystal at birth and never placed in either parent's home. Thus, according to David, Jesse was not another child "in the home."

¶25 David concedes that the Department is correct that an overly strict definition of "in the home" would lead to absurd results. He asserts, however, that the phrase "has to mean something." The meaning that David seems to be advancing is "anywhere a child resides with" a parent. David does not further define "resides with," and does not otherwise demonstrate why the "resides with" test would be a reasonable interpretation of the statute.

¶26 We conclude that David has failed to show that the circuit court's application of the statute to his situation was incorrect. We note that David does not challenge the circuit court's fact finding that David, Crystal, Jesse, and Chyanne were part of one family unit, nor has he disputed that there were periods of visitation with Jesse "in the home."

¶27 David also argues that he was not notified of the hearing at which Crystal admitted to the allegations in the petition, in violation of WIS. STAT. §§ 48.27 and 48.30, and that the acceptance of her plea without his presence or participation violated his right to due process. The Department responds that the

record is silent as to whether David received notice and that any error in this regard was harmless. David replies with the further assertion that the lack of notice was an intentional attempt to ensure that he would not have an opportunity to speak with Crystal about her decision, and to make it easier for the Department to get Crystal's admission.

¶28 We do not address this issue because David did not argue it in the circuit court, despite having at least two opportunities to do so. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."). We also note that, even though David's assertion that the lack of notice was intentional is a serious allegation, David points to no facts in the record to support this assertion.

By the Court.—Order reversed and cause remanded for further proceedings.

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