

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 2015

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. 2015AP552

Cir. Ct. No. 2012JC102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF K. H.:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

CONNIE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Connie H. appeals from an order of the circuit court denying her petition to revise a CHIPS dispositional order to lift a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

suspension of visits with her son, K.H. Connie argues that she met the conditions established by the court for the reinstatement of her visitation privileges to the best of her ability and, therefore, the circuit court should have reinstated her visitation privileges. I affirm for the reasons discussed below.

BACKGROUND

¶2 Connie is the biological mother of K.H. who was born in April 2008. In May 2012, Dane County filed a petition for protection or services alleging that Connie and K.H.'s father, Gene G., were “neglecting[,] refusing or unable to provide necessary care, food, clothing[,] medical or dental care[,] or shelter so as to seriously endanger the physical health of the child.” *See* WIS. STAT. § 48.13(10). The petition was filed after K.H. and his two-year-old sister were admitted into the hospital after having ingested gasoline while in the care of Connie and Gene. K.H.'s sister died as a result, and K.H., in addition to having ingested gasoline, suffered burns to his back and right inner thigh and was presumptive positive for cocaine.

¶3 On May 8, 2013, a dispositional order was entered placing K.H. out of the home and establishing conditions for the return of K.H. to Connie's care. The dispositional order provided that Connie “continues to struggle with severe untreated mental health issues which limit her ability to adequately supervise and parent [K.H.]” On May 23, 2013, Dane County filed a request to revise the May 8 dispositional order to provide that Connie's and Gene's visits with K.H. be suspended until such time that Connie “demonstrate[s] the capacity to behave in ways that do not cause emotional harm to [K.H.] during supervised family interactions.” The request to suspend Connie's visitation provided that K.H. is “extremely vulnerable ... due to the repeated trauma he experienced in the

parental home” and that K.H.’s therapist “determined that [K.H.] is in need of exceptional support regarding his trauma and that the current family interaction plan is harmful to his emotional health.” The request further provided that Connie had not “shown an interest or an attempt to understand [K.H.’s] needs,” that Connie had “been resistant to engaging in conversation with the department regarding ways in which [K.H.] needs support,” and that Connie’s behavior “is impulsive and oriented toward meeting her own needs and not those of [K.H.],” all of which “poses a threat to [K.H.’s] emotional safety and results in [the] department’s inability to control for this threat.”

¶4 A hearing was held on the County’s request to suspend Connie’s supervised visitation with K.H. At the hearing, both the social worker assigned to K.H.’s case, Chelsea Olson, and K.H.’s therapist, Rainbow Marifrog, testified that K.H.’s visits with Connie should be suspended because Connie’s visits with K.H. were detrimental to K.H.’s treatment. K.H. was described by Olson as “a child with exceptional needs” who “need[s] to be supported by people in his life.” Marifrog testified that K.H. suffered “very early trauma and neglect,” and as a result suffers “a lot of developmental gaps around ... infancy.” Marifrog testified that K.H. also suffers from posttraumatic stress disorder and has serious behavioral issues, including “a lot of aggression,” “explosive emotions,” and inappropriate sexual conduct.

¶5 Both Olson and Marifrog testified that Connie had failed to acknowledge the trauma K.H. has experienced, sometimes actively denying that K.H. had been harmed, and that Connie’s focus was more on her own personal experiences and needs rather than on K.H. and his needs. Connie testified that K.H. “will say things like ‘Geno hurt me’” and that Connie would respond, “‘No, Geno is a good guy.’” Marifrog testified that Connie did things to “remind [K.H.]

constantly [that] she doesn't believe him or see or understand what [K.H. has] been through," which "makes [K.H.] ... become very agitated and then regress in his own treatment." Marifrog testified that during Marifrog's one-hour session with Connie, Connie had "adamantly denied that [K.H.] had ever been harmed and then proceeded to spend the rest of the time crying and going on about [Connie's own] extensive trauma history." Marifrog also described a visit she observed between K.H. and Connie as follows: "it ... seemed to be very, very much focused on [Connie's] needs, a lot around getting ... [K.H.] to affirm her, like 'So you miss me, do you love me?'"

¶6 Both Olson and Marifrog testified that parameters had been set around things that they did not want Connie to bring up or discuss during her visits with K.H., but that Connie would nevertheless find ways to bring up those topics. Both Olson and Marifrog also testified that before Connie's visits with K.H. can continue in a manner that is conducive to K.H.'s safety and treatment, Connie first needs to address her own personal mental health concerns, including her history of trauma.

¶7 The circuit court granted the County's request and on September 16, 2013, entered a revised dispositional order, which provided in relevant part: "Visitation is denied between [K.H.] and each parent until such time as the attached conditions are met." The conditions for reinstatement of Connie's visitation that are attached to the revised dispositional order are as follows:

A. Participate in individual therapy and address the following issues:

1. Come to terms with the impact that her own trauma has made on her ability to parent and how her trauma inhibits her from meeting her son's needs.

2. Acknowledge [K.H.'s] experience and provide support to him around his past trauma.

3. Develop reality based thoughts and perceptions and thinking in line with [K.H.'s] reality.

4. Develop coping strategies to deal with her unmet emotional needs.

5. Accept coaching to help her meet [K.H.'s] needs during visitation.

B. Attend AODA treatment to address her ongoing AODA issues.

C. Cooperate with [K.H.'s] service providers including his current therapist and meeting with that therapist as the therapist recommends.

D. Attempt to write age appropriate letters to [K.H.] which shall be sent to the social worker. If the social worker, GAL and [K.H.'s] therapist agree that a letter is appropriate and it is in [K.H.'s] best interest to share the letter, it shall be shared with him by his therapist.

¶8 In August 2014, Connie filed a request to revise the September 16, 2013 dispositional order, seeking to have her visits with K.H. reinstated. A hearing was held on Connie's request in September 2014. At this hearing, testimony was given by Connie's therapist, Mary Sue Roberts, and Olson. The details of their testimony is set forth more fully below.

¶9 Following the hearing, the circuit court denied Connie's request to revise the dispositional order. The court stated that it declined to grant Connie's request to revise the dispositional order because Connie had failed to make "any showing that she can support [K.H.] around his past trauma," condition A.2. The court also stated that Connie hadn't made "any showing that she'[d] cooperated with [K.H.'s] therapist, including meeting with that therapist as the therapist recommends," and that the court was "not going to order that a parent have visitation with a child when the child's therapist has opined that this contact is

emotionally harmful to the child,” but no evidence was presented that the therapist believed that contact would no longer be emotionally harmful or that if the therapist was being unreasonable in refusing to meet with Connie. Connie appeals.

DISCUSSION

¶10 Connie challenges the circuit court’s order denying her request that the September 16, 2013 dispositional order be revised to reinstate her visitation with K.H. Connie argues that the court should have reinstated her visits with K.H. because she has met all of the conditions for reinstatement of visitation established in the revised dispositional order to the best of her ability, and that the court’s failure to do so was a violation of her due process rights. Before I address Connie’s arguments, I must first address the standard of review applicable in this case.

1. Standard of Review

¶11 Connie asserts that this court’s review of the circuit court’s order denying her request to revise the September 16, 2013 dispositional order is de novo. In support of her assertions, Connie cites, without explanation, *Stuligross v. Stuligross*, 2009 WI App 25, ¶9, 316 Wis. 2d 344, 763 N.W.2d 241. *Stuligross* concerned a parent’s request for child support modification. A hearing was held first before a court commissioner and the parent sought review of the commissioner’s decision before the circuit court, which declined to conduct a new hearing. *Id.*, ¶¶2-6. In the paragraph cited by Connie, we stated that the issue before this court on appeal was whether the parent was entitled to a de novo review before the circuit court, the resolution of which required us to interpret, de novo, the language of the relevant statute. *Id.*, ¶9.

¶12 In this case, the issue is whether the circuit court properly denied a request to revise a dispositional order, which does not require this court to interpret WIS. STAT. § 48.363, which addresses the revision of dispositional orders, or any other statute. Accordingly, I conclude that *Stuligross* is not applicable here.

¶13 This court reviews a circuit court's dispositional order for an erroneous exercise of discretion. *State v. Richard J.D.*, 2006 WI App 242, ¶5, 297 Wis. 2d 20, 724 N.W.2d 665. I see no reason why the standard of review would not be the same where the review is of a circuit court's order denying a request to revise the dispositional order, and Connie has given this court no reason why it would not be the same. Accordingly, the decision of the circuit court will be affirmed so long as the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *State v. Cesar G.*, 2004 WI 61, ¶42, 272 Wis. 2d 22, 682 N.W.2d 1 (quoted source omitted). An appellate court will look for reasons to sustain a discretionary decision of the circuit court, *see Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and “may search the record to determine if it supports the court's discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

2. Denial of Request for Revision of Dispositional Order

¶14 Boiled down, Connie's first argument is that it was an erroneous exercise of the circuit court's discretion to deny her request to revise the September 16, 2013 dispositional order because the evidence presented at the hearing on her request established that she had satisfied, to the best of her ability,

each of the conditions set for the reinstatement of her visitation with K.H. The State counters that Connie failed to make a sufficient showing that she can provide support to K.H. around the trauma he has experienced, condition A.2., and, therefore, the circuit court did not erroneously exercise its discretion by denying Connie's request to reinstate her visitation with K.H.² I conclude that evidence presented at the hearing supports the circuit court's determination that Connie did not present sufficient evidence that she has satisfied condition A.2.

¶15 At the hearing, Roberts testified that she had been Connie's therapist since November 2013 and that Connie had participated in twenty-nine individual sessions and eleven parenting groups. On cross-examination, Roberts testified that she was aware of the conditions Connie was expected to meet to have her visitation with K.H. reinstated, but that Connie had executed only a "limited release" for Robert's participation at the hearing, which prevented her from testifying as to whether Connie had come to terms with the impact her personal trauma has on her ability to parent K.H. and meet K.H.'s needs, whether Connie had been able to acknowledge K.H.'s experience and provide support for him, whether Connie had developed reality-based thoughts and perceptions in line with K.H.'s reality, whether Connie had developed coping strategies to deal with her emotional needs, or whether Connie is able to accept coaching to help meet K.H.'s needs during visitation. Roberts testified that it was her understanding that after

² I also read the State's brief as arguing that even if the evidence presented at the hearing established that Connie had satisfied each of the conditions, the circuit court was within its discretion to deny her request to reinstate her visitation with K.H. in light of the totality of the new evidence presented at the September 2014 hearing on Connie's request to revise the September 16, 2013 revised dispositional order. I need not address this argument because, as I explain in ¶¶15-18, I conclude that evidence at the hearing supports the circuit court's determination that Connie did not establish that she has satisfied each of the conditions.

Connie had participated in sufficient sessions, she was to meet with Olson and “perhaps” Marifrog. Roberts testified that at some point during her treatment of Connie, she believed that Connie “had met her end of what she needed to do to restart visits” and that she had spoken with Olson about the plan for Connie to restart visits with K.H. and that she had asked Olson if it was time to get into contact with Marifrog. Roberts testified that she met with Marifrog, and that Marifrog had indicated that Marifrog did not feel that supervised visits with Connie would, at the time, be beneficial to K.H.

¶16 Olson acknowledged that Connie had made progress in therapy and has been able to work through some of her own trauma. Olson testified, however, that it was her opinion that Connie had not yet demonstrated that she is capable of visitation with K.H, even if that visitation is supervised. Connie testified that Roberts had previously indicated that Connie was ready to meet with K.H.’s therapist, but that after Roberts had met with Marifrog and spoken with Olson, it was determined “that Roberts did not have all the information on [Connie]” or a “clear picture” as to K.H.’s trauma, and that Connie had more to do before the conditions outlined in the revised dispositional order were satisfied. Olson testified that it was clear that “Roberts was functioning off of a different basis for [K.H.] and viewed him very differently” after Roberts had spoken with Marifrog. Olson testified:

[I]t was determined through a conversation that I had with [] Roberts that since there was more information shared with her, that there was more work to be done with Connie before we were to initiate any sort of contact between Connie and [K.H.]. And that it had been unclear to [] Roberts how severe some of the situations were that led to the Department being involved with this family, and also, the extensive needs of [K.H.]

Olson further testified that Roberts had “indicated that Connie had made some minimal progress in therapy but that [Connie] had not met the concerns and that [Roberts] felt [Connie] had not met those conditions that were stated in [the September 16, 2013 dispositional order].” In addition, Olson testified that Connie’s ability to manage her emotions around [K.H] is “incredibly important,” but that Connie has failed to demonstrate that she is capable of this. As an example, Olson testified that in her most recent meeting with Connie, Connie had “burst out of the room crying because she was upset by ... discussions [they] were having.”

¶17 The testimony of Roberts and Olson, which I’ve summarized, supports the circuit court’s determination that Connie failed to make a sufficient showing that she is able to provide support to K.H. around his past trauma, and thus failed to establish that she has satisfied each of the conditions for reinstatement of her visits with K.H.³

¶18 Accordingly, I conclude that although Connie has made great efforts to satisfy the conditions established for reinstatement of her visits with K.H., it was not an erroneous exercise of the circuit court to deny Connie’s request to revise the dispositional order.

³ Connie also argues that the circuit court imposed an additional *de facto* condition that K.H.’s therapist must approve of K.H.’s visitation with Connie before visitation may be reinstated, which is not one of the conditions she was ordered to meet in the September 16, 2013 revised dispositional order and should therefore be disregarded. As I explain below in ¶25, Connie’s argument of a *de facto* condition is without merit.

3. *Due Process Challenge*

¶19 Connie also contends that the circuit court’s failure to grant her request to revise the dispositional order violated her due process rights. Whether a challenged State action violates the Fourteenth Amendment due process protections presents a legal question which we review independently of the circuit court. See *Monroe Cty. DHS v. Kelli B.*, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. “Substantive due process has been traditionally afforded to fundamental liberty interests,” *id.*, ¶19, and Wisconsin has recognized a parent’s fundamental liberty interest in parenting his or her child. See *T.M.F. v. Children’s Serv. Soc’y of Wis.*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983).

¶20 Connie asserts that the circuit court denied her request to revise the dispositional order on the following bases: (1) “there was no showing that Connie [] can support K.H. around his past trauma”; (2) “there was no showing that Connie [] has cooperated with [K.H.’s] therapist, including meeting with that therapist as the therapist recommends”; and (3) because K.H.’s therapist had previously testified that contact with her is emotionally harmful. Connie argues that she “has no control” over any of the bases relied upon by the court in denying her request and, therefore, the court’s denial of her request on those bases “violate[s her] fundamental liberty interest” to have contact with K.H.

¶21 Citing *Kenosha Cty. DHS v. Jodie W.*, 2006 WI 93, ¶¶41-49, 293 Wis. 2d 530, 716 N.W.2d 845, Connie argues that this State’s supreme court has determined that “[w]ith respect to conditions of return, as opposed to conditions for reinstatement of visits, the Wisconsin Supreme Court has found that the requirements must be something on which a parent is capable of working.” Although Connie does not explicitly say so, she appears to be arguing that

conditions for the reinstatement of visits must likewise be something the parent is capable of accomplishing.

¶22 In *Jodie W.*, the supreme court held that a parent could not be determined to be unfit based only on a parent's failure to fulfill a condition of return that was impossible for the parent to fulfill due to the parent's incarceration. Assuming, without deciding, that Connie is correct that the supreme court's holding in *Jodie W.* applies to conditions imposed for the reinstatement of visitation rights and that it extends to situations other than incarceration, Connie has not demonstrated that the conditions the circuit court determined she failed to meet were "impossible."

¶23 Connie asserts that the conditions were out of her "control" because, although "she had done everything within her control to comply with the conditions for reinstatement," it wasn't enough.⁴ Connie has not made a showing that there is nothing more she is capable of doing in order to meet all the conditions, in particular, condition A.2. Nor has Connie cited this court to any legal authority supporting her argument that a parent's substantive due process rights are violated where a circuit court finds, as the court did in this case, that the parent failed to make a sufficient showing that the conditions have not yet been fully met.

⁴ This position of Connie seems to confirm the circuit court's determination that Connie has not shown that she views things from K.H.'s perspective. Connie appears to equate going through the motions of compliance with compliance, while the essence of protecting K.H. depends upon a change in Connie's thinking, not just attendance at sessions. Connie seems to be asserting that the conditions are impossible to meet because it is hard for her to change. This is not the same kind of impediment as being incarcerated and therefore not in control of your own movements.

¶24 Connie also asserts that the “conditions were all impossible for [her] to achieve [because] they all depended upon K.H.’s therapist permitting [her] to do certain things.” However, Connie does not explain what “certain things” K.H.’s therapist *must* permit her to do in order to satisfy the conditions for reinstatement of her visits, nor has she argued that the therapist has unreasonably refused to permit Connie to do those “things.”

¶25 Finally, Connie argues that due process rights were violated because the court “added [the] *de facto* condition that K.H.’s therapist approve of Connie[’s] contact with K.H.” Connie’s argument is without merit. The State argues, and I agree, that the circuit court made it clear that it would independently determine whether visitation between Connie and K.H. should be reinstated. The court stated:

I’m just not going to order that a parent have visitation with a child when the child’s therapist has opined that this contact is emotionally harmful to the child. That’s what got this order in the first place. And it seems to me if—to ask the Court to undo that kind of order, you need to get that therapist in here and you need to have the therapist say, “We’ve done some work, it’s okay.” Or you need to have the therapist in front of me and you need to say, “Now why aren’t you meeting with mom and what does mom need to do to satisfy you?” And I think you need to persuade the judge the therapist is not being reasonable.

I mean, *ultimately, the decision of are there going to be visits or placement is a legal one that the judge gets to make.* I place a lot of weight on what mental health professionals and experts have to say about emotional harm and trauma and what goes on in human interaction. *But, I think it’s probably fair to say if a therapist and I disagree, I win.* (Emphasis added.)

This is the essence of due process. Testimony is given, but the trier of fact is the ultimate arbiter of what is true.

CONCLUSION

¶26 For the reasons discussed above, I affirm.

By the Court.—Order affirmed.

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

