

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2005

Cornelia G. Clark
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. 2005AP849
2005AP850
2005AP851**

STATE OF WISCONSIN

**Cir. Ct. Nos. 2004JC153
2004JC154
2004JC155**

**IN COURT OF APPEALS
DISTRICT IV**

No. 2005AP849

**IN THE INTEREST OF CHEYENNE M.R.,
A PERSON UNDER THE AGE OF 18:**

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

MABEL R.,

RESPONDENT-APPELLANT,

ELVIN R.,

RESPONDENT.

No. 2005AP850

**IN THE INTEREST OF CHRISTOPHER Q. R.,
A PERSON UNDER THE AGE OF 18:**

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

MABEL R.,

RESPONDENT-APPELLANT,

ELVIN R.,

RESPONDENT.

NO. 2005AP851

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

WOOD COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

MABEL R.,

RESPONDENT-APPELLANT,

ELVIN R.,

RESPONDENT.

APPEAL from orders of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Mabel R. appeals from Child in Need of Protective Services (CHIPS) dispositional orders placing three of her children, Cheyenne R., Christopher R. and Tracey R. in the care of their older sister.² Mabel contends that the evidence does not support findings that the children are in need of protective services, and that placement out of the home violates her constitutional right to rear her own children. Because the evidence supports the findings that Cheyenne, Christopher and Tracey are in need of protective services, and because the constitutional claim is without merit, we affirm.

Background

¶2 On September 27, 2004, pursuant to family court orders, the Wood County Department of Human Services placed Cheyenne, Christopher, and Tracey in the temporary legal custody of their older sister.³ A social worker was assigned a referral concerning possible neglect of the children. The social worker inspected the children's home that day.

¶3 On October 22, 2004, the Wood County Department of Human Services filed a CHIPS petition requesting that the court find the children in need of protection or services pursuant to WIS. STAT. § 48.13(10). The court held a fact-finding hearing regarding the CHIPS allegations. At the hearing, a social

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Mabel R. and Elvin R. are currently in the process of a divorce. Mabel appeals on behalf of herself only.

³ We will refer to Cheyenne, Christopher and Tracey collectively as "the children" with the understanding that we are not referring to all of Mabel's children.

worker testified that the children were subjected to unhealthy living conditions.

The social worker testified that on September 27, 2004:

The first thing when you enter [Mabel's] home, there was a very strong obnoxious odor of urine. It just permeates throughout the whole house, and that was emanating from a mattress. It was wet to the touch. It was urine soaked. So was the bedding. The kitchen was unsanitary. There were dishes everywhere, in the sink, on the counter, on all the counters, on the table. There was spoiled food in them. In the bathroom, there was used toilet paper all over the floor containing human waste. In the bathtub there was an inch of standing water. It was filthy. The toilet didn't flush. Going through the house, there's a lot of clutter, and there was also—I mean, it wasn't obvious, but there was a chronic and persistent head lice infestation.

The social worker also testified that the children were being home-schooled, but that each child had tested well below grade level.

¶4 The social worker admitted that on October 21, during a scheduled visit to Mabel's house, most of the unsanitary conditions regarding the home had been rectified, stating that “the mattress was taken out, the dishes were done, the bathroom was cleaned.” However, the children's sister testified that Mabel would clean up the house before social services would arrive, and then within a week the house would return to its previously unsanitary state.

¶5 The court concluded that the children were in need of protective services. The court issued dispositional orders placing the children with their sister, and under control of the Wood County Department of Human Services. Mabel appeals the finding that the children were in need of protective services.

Analysis

¶6 Mabel contends that there were insufficient facts to support a finding that the children were in need of protective services. Mabel asserts that, under WIS. STAT. § 48.13(10), Wood County was required to show that the household “seriously endangers the physical health of the child,” and that the facts at the hearing did not fulfill this statutory standard. Mabel also argues that she has a constitutional right to rear and home school her children.

¶7 The elements of a CHIPS petition set out in WIS. STAT. § 48.13(10) are questions for a fact-finding hearing, and these elements must be proven by clear and convincing evidence for a court to grant the petition. WIS. STAT. § 48.31(1). The trial court’s findings will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2). However, whether the child is in need of protective services is a question of law because it involves the application of the facts as found by the court to a statutory concept. *In re K.N.K.*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). We review questions of law de novo. *Id.*

¶8 We conclude that there was sufficient evidence to support the court’s finding that Mabel’s children were in need of protective services pursuant to WIS. STAT. § 48.13(10). WISCONSIN STAT. § 48.13(10) provides jurisdiction for protective services for children “[w]hose 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.” *Id.*

¶9 The social worker testified that the children were subjected to the following unsanitary conditions: The children’s bed was soaked in urine; all of

the children had had head lice problems for several years, which had never been treated; and they had poor hygiene, bathing as little as once a month. Additionally, the social worker testified that the children had little structure in their lives. She further testified they received little parenting, fixing their own meals and studying their home school assignments alone. The children's sister testified that many of the problems within Mabel's household would abate after a visit from a social services worker, but the household would revert to its unsanitary state within a week.

¶10 Mabel contends that, pursuant to WIS. STAT. § 48.13(10), Wood County was required to show that her household "seriously endangers the physical health" of her children. This is the plain language of the statute, and we conclude the evidence we have cited supports a finding that Mabel's household seriously endangered the physical health of her children. The social worker testified about the poor hygiene of the children, and of a potential for gastrointestinal problems because the children were responsible for making their own food. Furthermore, the social worker's testimony about unsanitary conditions in the kitchen and the bathroom supports a finding that the children's physical health was seriously endangered due to the risk of diseases. Finally, the social worker's testimony that Mabel had not treated her children for head lice, despite infestations lasting several years, indicates that Mabel is unable to properly care for her children. There was no evidence at the hearing that such conditions existed because of poverty. It is not necessary that children be on the verge of starvation or death by disease before a court may find that their health is seriously endangered. We conclude that the facts satisfy the standard under WIS. STAT. § 48.13(10) that the children are in need of protective services.

¶11 Mabel’s brief repeatedly argues that there was no evidence that the children were malnourished.⁴ Even if we were to conclude that the record does not establish that the children had poor nutrition, this does not undermine our conclusion that the children were in need of protective services. The social worker testified that the children had an adequate amount of food, but were responsible for getting it themselves. This testimony shows a lack of structure and parenting, and supports the court’s finding that the children were in need of protective services.

¶12 Mabel also contends that the evidence relating to inadequate education cannot be found to “seriously endanger the physical health” of her children. This may be true. But as we have explained, there is ample evidence to support a finding that the children were in need of protective services because their physical health was endangered.

¶13 Finally, Mabel contends that she has a constitutional right to rear her children, including the right to home school them. Mabel points to the “Home School Non-Discrimination Act of 2003” (108 H.R. 2732), and cites *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), to support her constitutional argument.

¶14 Mabel’s reliance is mistaken. The “Home School Non-Discrimination Act of 2003,” 108 H.R. 2732 did not pass the United States

⁴ The dispositional order states that “the conditions of the parental home were found to be unsanitary; the children’s education needs were neglected, there was poor hygiene and nutrition, inadequate sleeping arrangements, minimal parental oversight resulting in a lack of routine/structure/discipline and a lack of protective behaviors.”

Congress. Regardless of its potential import here, it is not law. *Troxel* supports the principle that the “Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning ... their children.” *Id.*, 530 U.S. at 66. Wisconsin has long adhered to this principle. “Both this court and the United States Supreme Court have recognized that the relationship between a parent and a child is a constitutionally protected right.” *Barstad v. Frazier*, 118 Wis. 2d 549, 556-57, 348 N.W.2d 479 (1984). But *Barstad* specifically recognizes that, “what are called parental ‘rights’ are both rights and responsibilities, and that a neglect of one’s responsibilities can result in a forfeiture of one’s rights.” *Id.* at 568. Mabel has neglected her responsibilities. As a consequence, she has forfeited her rights. Mabel’s constitutional claim is without merit.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

