

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

Nos. 00-0912
00-0913
00-0914

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

00-0912

**IN THE INTEREST OF SHAYLA L.H., A PERSON
UNDER THE AGE OF 17:**

**MONROE CO. DEPARTMENT OF HEALTH AND
FAMILY SERVICES,**

PETITIONER-RESPONDENT,

V.

HARLAN H.,

RESPONDENT-APPELLANT.

00-0913

**IN THE INTEREST OF CLARISSA M.H., A PERSON
UNDER THE AGE OF 17:**

**MONROE CO. DEPARTMENT OF HEALTH AND
FAMILY SERVICES,**

PETITIONER-RESPONDENT,

V.

HARLAN H.,

RESPONDENT-APPELLANT.

00-0914

**IN THE INTEREST OF TIFFANY L.H., A PERSON
UNDER THE AGE OF 17:**

**MONROE CO. DEPARTMENT OF HEALTH AND
FAMILY SERVICES,**

PETITIONER-RESPONDENT,

V.

HARLAN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed in part; reversed in part and cause
remanded.*

¶1 VERGERONT, J.¹ Harlan H. appeals a trial court order restricting his contact with his three minor children to sending each a birthday card and a Christmas card.² He contends the trial court erroneously exercised its discretion in so severely limiting his contact with his children. We conclude the trial court did not erroneously exercise its discretion in prohibiting Harlan from sending gifts to his children and directing that any money he wished to give them must be

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

² There was a separate case for each child before the trial court, but we have ordered them consolidated on appeal.

deposited in a separate account for them and not sent to them, their foster parents, or the county agency. However, we conclude the trial court did erroneously exercise its discretion in prohibiting Harlan from sending any cards or letters to his children except a birthday card and a Christmas card to each. We therefore affirm in part, reverse in part and remand.

BACKGROUND

¶2 Harlan's three minor children are: Shayla, d/o/b 9/30/88; Clarissa, d/o/b 1/24/93; and Tiffany, d/o/b 10/26/95. He is divorced from the children's mother, Linda, with whom the children were residing until July 18, 1997, when the Monroe County Department of Human Services removed them from her home.

¶3 The County filed a petition on July 30, 1997, alleging the children were in need of protection and services on the ground that the man with whom Linda and the children were living physically abused them and Linda failed to protect them. The initial disposition order, entered on October 2, 1997, has been extended on subsequent occasions, and the children have been placed in various foster homes.

¶4 In May 1996, Harlan was sentenced to a term of 152 years for convictions on several counts of sexual assault of a minor and he is incarcerated at Waupun Correctional Institution. The dispositional orders initially did not restrict his contact or communication with his daughters, but, when the County petitioned for a revision of the then-current order in early 1999, it recommended that Harlan have no contact of any kind with the three children. The factor concerning the children's health and safety identified in the recommendation relating to Harlan was that he had "demonstrated sexually deviant behavior to other children," and it

was necessary to ensure the children's safety that his "sexual issues be thoroughly treated and confidently resolved before he is allowed the ability to care for his children in any manner." After a hearing, the court entered an order on March 29, 1999, approving the permanency plan recommended by the County but amending it to allow Harlan to "send a card, letter and/or gift to his children, no more than once per month."

¶5 On September 29, 1999, the County moved to modify the provision in the March 29, 1999, order regarding Harlan's communication with his children. The motion stated that Harlan had violated that order by having written contact with his daughters more than once a month and by sending gifts more than once a month; of particular concern was that he had more written contact and sent more gifts to Shayla than the other children, which, according to the report of the social worker and the foster parents, caused "extreme emotionally [sic] difficulty for the three ... girls in their home." The motion asked that Harlan be reminded of the requirement that he send correspondence or gifts to each child no more than once per month, and, to eliminate any further difficulty, that he be ordered to forward all correspondence and gifts to the case manager, who will then provide them to the foster parents, who will distribute them to the girls on a once-per-month basis.

¶6 After this motion was filed, the County petitioned for an extension of the dispositional order. The recommendation again provided that Harlan have no contact of any kind with the children. However, in an addendum the County requested, as it had in the motion, that Harlan have no personal contact with his children, meaning no phone as well as face-to-face contact, and, with respect to the court order allowing one "indirect contact by mail per month," that the gifts

and correspondence be sent directly to the case manager who would then distribute them on an equal basis to the children.

¶7 After a hearing, the court on November 3, 1999, granted an extension of supervision for another year and adopted the terms of the addendum, adding the following clarification. “With respect to letters, gifts, cards or other written correspondence allowed between Harlan ... and his daughters, the Court does further clarify that this type of allowed contact is defined as ‘one contact per child per month.’” The court ordered that all correspondence, gifts, money, or other allowed correspondence be sent to each child in care of the case manager, who would then distribute them to each child, “one contact per month.”

¶8 On January 19, 2000, the County moved for an order eliminating all contact between Harlan and his children. The motion alleged that he had not complied with the “one contact” provision of the March 29, 1999, and November 2, 1999, orders for the months of September, October, November, December, and January, and he appeared to be in “deliberate defiance [of] or indifference to” the court orders since in December there were five contacts, some directly to the foster parents’ home. The motion also alleged that he was manipulating the court and the county agency by now providing checks for the children through his mother, Lucy Rhodes.

¶9 After a hearing on the motion, at which Harlan, his mother, and the children’s foster father testified, the court entered an order restricting Harlan to sending each child a birthday card and a Christmas card, and prohibiting him from sending any gifts, cards, letters, or any other communication. The order also provided that any money Harlan or his mother wished to give the children should be provided by setting up an account for them rather than sending it to the children

or their foster parents or the county agency.³ In explaining its decision, the court first stated its reasons for allowing the contact it did under the March 29, 1999, order, even though the County asked for no communication:

[T]he court felt that there might be some benefit to the girls by allowing that contact. There clearly was a benefit to the father who considered this important ... particularly under the circumstances that he is incarcerated, it looks like he will be incarcerated at least until the girls reach the majority, although the court has no way of knowing that for sure. And the court did at that time say it was concerned about interfering with potential grounds for termination of parental rights for either side and wanted to leave that for some other day.

The court did not believe at that time that the contact was against the children's best interests.

¶10 The court then stated that Harlan "did not follow the court's order," had "misconstrued" that order, and the court had "to clarify it for his benefit in November of 1999." Even after that, the court observed, there was a violation of the order. The court did not believe it could find Harlan in contempt of court for intentionally violating the order. However, it did find that there had been "a subtle manipulation" between Harlan and his mother to get things to the children in spite of the court order, and the court found it necessary to control that. The court stated that the County had not proved harm to the children, but it did not need to, because the standard was what is in their best interests. The court found "[no] real benefit to these children from having contact" with their father, but there was a benefit for the father, and it was reluctant to cut off all contact. However, the

³ The order also addressed the issue of Harlan's mother's contact with the children, which had been raised in the motion. In particular, there was considerable testimony on a disruptive visit by her to the foster parents' home to deliver gifts to Harlan's children from one of the children's godparents. The portions of the order concerning Harlan's mother have not been appealed.

court stated, what it had attempted to do was not working, and it referred to testimony on Harlan's or his mother's efforts to give money, gifts, and magazine subscriptions to the children and problems this had caused both the County and the foster parents. This testimony will be discussed in more detail below.

DISCUSSION

¶11 Harlan contends on appeal that the trial court erroneously exercised its discretion in restricting his communication with his children to the degree it did and prohibiting all gift-giving, because the court failed to follow the requirement of WIS. STAT. § 48.355(1) (1997-98)⁴ that a disposition “shall employ those means necessary to maintain and protect the well-being of the child ... which are the least restrictive of the rights of the parent and child....” The court, Harlan contends, did not take into account the least restrictive manner of protecting the children's well-being. Harlan also relies on § 48.355(3), which provides that “[i]f, after a hearing on the issue with due notice to the parent or guardian, the judge finds that it would be in the best interest of the child, the judge may set reasonable rules of parental visitation.” Harlan contends that the court's order was unreasonable based on the record before it, because there was no expert testimony that Harlan's prior letters and cards to his daughters were detrimental to their best interests.

¶12 Both Harlan and the County agree that a disposition under WIS. STAT. § 48.355 is committed to the court's discretion. They also agree that this court is to affirm discretionary decisions if the trial court applies the correct legal standard to the relevant facts, and using a rational process, arrives at a reasonable

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

conclusion. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). The County disputes Harlan's contention that § 48.355(3) is applicable, because, it asserts, the court did not entered a visitation order. We need not resolve this dispute, because both parties agree that the trial court is to consider the best interests of the children in deciding the type and amount of contact Harlan may have with them, whether that results in face-to-face contact or another kind of contact. Indeed, WIS. STAT. § 48.01(1) provides that, "[i]n construing this chapter, the best interests of the child ... shall always be of paramount consideration."

¶13 We consider first the portion of the court's decision prohibiting Harlan from sending his children any gifts or money but allowing him to set up a separate account in order to contribute money to his children. We conclude that this portion of the court's decision is a proper exercise of discretion.

¶14 With respect to the money, the foster father testified that the children earned their own spending money, and that he and his wife were uncomfortable being responsible for the money sent for the children. With respect to the gifts, the foster father testified that the unequal receipt of gifts from Harlan had caused problems such as jealousy among the children. Also, the foster parents did not want gifts being delivered directly to the house that they did not have the opportunity to examine first, such as when UPS or the postal service simply left items.

¶15 With respect to the children's response to the gifts, the foster father testified that the walkie-talkies Harlan purchased them were very expensive and beyond the ability of the children to use, and they did not use them. The keyboards he sent were stored under their beds so that they could pull them out

when they wished, but since there was a piano in the home, they used that instead, with the exception of Tiffany who used her keyboard because it was smaller. The other toys from their father that the children brought to this foster home with them were stored in accessible lockers in the playroom but they had not touched them. The foster father also testified that he and his wife provided the children with toys, the children did not comment on receiving or anticipating gifts from their father, and the gifts they did receive from him did not seem to have any special significance because they were from him.

¶16 There was ample evidence that the alternative attempted—whereby the County retained the gifts and checks so that it could distribute them equally and regulate the number of contacts Harlan had with his children—was not working. Harlan testified that when he ordered gifts he had no control over when they were sent, which is why items ordered prior to the November 2, 1999, “clarifying” order arrived afterwards, resulting in more than one item (whether gift or correspondence) being received by the County per month for each child even after the entry of that order. He also testified that prior to the November order he had renewed a subscription of a magazine for the children, which came either monthly or quarterly, directly to the children. He acknowledged that as a result of the county agency retaining certain items for later distribution, he had expressed concerns to the case manager about the security of those items. Finally, in addition to gifts for the children, Harlan and his mother had a poinsettia delivered to the foster parents’ home in mid-December.

¶17 The court’s finding that Harlan and his mother were engaged in a “subtle manipulation” to get things to the children is also supported by the record. Initially, Harlan sent each child ten dollars a month. This was from a joint account

he had with his mother so that she could sign his checks. Harlan ceased doing that after the November 2, 1999, order because he understood a check for their allowances would constitute one contact. In December 1999, Harlan's mother for the first time sent the children a check from her own account for \$60.00, stating that it was their November and December allowances "from Grandma Lucy," and in January she sent a check on her own account for \$30 stating that it was their January allowance "from Grandma Lucy only." She testified that Harlan did not ask her to send these allowances, that she decided to do so on her own, but she acknowledged she mentioned it to her son. Harlan agreed that his mother "took over making that allowance payment." The court was entitled to disbelieve the explanation that Harlan's mother's actions in sending the checks were entirely independent and to conclude there was an understanding she would take over sending them an allowance after the November 2, 1999, order made clear that Harlan could have only one contact per month with each child. Although the court found that Harlan had not intentionally violated the court orders, it could reasonably infer from the testimony that the problems with regulating the gifts and money he sent for the children would not simply disappear with a third court order.

¶18 Based on this record, the trial court could reasonably decide it was not in the children's best interests to receive money and gifts from their father, but rather that it was in their best interests to have Harlan deposit whatever money he was able to spend on them in a separate account for the children. While this restricts Harlan's ability to provide the children directly with money and gifts now, it does not restrict his ability to provide materially for them to the extent he can. The money he deposits may be used by them or for them when there is a need, and they will know their father is providing for them in this way.

¶19 We now turn to the portion of the court's decision that Harlan may send each child no more than a birthday card and a Christmas card each year. We observe initially that this limitation impacts on the relationship between Harlan and his daughters in a way that a prohibition on sending gifts and money to them does not. Given that Harlan is incarcerated and there is no face-to-face visitation and no telephone contact, limiting his correspondence with the children to two cards a year is effectively eliminating a continuing relationship with them. We conclude the record does not contain sufficient evidence from which the court could reasonably conclude this is in the best interests of the children.

¶20 The County's proposed permanency plan suggests all contact between Harlan and his children should be barred because he is incarcerated for sexual offenses against children, and this was one of the themes of the county attorney's argument to the court at the hearing. However, this was not one of the grounds stated in the motion, and there was no evidence presented on this point. There was also no testimony that any of the contents of Harlan's letters and cards to his children were inappropriate or harmful or otherwise objectionable.

¶21 The focus of the motion and of the testimony at the hearing was the difficulties in regulating, receiving, and distributing the money and gifts to the children, and limiting to one a month the total number of items received by each from their father. In the County's view, Harlan had intentionally violated the November 2, 1999, order, but the court expressly found that was not so. While arguably an intentional lack of compliance with a court's orders concerning a parent's contacts with his children might be a reasonable basis on which a judge could decide that it is not in the children's best interests to have any contact with

that parent, the trial court here chose not to make the factual findings that might support such a decision.

¶22 The court found Harlan’s mother’s disruptive visit to the foster parents’ home in an effort to deliver gifts from the godparents of one of the children to be “unfortunate and potentially harmful,” and it entered orders concerning Harlan’s mother to prevent such situations in the future.⁵ However, there was no testimony that Harlan was in any way involved in that incident, and the court did not suggest he was. There was no testimony that Harlan’s letters and cards to the children had caused any disturbance in the foster family’s home, or that, if the County chose to have them sent first to the County, there was any problem with that method of receiving them.

¶23 There was little testimony on the subject of Harlan’s letters and cards to his daughters or the nature of their relationship with him. When asked if the children had a positive reaction to the cards and letters, the foster father answered:

The reaction, the letters are all made available to them as well. We keep that on a shelf where they can actually get to it. It’s at their height where they can go to it at any time in our home. They know where it is. Those letters sit in that closet on that shelf. And they have not – they don’t go into them. The last written letter that was received was only half read by Shayla. And she actually left this laying out. There is candy and things that are included. And that seems to be what occupies their attention. The letters just go unread.

⁵ See footnote 3.

When asked if the children ever talked about their father in a way that indicated to him that “they need more contact or desire to have more information about him or something like that,” he answered:

This is difficult to say, but the only one who ever asks is Tiffany. And Tiffany doesn't have a concept of what prison is. And the only time that we ever get questions about Mr. Harlan H[] or Tiffany simply because she has been told he is in prison, and she desires more information about what that means. But the other girls never ask about him. They know where he is. They seem to have an understanding of why he is there. And that they seem content with that understanding. There is no desire on their part to learn more.

¶24 The other testimony on the impact of the correspondence on the children, or on their relationship with Harlan, came from Harlan. He testified that until his daughters went to the current foster parents in June 1999, he and his daughters corresponded at least once a month and, most of the time, twice a month, and he believed it was a benefit to them because they wrote back to him and told him what was going on in school and other activities. There was no testimony on whether any of the children were writing to him in their new foster home, and if not, why not.

¶25 Even if the court were to disregard Harlan's testimony and accept only that of the foster father's, the foster father's testimony does not address questions crucial to a determination whether the elimination of all contact but two cards a year is in the best interests of the children. The children had been in this foster family's home approximately seven months when the foster father testified. The foster father related his observations of the children's responses to the letters and cards, but the lack of interest he described could have a number of causes, not all of them consistent with an order that their father may send each only two cards

a year. The same is true with respect to the children's lack of questions about where he is and why. The foster father testified that the children were seeing a therapist, but no testimony from that important source was presented. Nor was there any testimony from the social worker who had been working with the children for some time.

¶26 The County points out that the foster father testified that if the court were to grant the County's motion to prohibit all contact, he could not think of any harm that would come to the children, and he thought it was in their best interests to grant the motion. However, while his opinion of what is in the children's best interest is certainly appropriate for the court to consider, his opinion must be evaluated in light of the evidence presented in support his opinion so that the court can reach its own conclusion on what is in the best interests of the children. We have already indicated the testimony of the foster father is not sufficiently comprehensive to provide a basis for the trial court to make a reasoned judgment on the best interests of the children.

¶27 We are persuaded that the correct result is to reverse the trial court's decision with respect to the restriction on correspondence from Harlan to his daughters to one birthday card and one Christmas card per child each year and remand to the trial court on that issue. The trial court may conduct such proceedings on remand as it considers appropriate, including taking additional

evidence. As we have already indicated, we affirm that portion of the order regarding gifts and money from Harlan to his children.⁶

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

⁶ Harlan appears to argue that the application of WIS. STAT. §§ 48.355(1) and 48.01(1) (“In construing this chapter, the best interests of the child are paramount”) is not sufficient to protect his constitutionally-based liberty interest in parenting his children, given that limitations on his contacts with his children may bear on a termination of his parental rights under WIS. STAT. § 48.415. Because of our disposition, we conclude it is unnecessary for us to address that argument.

Nos. 00-0912
00-0913
00-0914

