COURT OF APPEALS
DECISION
DATED AND RELEASED

August 3, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1767

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

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

CHOICE W.E.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Rock County: JAMES WELKER, Judge. *Reversed and cause remanded with directions*.

SUNDBY, J. This court[1] believes that placement at Ethan Allen is the more appropriate disposition for Choice W.E. However, whether a particular disposition is more appropriate is not the statutory test. Section

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. "We" and "our" refer to the court.

48.355(1), STATS., provides:

> In any order under s. 48.34 or 48.345 the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the child's well-being which are the *least restrictive* of the rights of the parent or child and which assure the care, treatment or rehabilitation of the child and the family, consistent with the protection of the public. Wherever possible, and, in cases of child abuse and neglect, when it is consistent with the child's best interest in terms of physical safety and physical health the family unit shall be preserved and *there shall be a policy of transferring custody from the parent only where there is no less drastic alternative*. If information under s. 48.331 has been provided in a court report under s. 48.33, the court shall consider that information when deciding on a placement and treatment finding.

(Emphasis added.)

Whether a disposition is the "least restrictive" is a mixed question of fact and law. *See* ***Adoption of Randolph***, 68 Wis.2d 64, 69, 227 N.W.2d 634, 637 (1975). The trial court finds the facts and we review those facts to determine whether the statutory standard has been met. *See* ***Lifedata Medical Servs. v. LIRC***, 192 Wis.2d 663, 670, 531 N.W.2d 451, 454 (Ct. App. 1995).

Choice was thirteen years old when he was charged with possession of cocaine with intent to deliver within 1,000 feet of a Beloit school, contrary to §§ 161.41(1m)(cm) and 161.49, STATS. He lives with his mother in Chicago although he frequently stays with his grandmother who also resides in Chicago. Choice's mother informed the probation officer that she did not know how Choice got to Beloit or who he stayed with on this occasion. However, she knew that he sometimes stayed with relatives but she couldn't tell the probation officer who they were because they were the father's relatives. The trial court concluded that Choice was "leading a lifestyle of, in effect, an adult criminal."

We do not believe the record supports that conclusion but is an educated, intuitive inference drawn by the trial court, which has experience sufficient to require us to give considerable weight to the court's conclusion. However, the record evidence is not sufficient to support the inference drawn by the court.

First, this is Choice's first delinquency determination. Second, while his offense was serious, it was not violent. Third, he has a mother and her significant other and three siblings with whom he lives. The probation officer reported that the mother's significant other tries to parent Choice. Finally, he appears to be living a life not greatly dissimilar from the lives of most children his age: the family is involved with church; he gets along well with his mother, her significant other and siblings; he likes to ride his bike and be with friends; and his habitual truancy has lessened.

The probation officer recommended: (1) formal supervision by the human services agency having jurisdiction; (2) rules and sanctions advised by the court; (3) an Interstate Compact with Illinois; and (4) he not be allowed to return to Wisconsin.

The probation officer's recommendations more nearly satisfy the "least restrictive" requirement than does the trial court's disposition.[2] We consider the question very close and would have preferred that the trial court have more information on which to base its decision. For example, Choice's mother reported that he has begun associating with the "wrong crowd." The court should have had more evidence as to what that means.

Uprooting a child of Choice's tender years from home and family can have serious consequences. The record herein did not provide the judge with the information he needed to make a reasoned decision.

We conclude that we must reverse the dispositional order and remand these proceedings for the trial court to enter a dispositional order which satisfies § 48.355, STATS. The court may take additional evidence and base its decision upon that record and the record herein. We remind the court that it

[2] Keeping Choice out of Wisconsin has constitutional implications. We do not address that recommendation because the question has not been briefed.

may specify a shorter period than one year for a dispositional order. *See* § 48.355(4)(a), STATS.

By the court.--Order reversed and cause remanded with directions.

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