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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In re the termination of parental rights to N.H.
a person under the age of 18;
In re the termination of parental rights to A.R.H.
a person under the age of 18;
In re the termination of parental rights to M.H.
a person under the age of 18;
In re the termination of parental rights to M.R.M.K.
a person under the age of 18;

Appeal No. 2018AP002440
Appeal No. 2018AP002441
Appeal No. 2018AP002442
Appeal No. 2018AP002443

Jackson County Department of Human Services,
Petitioner-Respondent,

Vs.

R.H.H. Jr.
Respondent-Appellant

APPEAL FROM THE JUDGMENTS AND ORDERS TERMINATING PARENTAL RIGHTS ENTERED IN THE JACKSON COUNTY CIRCUIT COURT, THE HONORABLE RIAN W. RADTKE PRESIDING.

RESPONDENT-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

Is Department entitled to summary judgment on issue of whether grounds exist for termination of parental rights under Wis. Stat. §48.415(4), "continuing denial of periods of physical placement or visitation."

The circuit court answered: yes.

This court should answer no for the following reasons:

1) the Department is not entitled to summary judgment as a matter of law because the underlying order denying visitation violated R.H.'s Fifth Amendment right against self-incrimination;

2) the Department is not entitled to summary judgment because its claim under §48.415(4) constitutes an as applied violation of R.H..'s right to substantive due process; and

3) the Department is not entitled to summary judgment because genuine issues of material fact exist as to whether R.H. was denied visitation under an order containing the requisite termination of parental rights notice.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. §§752.31(2) and (3), and a request for publication is therefore prohibited under Wis. Stat. §809.23(4)(b). Counsel does not request oral argument.

STATEMENT OF THE CASE

This case involves a petition filed by the State to terminate the parental rights of R.H.H. Jr., "R.H.," to his four biological children. The petition alleged "continuing need of protection and services" under Wis. Stat. §48.415(2) and "continuing denial of periods of physical placement or visitation" under Wis. Stat. §48.415(4). 1:2.[1] Prior to trial, the Department filed a motion for summary judgment along with an affidavit and supporting materials. 15:1-133; 17:1-2. R.H., through trial counsel, filed a response along with a supporting affidavit. 27:1-10; 28:1-3. The circuit court, after hearing, granted the Department's motion, made a finding of unfitness, and continued the matter for disposition. 59:23; Ap.114. R.H. filed a motion for reconsideration, 39:1-8; 40:1, which the circuit court denied, 61:9, Ap.122. At disposition, the circuit court, after hearing evidence and

[1] Record citations, unless otherwise noted, will refer to the record in 2018AP2440.

argument, determined that it was in the best interests of the children to terminate R.H.'s parental rights. 61:34-35. As required by statute, the circuit court subsequently entered a written judgment and order terminating parental rights. 4:1-10. R.H. filed a notice of intent to pursue postdisposition relief, 47:1, pursuant to which the State Public Defender appointed the undersigned counsel. By and through counsel, R.H. filed a notice of appeal, 49:1. These proceedings follow.

STATEMENT OF FACTS

R.H. does not intend this statement to be a recitation or summarization of all facts related during the underlying proceedings. Instead, R.H. intends here to merely highlight those facts which are contextually and materially relevant to the issues in this appeal.

Facts pertaining to CHIPS dispositional orders.

On February 3, 2011 the circuit court entered a dispositional order in Jackson County Case Nos. 15JC51, 15JC52, 15JC53 and 15JC54 placing the children outside the home. 15:2-6.

On May 2, 2013, the Department filed a request seeking to revise the order so as to suspend phone calls between R.H. and his children. 15:10-11. In support of the request, the Department related facts pertaining to R.H.'s conviction and sentence in Ashland County Case No. 11CF82. The Department asserted that R.H. had on October 11, 2012 been convicted of repeated sexual assault of a child, D.M.K., and sentenced to 30 years confinement and 10 years extended supervision, and that R.H. was ordered to have no contact with anyone under the age of 17, to have no contact with D.M.K, and to have no contact with his four children when D.M.K. was present in the home. 15:11.

On June 13, 2013, the circuit court granted the request. 15:6. [2]

Facts pertaining to June 20, 2016 order suspending visitation and establishing conditions to reinstate visitation.

On June 20, 2016, the circuit court entered an order in 15JC51, 15JC52, 15JC53 and 15JC54 entitled "Order Suspending Visitation And Establishing Conditions To Reinstate Visitation."

[2] The order provided that "phone calls may continue until attachment assessment has been completed." 15:6.

29:6; Ap.100.[3] The order stated in relevant part, "the Court orders that (R.H.) must complete the following conditions before he may request to have contact and visitation with his children reinstated." 29:6; Ap.100. The order enumerated the following conditions:

1) Complete intensive, high-risk sex offender treatment. Must be completed by a licensed professional trained in evaluating and working with psychopathic personalities.

2) Complete Domestic violence programming.

3) Complete criminal thinking programming such as CCIP or thinking for a change.

4) Acknowledge and demonstrate an understanding the effect his crime, the sexual assault of their half-sibling by their father, has on his children.

5) Acknowledge and demonstrate an understanding of the effect of his incarceration has (sic) his children.

6) Sign all releases necessary for DHHS to verify compliance of these conditions and the dispositional conditions.

29:6; Ap.100.

[3] The prior dispositional order had been used by the Department as a predicate basis for summary judgment in an earlier TPR action filed against R.H. by the Department in Jackson County Case Nos. 2015-TP-1, 2015-TP-2, 2015-TP-3, and 2015-TP-4. Although orders terminating parental rights were initially entered, they were later vacated on March 31, 2016. 29:1. Postconviction proceedings established that the June 13, 2013 order impermissibly failed to provide for any conditions for the reinstatement of contact between R.H. and his children. As a result of the problem caused by the failure of the June 13, 2013 order to provide for conditions which would have allowed for contact, the court issued the June 20, 2016 order which established such conditions.

Department's motion for summary judgment

Based on the June 20, 2016 order, the Department filed a motion for summary judgment as to the "continuing denial of periods of physical placement or visitation" allegation. 15:1. The motion was accompanied by various documentation concerning the underlying CHIPS cases, 15:2-133, as well as an affidavit by social worker J.D. 17:1-2.

R.H.'s affidavit in response to motion for summary judgment.

R.H. filed a brief and affidavit in response to the Department's motion. 27:1-10; 28:1-3. Among other arguments, R.H. asserted that condition number four of the June 20, 2016 order infringed upon his right against self-incrimination, was impossible to meet, and violated his right to substantive due process. 27:7. R.H. also asserted that condition number one and condition number two were impossible to meet. 27:7. R.H.'s affidavit alleged in relevant part the following:

> On June 20, 2016 when the circuit court issued the attached Order Suspending Visitation and Establishing Conditions to Reinstate Visitation, I was incarcerated at Jackson Correctional Institution;

I remained incarcerated in prison until January 6, 2017, when I was released because the conviction in Ashland County Case No. 11-CF-82 was overturned on appeal;

The District attorney's office in Ashland County elected to retry the case. A trial is pending. Due to newly discovered evidence and the unavailability of a material witness, the case may be dismissed prior to trial. As of this date, I have not been convicted and am presumed innocent of the charge in that case;

I was reincarcerated on March 22, 2017, on new charges, in Dane County Case No. 17-CF-2770. I have remained incarcerated in county jails, primarily Dane County jail, since that date. A trial is pending in this case. I have not been convicted and am presumed innocent of the charges;

The Jackson County Circuit Court imposed six conditions for me to complete to have visitation with my children reinstated. See attached order;

I completed condition #3 by graduating from Thinking for Change while in prison;

I completed condition #5. I fully understand and acknowledge the emotional pain my children have suffered due to my incarceration;

I completed #6 by signing releases for DHHS. I did not release sex offender treatment (SOT) records. As explained below, it has been impossible for me to participate in SOT at any time since the order was entered on June 20, 2016;

I did not complete condition #2 because it is an impossible condition. It has been impossible for me to participate in Domestic Violence programming since the order was entered on June 20, 2016. The Department of Corrections (DOC) decides which programming inmates will receive. Because I was not incarcerated for a crime of domestic violence and have never been convicted of a crime of domestic violence, the Domestic Violence programming was not available to me. Domestic violence programming is not available in the Dane County Jail;

I did not complete condition #1, because it is an impossible condition. My conviction in Case No. 11-CF-82 was in appeal status during the entire time I was in prison. The DOC does not provide SOT programming to inmates whose convictions are being appealed. SOT programming is not available in the Dane County Jail;

The period between my release from prison and reincarceration was 75 days. During that period, I moved to Dane County and found employment;

I drove to Jackson County twice to meet with DHHS case workers. They made no effort to connect me with the mandated services, although they were in contact with Dane County DHHS to set up courtesy supervision;

At no point, while I was in prison, in jail, or in the community, did Jackson County DHHS provide services to me to assist me with completing the conditions for reinstatement of visitation. No "licensed, trained professional to conduct sex offender treatment" contacted me on behalf of Jackson County DHSS in prison or in jail. DHSS made no referral to such profession while I was in the community;

I did not complete condition #4, because it is an impossible condition. To order that I need to admit guilt to my children for a crime I did not commit as a condition of seeing them puts me in an impossible position. I have maintained my innocence throughout the proceedings in 11-CF82. Due to developments in that case, I will soon be able to prove my innocence. 30:1-2.

R.H. attached to his affidavit the various documents, 29:1-10, to which he referred in the affidavit. These included the June 20, 2016 order suspending visitation, 29:6, the judgment of conviction and sentence in Ashland County Case No. 11-CF-82, 29:3-4, a certificate showing completion of "Thinking for a Change," 29:10, a signed release for Jackson County Department of Health and Human Services, 29:7-9, a printout showing available inmate programming in the Dane County, 29:2, and a letter dated February 9, 2017 from J.D. to the Dane County Department of Human Services requesting the Dane County Human Services provide R.H. with assistance in locating services providers in the Madison area. 29:5.

Circuit court's hearing on Department's motion for summary judgment.

The circuit court made the following findings:

that the children were found to be in need of protection and services on February 3, 2011 in Case Nos. 10-JC-51, 10-JC-52, 10-JC-53 and 10-JC-54; 59:15;

that on June 13, 2013, the court suspended visitation and contact between R.H. and his children; 59:15;

that on June 20, 2016, the court continued the no contact order and established conditions for visitation between R.H. and the children; 59:15;

that the order was never modified or lifted by the court; 59:15;

that the order(s) denying periods of visitation had been in place well over a year; 59:17; and

that the court had not modified or lifted the order denying visitation; 59:18. App.106-109.

As to the termination of parental rights notice, the circuit court found as follows:

[a]s to conditions for visitation on February 3rd, 2011 and any subsequent hearings, the notice concerning grounds to terminate parental rights was provided by the court. 59:16. App.107.

The circuit court additionally found that R.H. never filed a motion or request indicating that he had complied with the conditions or seeking reinstatement, or a motion seeking to

change the conditions. 59:20-21,22. In particular, the circuit court noted that R.H. was present in court at a February 21, 2017 permanency plan hearing yet did not request a change of the conditions. 59:20.

As to the condition that R.H. "acknowledge and demonstrate an understanding of the effect of his crime, the sexual assault of their half sibling by their father, has on his own children," the circuit court determined that such condition did not require an admission to the crime and did not demand that R.H. choose between invoking his right to not self-incriminate versus complying with the condition. 59:21. App.112. The court determined that the condition was not impossible to complete. 59:22. App.113.

The circuit court determined that the Department was entitled to partial summary judgment and entered a finding of unfitness. 59:22. App.113.

R.H.'s motion for reconsideration.

Prior to disposition, R.H. filed a motion for reconsideration of the circuit court's decision to grant partial summary judgment.

39:1-8. The motion in relevant part proffered evidence showing that R.H. had, prior to the February 21, 2017 permanency plan hearing, filed a pro se motion entitled "Motion to Vacate & dismiss order regarding contact and visitation Request" which sought to modify the conditions. 39:8. The pro se motion cited to *Dane County DHS v. Ponn P.*, 2005, WI 32, 279 Wis.2d 169, 694 N.W.2d 344, and in part stated, "[i]f an order denying visitation/contact is entered, it must contain conditions which can be met and not impossible(sic)." 39:8. R.H.'s motion for reconsideration asserted that at the permanency plan hearing on February 21, 2017, the circuit court heard and denied R.H.'s pro se request. 39:3. R.H.'s motion additionally re-asserted arguments that complying with the condition that he "[a]cknowledge and demonstrate an understanding the effect of his crime, the sexual assault of their half-sibling by their father, has on his children," violated his right against self-incrimination. 39:4, 45:3.

Circuit court's findings and determination regarding motion for reconsideration.

The circuit court determined that as to conditions one and two, that R.H. participate in and complete sex offender and

domestic violence programming, R.H. could have completed or attempted to have completed such items while he was out in the community during the 70 to 75 days after he had been released from prison and when he was reincarcerated. 61:8.

The circuit court determined that as to condition four, that R.H. "[a]cknowledge and demonstrate an understanding the effect of his crime, the sexual assault of their half-sibling by their father, has on his children," it "was possible for R.H. to acknowledge and demonstrate an understanding of the effects of his crime," even though doing so may not have been "desireable" or "adviseable." 61:9. The circuit court additionally determined that R.H.'s failure to meet the conditions was not impossible. 61:8-9. The circuit court denied R.H.'s motion for reconsideration. 61:9.

ARGUMENT

I. *The Department is not entitled to summary judgment as a matter of law because the underlying order denying visitation violated R.H.'s Fifth Amendment right against self-incrimination.*

Standard of review

A motion for summary judgment is subject to de novo review. See *Camacho v. Trimble Irrevocable Trust*, 2008 WI App 112,¶3, 313 Wis.2d 272, 756 N.W.2d 596.

Partial summary judgment may be granted in the unfitness phase of a TPR case where the moving party establishes that there is no genuine issue as to any material fact regarding the asserted grounds for unfitness under Wis. Stat. §48.415, and, taking into consideration the heightened burden of proof specified in Wis. Stat. §48.31(1) and required by due process, the moving party is entitled to judgment as a matter of law. *Steven V. v. Kelley H.* 2004 WI 47, ¶6, 271 Wis.2d 1, 678 N.W.2d 856. A factual issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Camacho, v. Trimble Irrevocable Trust*, 2008 WI App 112 at¶3.

The Fifth Amendment right against self-incrimination, which applies to the states through the Fourteenth Amendment, states that "[n]o person…shall be compelled in any criminal case to be a witness against himself.." See *Estelle v. Smith*, 451 U.S. 454 (1981)(quoting U.S. Const. Amend. V.). The Fifth Amendment not only protects individuals in criminal proceedings, "but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where answers might incriminate him in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Further, an individual cannot be penalized for invoking his Fifth Amendment right. See *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967). If the state, expressly or by implication, imposes a penalty for the exercise of the privilege, the failure to assert the privilege is excused. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

The United States Supreme Court has held that the state may not compel a person to choose between the Fifth Amendment privilege against self-incrimination and another important interest because such a choice is inherently coercive. *Lefkowitz v.*

Cunningham, 431 U.S. 801, 805-08 (1977). Both the United States Supreme Court and the Wisconsin Supreme Court have recognized that a parent's interest in the parent-child relationship and in the care, custody, and management of his or her child, is a fundamental liberty interest protected by the Fourteenth Amendment. *Steven V. v. Kelley H.,* 2004 WI 47 at ¶21, citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Fifth Amendment in context of termination of parental rights cases and other juvenile matters.

Although no Wisconsin decision appears to have examined the issue, decisions from other jurisdictions indicate that it is constitutionally impermissible to effectively force a parent to choose between waiving his right against self-incrimination and losing his parental rights:

Matter of Welfare of J.W. and A.W., 415 N.W. 879, 883 (Minn. 1987)("…appellants noncompliance with the order requiring them to divulge details of the nephew's death to psychologists, cannot be used as grounds…for termination of parental rights nor for keeping J.W. and A.W. in foster care. Assertion of a constitutional right does not make a person a less fit parent, any more than it makes a person a less good citizen. The state may not penalize the parents for noncompliance with the court order impinging on their privilege…");

In re M.C.P., 571 A.2d 627, 641 (Vt. 1989)("The trial court cannot specifically require the parents to admit criminal misconduct in order to reunite the family.";

In re Amanda W., 705 N.E.2d 724, 727 (Oh. App. 1997)(finding that a "penalty for failure to satisfy the requirements of a particular case plan is the loss of a parent's fundamental liberty to the care, custody, and management of his or her child," as "this is the type of compelling sanction that forces an individual to admit to offenses in violation of his right not to incriminate himself.");

In re Clifford M., 577 N.W.2d 547, 554, 558 (Neb. App. 1998)(finding that court order requiring parent to enroll in a program which required her to make incriminating statements as a prerequisite to enrollment violated parent's right against self-incrimination and required that order of termination be reversed.) ;

In re P.M.C. and J.L.C., 902 N.E.2d 197, 204 (Ill. App. 2009)(…"the circuit court's determination of unfitness was improper because it was based on the respondent's refusal to admit to sexual abuse and had the effect of requiring the respondent to incriminate himself.");

Dep't of Human Servs. V. K.L.R., 230 P.3d 49, 54 (Orr. App. 2010)("[R]equiring an admission of abuse as a condition of family reunification violates a parent's Fifth Amendment rights…");

In re A.D.L. and C.L.B., Jr., 402 P.3d 1280, 1286 (Nev. 2017)("[A]s part of a family reunification plan, courts cannot explicitly compel a parent to admit guilt, either through requiring a therapy program that specifically mandates an admission of guilty for family reunification, or otherwise through a direct admission…";

Other juvenile related matters:

Mullin v. Phelps, 647 A.2d 714, 724 (Vt. 1994)("We are also concerned that the family court's order conditioned the father's contact with his children on his admitting that he sexually

abused them…..Regardless of the strength or credibility of the evidence of sexual abuse, specifically conditioning the father's future contact with his sons on his admitting that he abused (one son) violates his privilege against self-incrimination.");

In re L.F., 714 N.E.2d 1077, 1081 (Ill. App. 1999)(trial court violated mother's right against self-incrimination when it changed permanency goal from return home to termination of parental rights based on mother's refusal to comply with permanency plan requirement that she "acknowledge responsibility for the maltreatment of the child in her care.");

In re A.W., 896 N.E.2d 316, 326 (Ill. 2008)("[A] trial court may order a service plan that requires a parent to engage in effective counseling or therapy, but may not compel counseling or therapy requiring the parent to admit to committing a crime.").

Condition number four required self-incrimination by R.H.

The June 20, 2016 order expressly provided as follows:

> …the Court orders that (R.H.) must complete the following conditions before he may request to have contact and visitation with his children reinstated.
>
> – – –
>
> 4)Acknowledge and demonstrate an understanding the effect of his crime, the sexual assault of their half-sibling by their father, has on his children.

29:6, App.100.

The condition as worded can only reasonably be interpreted to require self-incrimination by R.H. in order to regain contact and visitation with his children. In this regard, it is important to recognize that the Fifth Amendment protects not only statements

that could be directly incriminating, but also protects statements that "would furnish a link in the chain of evidence needed to prosecute the…crime." *In re R.C.,* 230 P.3d 49, 52 (Or. App. 2010) citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The Fifth Amendment therefore protected against compelled statements from R.H. whether they were in the form of a confession to the crime, an admission to the conduct comprising the crime, or statements against interest which could be used against him prosecutorily. In this case, the condition required statements from R.H. that constituted all of the above. The condition required that R.H. "acknowledge" the presumptions made in the condition, specifically, that a "crime' was committed, that the "crime" was the "sexual assault" of the half-sibling, and that the "crime" was "his." The term "acknowledge" means to "recognize as genuine or valid."[4] The condition as such required R.H. to recognize as genuine or valid the presumptions embodied in the condition, essentially, that he sexually assaulted D.M.K. It is hard to view the condition as doing any thing other than requiring statements from R.H. admitting the unlawful conduct

[4] https://www.merriam-webster.com/dictionary/acknowledge?utm_campaign=sd&utm_medium=serp&utm_source=jsonld#synonyms

and/or confessing to the crime. To the extent the Department may argue that the condition did not require an admission or confession, this argument must be rejected. The situation is strikingly similar to that in *In Re L.F.*, *supra*. In that case, the Illinois trial court viewed a condition that the parent "will acknowledge responsibility for the maltreatment of the child in her care" as not constituting an admission to a crime. See *In re L.F.,* 714 N.E.2d at 1080. The Illinois appellate court rejected such view and concluded that "[t]he record in fact shows that the (parent) was being asked to admit to a crime." *Id.* at 1081. The appellate court found that the trial court's conversion of the permanency goal from return home to termination based on the parent's failure to comply with the condition violated the parent's right against self-incrimination. *Id.* This court should view the condition in this case similarly. Moreover, even assuming arguendo that the condition did not require a confession or admission, it at a minimum, required statements against interest which could be used against R.H. prosecutorily.

Such statements would not have been just self-incriminating in an abstract or academic sense. The statements would have had imminent and real consequences. At the time the

circuit court made the condition, June 20, 2016, R.H. was in the process of pursuing post-conviction remedies in connection with the conviction and sentence in Ashland County Case No. 11-CF82. Specifically, on March 1, 2016, R.H. had filed a petition for writ of habeas corpus relief in federal court.[5] He had been convicted on October 11, 2012 of repeated sexual assault of the same child, and sentenced on March 14, 2013 to 30 years confinement and 10 years extended supervision. 29:3-4.[6] As noted by the Department in the petition, "(R. H.) consistently report(ed) that he (was) innocent of the conviction that he sexually assaulted his step daughter and that he (was) able to prove this." 1:5. As also noted by the Department in the petition, and in R.H.'s affidavit, the federal court granted R.H.'s habeas corpus petition which resulted in (R.H.) being released from incarceration on January 6, 2017. 1:5, 28:1.[7] As also noted by the Department in the petition and in R.H.'s affidavit, the State

[5] On March 1, 2016 R.H. filed a petition for writ of habeas corpus in 16-CV-124, United States District Court for the Western District of Wisconsin. https://ecf.wiwd.uscourts.gov/cgi-bin/DktRpt.pl?11991597640095-L_1_0-1. Judicial notice of such fact is appropriate under Wis. Stat. §902.01(4) or (3).
[6] R.H. directly appealed the conviction and sentence and exhausted his state court remedies.
[7] An opinion and order granting the petition was entered on October 27, 2016. https://ecf.wiwd.uscourts.gov/cgi-bin/DktRpt.pl?11991597640095-L_1_0-1.

elected to re-try R.H. in connection with Ashland County Case No. 11CF82. 1:5, 28:1.

Given the procedural posture of R.H.'s federal appeal and its relationship to Ashland County Case No. 11CF82, any statements R.H. may have given in attempt to comply with condition number four would have been contrary to his very efforts to prove his innocence. In the time period from June 20, 2016, the date when the circuit court entered the order denying visitation, to October 27, 2016, the date when the federal court granted R.H.'s petition for writ of habeas corpus, R.H. was actively pursuing his appellate remedies, asserting his innocence, and hoping for release and/or a new trial. Any incriminating statements made during this time period would have compromised these efforts to say the least. Between the date the federal court granted relief and the date of R.H.'s long anticipated second trial, the effect of any incriminating statements assumed an even more prominent stature. This time period ran the duration from October 26, 2017, the date of the federal decision, to December 4, 2017, the date the Department filed its petition. Obviously, any statements made by R.H. during this time period in an effort to comply with condition number four

would have been available to the state for use in the second trial and would have be self-incriminating in a very imminent and real sense.

Of course, after R.H. had obtained federal relief for his conviction, he filed on November 16, 2016, the pro-se written motion with the circuit court seeking to vacate the no contact condition and reinstate contact. 39:8. As related in R.H.'s motion for reconsideration, 39:3, the circuit court, in a permanency review hearing on February 21, 2017, declined R.H.'s requests. In addition to the imposition of the condition itself, the circuit court's refusal to change it further infringed R.H.'s right against self-incrimination.

The June 2016 order denying R.H. visitation placed R.H. in the position of having to choose between maintaining his right against self-incrimination and losing his fundamental right to the care, custody and management of his children. As discussed earlier in this brief, the United States Supreme Court has held that the state may not compel a person to choose between the Fifth Amendment privilege against self-incrimination and another important interest because such a choice is inherently coercive. See *Lefkowitz v. Cunningham*, 431 U.S. at 805-808.

Such is the case here. This court should join the other courts from around the nation which have recognized the inherently coercive dynamic created by court imposed conditions which place a parent in this impermissible constitutional dilemma. Because the order denying R.H. visitation violated his right against self-incrimination, it cannot properly be used as a predicate basis to terminate his parental rights under §48.415(4). The Department is not entitled to judgment under such an order.

II. The Department is not entitled to summary judgment because its claim under §48.415(4) constitutes an as applied violation of R.H..'s right to substantive due process.

As discussed earlier in this brief, a parent's interest in the parent-child relationship and in the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment. *Steven V. v. Kelley H.,* supra. In *Dane County DHS v. Ponn P.*, *supra*, the Wisconsin Supreme Court recognized that §48.415(4) could be applied in such a way as to infringe upon a parent's right to substantive due process in the relationship with his or her child. *Id.* at ¶25. The court in particular noted the case where a parent is not allowed to present reasons for failing to modify the order

denying visitation or physical placement. *Id.* This is one such case. Summary judgment of the Department's §48.415(4) would effectively prevent R.H. from presenting evidence to the jury regarding the reasons why he failed to comply with or obtain modification of the order denying visitation. R.H. is entitled to present evidence to a jury concerning such situation. As Justice Prosser stated in *Ponn. P.*,

> [a]s I see it, if a parent is able to show a fundamental flaw in the procedure leading up to a termination petition under § 48.415(4), the parent must have an opportunity to bring that flaw to the attention of the termination court before the court or jury makes a finding on this ground for unfitness. If a parent is able to show that it was impossible or completely unreasonable to comply with the court order, the parent must have an opportunity to present that evidence. Failure to provide such an opportunity is not only unfair but also implicates the parent's due process right to present a defense. *Dane County DHS v. Ponn P.*, 2005, WI 32 at ¶60. Citations omitted.

The June 20, 2016 order expressly provided that R.H. had to complete the enumerated conditions "before he (could) request to have contact and visitation with his children reinstated." 29:6. R.H., through his affidavit, presented to the circuit court evidence of why it was impossible or completely unreasonable for him to comply with the June 20, 2016 order. Specifically, R.H. asserted as follows:

> I did not complete condition #2 because it is an impossible condition. It has been impossible for me to participate in Domestic Violence programming

since the order was entered on June 20, 2016. The Department of Corrections (DOC) decides which programming inmates will receive. Because I was not incarcerated for a crime of domestic violence and have never been convicted of a crime of domestic violence, the Domestic Violence programming was not available to me. Domestic violence programming is not available in the Dane County Jail;

I did not complete condition #1, because it is an impossible condition. My conviction in Case No. 11-CF-82 was in appeal status during the entire time I was in prison. The DOC does not provide SOT programming to inmates whose convictions are being appealed. SOT programming is not available in the Dane County Jail;

The period between my release from prison and reincarceration was 75 days. During that period, I moved to Dane County and found employment;

I drove to Jackson County twice to meet with DHHS case workers. They made no effort to connect me with the mandated services, although they were in contact with Dane County DHHS to set up courtesy supervision;

At no point, while I was in prison, in jail, or in the community, did Jackson County DHHS provide services to me to assist me with completing the conditions for reinstatement of visitation. No "licensed, trained professional to conduct sex offender treatment" contacted me on behalf of Jackson County DHSS in prison or in jail. DHSS made no referral to such profession while I was in the community;

I did not complete condition #4, because it is an impossible condition. To order that I need to admit guilt to my children for a crime I did not commit as a condition of seeing them puts me in an impossible position. I have maintained my innocence throughout the proceedings in 11-CF82. Due to developments in that case, I will soon be able to prove my innocence.

30:1-2.

Beyond the assertions in R.H.'s affidavit, this court must also consider the summary judgment evidence demonstrating that R.H. in February of 2017 attempted to vacate or change the conditions, 39:3, 39:8, but was denied by the circuit court. While this court may discount the reasons proffered for R.H.'s failure to comply with the conditions or obtain modification of them, it

must recognize that R.H. has proffered evidence which raises genuine issues of material fact as to why it was impossible or at the very least completely unreasonable for him to do so. In the words of Justice Prosser, R.H. "is able to show that it was impossible or completely unreasonable to comply with the court order," and as such, he "must have an opportunity to present that evidence." *Dane County DHS v. Ponn P.*, 2005, WI 32 at ¶60. "Failure to provide such an opportunity is not only unfair but also implicates the parent's due process right to present a defense." *Id.* Under *Ponn. P.,* summary judgment of the Department's §48.415(4) claim constitutes an as applied violation of R.H.'s right to substantive due process and must be avoided.

III. The Department is not entitled to summary judgment because genuine issues of material fact exist as to whether R.H. was denied visitation under an order containing the requisite termination of parental rights notice.

R.H. recognizes that it has long been established that summary judgment is available in the grounds phase of a termination of parental rights proceeding. See *Steven V. v. Kelley H.,* 2004 WI 47 at ¶6. However, the court in *Steven V.* cautioned that the process must be "carefully administered with

due regard for the importance of the rights at stake and the applicable legal standards…" *Id.* at ¶35. The court stated as follows:

[s]ummary judgment procedure requires notice, an opportunity to respond, and a hearing, and imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Id.

The court also stated that in determining whether those requirements have been met, a court must take into consideration "the heightened burden of proof specified in Wis. Stat. §48.31(1) and required by due process." *Id.* at ¶6. Of course, §48.31(1) requires the petitioning party to prove its allegations by "clear and convincing evidence." In this case, the Department's motion and supporting materials fail to meet this heightened threshold. Quite simply, genuine issues of material fact exist as to the first element of the Department's claim under §48.415(4). Such section provides as follows:

(4) CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:

(a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

(b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not

subsequently modified its order so as to permit periods of physical placement or visitation.

To establish this ground for termination, a petitioner must prove the following two elements:

1. that (parent) has been denied periods of physical placement by a court order affecting the family under Chapter 767 or has been denied visitation under an order pursuant to §§48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by §48.356(2) or 938.356(2).

2. that at least one year has elapsed since the order denying periods of physical placement or visitation to (parent) was issued and the court has not subsequently modified its order to permit periods of physical placement or visitation. See WI JI-CHILDREN 335, 2016 Regents, Univ. of Wis.

As to the notice required by §§48.356(2) or 938.356(2), such notice is as follows:

1)Whenever the court orders a child to be placed outside his or her home, orders an expectant mother of an unborn child to be placed outside of her home, or denies a parent visitation because the child or unborn child has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363, or 48.365 and whenever the court reviews a permanency plan under s. 48.38 (5m), the court shall orally inform the parent or parents who appear in court or the expectant mother who appears in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation.

(2) In addition to the notice required under sub. (1), any written order which places a child or an expectant mother outside the home or denies visitation under sub. (1) shall notify the parent or parents or expectant mother of the information specified under sub. (1). Wis. Stat. §48.356(2).

As to the first element of the Department's claim, the summary judgment evidence raises genuine issues of fact as to whether R.H. had been denied visitation by a court order

containing the notice required by §48.356(2). In this regard, a plain review of the June 20, 2016 order discloses that it did not contain the written notice required under §48.356(2). See 29:6, App.100. It likewise was not accompanied by any attachment which purports to provide the required written notice. The order additionally did not include an acknowledgment of receipt signed by R.H. or a certificate proving service upon him. At a minimum, R.H. was entitled to use deficiencies with the June 2016 order to argue before a jury that the Department had not established the first element of its claim under §48.415(4). A reasonable jury, examining the order at issue, could agree that it was deficient and did not, in accordance with the heightened burden of proof specified in Wis. Stat. §48.31(1), establish the first element of the Department's claim. At a minimum, the summary judgment evidence creates a genuine issue of material fact as to this element. Summary judgment therefore is not appropriate.

R.H. recognizes that other orders in the underlying CHIPS cases contained the §48.356(2) notice. For instance, see the February 3, 2011 dispositional order, 15:2-9, and the February

21, 2017 revised dispositional order, 15:30-15:34.[8] However, that these orders contained the requisite notice is of no import. In an action under Wis. Stat. §48.415(4), the first element of such cause of action specifies that it is the order denying visitation which needs to contain the requisite notice:

> 1. that (parent) has been denied periods of physical placement by a court order affecting the family under Chapter 767 or *has been denied visitation under an order pursuant to* §§48.345, 48.363, 48.365, 938.345, 938.363 or *938.365 containing the notice required* by §48.356(2) or 938.356(2).
>
> See WI JI-CHILDREN 335, 2016 Regents, Univ. of Wis. Italics added.

In this regard, an action under §48.415(4) is unlike one brought under §48.415(2), "continuing need of protection of services." R.H. is aware that the Wisconsin Supreme Court has held that the plain language of § 48.415(2) requires that in a TPR case where the underlying ground to terminate is based on continuing CHIPS, the statutory notice requirements are satisfied when at least *one* of the CHIPS orders contains the written notice required under §48.356(2). See *In Re Matthew D.*, 2016 WI 35, ¶24, 368 Wis.2d 170, 880 N.W.2d 170. The court explained its holding as follows:

> [a]lthough bright-line rules are helpful in practice, we cannot change the language of this statute, but must apply the statutory words chosen by the

[8] The June 13, 2013 revised dispositional order does not appear to include the warnings., 15:6, and neither does the September 30, 2016 revised dispositional order, 15:20.

> legislature. The language of Wis. Stat. § 48.415(2) is not ambiguous; it is very clear — only *one or more* of the written notices required under Wis. Stat. § 48.356(2) must be proven in a TPR case based on continuing CHIPS. The legislature does not explain why it used "one or more" in the TPR statute, but used "any" in the CHIPS statute. This does not, however, change our analysis. The legislature used "one or more" in § 48.415(2) and that is the language we must apply in this TPR case.

Id. at ¶25. Of course, the statutory language used in §48.415(4) is much different. It does not allow for the interpretation that only "one or more" of the CHIPS orders needs to contain the written notice under §48.356(2). To the contrary, the language unambiguously indicates that the order which needs to contain such notice is the one which denies visitation. The June 20, 2016 order does not satisfy this requirement. At a minimum, there are genuine issues of material of fact which preclude summary judgment.

CONCLUSION

For the reasons stated above, R.H. respectfully requests that this court vacate the judgments and orders terminating parental rights and remand the cases for trial as to whether grounds exist for termination of his parental rights.

Dated this _____day of February 2019.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 6805 words.

Dated this ___day of February 2019.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this ___ day of February 2019.

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