STATE OF WISCONSIN

SUPREME COURT

Appeal No. 2020AP000982

In re the termination of parental rights to D.N.B., a person under the age of 18:

DOUGLAS COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v.

Douglas County
Case No. 18TP20

D.B.,

Respondent-Appellant-Petitioner.

ON APPEAL FROM THE CIRCUIT COURT OF DOUGLAS COUNTY,

THE HONORABLE KELLY THIMM, PRESIDING

PETITION FOR REVIEW

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ISSUES PRESENTED

I. D.B.'s CHIPS dispositional order assured him that he would not lose his parental rights based on continuing CHIPS so long as he was within nine months of completing conditions of return. D.B. was easily within nine months of reunification at the time of his TPR trial, but his rights were terminated under continuing CHIPS anyway, and the court even accepted out-of-date CHIPS dispositional order warnings in order to prove the notice requirement of the new version of the statute.

> **The issues presented are:** When a county human service department gives a parent assurance of a protection against termination of his parental rights, and the legislature subsequently scraps that protection, need the parent be warned of the change either to satisfy due process or to meet the notice requirement of the new statue?
>
> **How the lower courts ruled**: The circuit court and Court of Appeals both answered no as to both questions.

II. Counsel for the petitioner told the jury multiple times that D.B. had availed himself of less than half of his opportunities to visit with his son. In truth, D.B. saw his son far more often than that, and counsel could easily have proved it but failed to do so.

> **The issue presented is:** Is an attorney ineffective when he fails to raise an important and straightforward defense for no good reason?
>
> **How the lower court ruled:** The circuit court answered no. The Court of Appeals answered no as to the continuing CHIPS ground but did not decide as to the failure to assume parental responsibility ground.

III. At trial, the petitioner introduced irrelevant and emotionally manipulative evidence that D.N.B. cried at visits with D.B. along with evidence that D.N.B. preferred his foster mother to D.B. Trial counsel did not object.

The issue presented is: Is an attorney ineffective for failing to object to the use of evidence relevant solely to the best interest of the child at the grounds phase so long as the jury is not instructed to consider the child's best interest?

How the lower court ruled: The circuit court and Court of Appeals both answered no.

TABLE OF CONTENTS

REASONS FOR GRANTING REVIEW

This case raises presents several issues related to termination of parental rights brought about by D.B.'s lawyer's indifference to the law and bland acceptance of inevitable defeat. It invites the court to reaffirm the gravity of TPR cases by finding that errors and omissions by counsel can indeed give rise to a reasonable probability of a different result, uncertainties that are altogether unworthy of these enormously consequential cases.

First, counsel ignored a change in the law that at the time clearly suggested a possible due process violation. Wis. Stat. § 48.415(2)(a) had changed after D.B. was given notice of it, and he would have won under the older version of the law. Notice was even an element of the statute, but counsel still made no objection. Since future changes to the TPR statutes are likely (App. 125-128), this court should accept this case both to remedy the due process violation it represents and to forestall other due process challenges that might arise from changes to the TPR statutes in the future.

Next, this case alleges ineffective assistance of trial counsel. The Court of Appeals decided this issue as narrowly as possible, finding only that there was no reasonable possibility of a different outcome on the continuing CHIPS ground. But there is something troubling, in a case involving as serious a deprivation of rights as a TPR, in finding that a parent's assistance of counsel was only just barely effective. This case gives this court the opportunity to reaffirm the necessity of effective assistance in these types of cases.

Finally, counsel stood by while the Department introduced irrelevant and prejudicial evidence about D.N.B.'s negative reactions to seeing D.B. at visits. There are many reasons why descriptions of interactions between parents and children might be relevant to failure to assume parental responsibility or continuing CHIPS. None of them was present here. This is at least the second time in two years that this court has been asked to review this issue: see ***A. C.-E. v. I. M.*** (In re Termination of Parental Rights to E.M.C.), Appeal No. 2019AP573 (Wis. Ct. App. Apr. 15, 2020). (App. 129). This court should clarify that evidence of a child's negative reaction to a parent is only admissible when it is relevant to grounds.

STATEMENT OF THE CASE

I. Introduction

Termination of parental rights cases are often so full of negative facts that it is difficult for a parent's defense counsel to craft a compelling defense. D.B.'s case was one of the exceptions, but his defense counsel utterly failed to see it.

First, D.B. would have defeated the continuing CHIPS ground if he had been tried under the law of which he was warned during the CHIPS proceeding. (R. 90:130-131; R. 49; App. 40). He had nearly completed the conditions of return such that there was not, in the words of the prior version of the continuing CHIPS statute, "a substantial likelihood that the parent [would] not meet these conditions within the 9-month period following the fact-finding hearing." Wis. Stat. § 48.415(2)(a) (2015-16). But the law had been changed in April of 2018, making the fact that D.B. was very close to meeting conditions irrelevant. Wis. Stat. § 48.415(2)(a) (2017-18). Case law strongly suggested a fundamentally unfair violation of D.B.'s due process rights, but counsel did not review that case law or object to the statutory change in any way. (R. 110:48-53, App. 75-76). The trial court then found that D.B. had been given the warnings required by the statute in effect at the time of trial, even though the dispositional order had never been amended to reflect the new statute. (R. 90:271, App. 47).

Next, trial counsel allowed the jury to think that, after D.N.B. entered foster care, the only time D.B. saw his young son was during supervised agency visits, of which the Department said he missed more than half. (R. 90:264, App. 56). In truth, D.B. cared for his son during frequent extended visits with D.B.'s parents (R. 110:9-10, App. 57-58), with whom D.B. was living (R. 90:115) and who hoped to take eventual placement of D.N.B. during the first year of the CHIPS case. (R. 110:8). And D.B. redoubled his efforts at reunification once he finished drug treatment, logging a nearly perfect visit attendance record in the six months immediately preceding the trial and thereby improving his overall visit attendance record significantly. (R. 111:22-23, App. 106-107). But the jury heard none of this. For all it knew,

D.B. had been dropping by a supervised visit occasionally for three and a half years, nothing more.

The jury also heard irrelevant testimony suggesting that severing ties with his father was in D.N.B.'s best interest: D.N.B. did not want to go to his father. (R. 90:219, App. 54). He screamed at the very sight of him. (R. 90:213-214, App. 51-52). He wanted to stay with his foster mother. (R. 90:206, App. 50). Counsel did not see a reason to object to this testimony. (R. 110:73, App. 95) even though it had nothing to do with either ground and was therefore unfairly prejudicial.

Because of these and other errors, D.B. is entitled to a new grounds hearing.

II. Procedural History

On November 30, 2018, the Department filed a petition to terminate D.B.'s parental rights to his son, D.N.B. (R. 1, App. 29). The petition alleged two grounds for termination: continuing need of protection or services, Wis. Stat. § 48.415(2)(a), and failure to assume parental responsibility, Wis. Stat. § 48.415(6). (*Id*.) The petition noted that, pursuant to 2017 Wisconsin Act 256, "the Department is not obligated to prove any substantial likelihood that [D.B.] will not meet the Conditions for Safe Return in the future." (*Id*. at 4).

D.B. contested the petition. After a one-day trial, a jury found that the Department established both grounds for termination. (R. 39-40). On October 11, 2019, after a disposition hearing, the court ordered that D.B.'s parental rights be terminated. (R. 57; App. 42-43).

D.B. filed a timely notice of intent to pursue postdisposition relief as well as a notice of appeal and then a motion to remand to the circuit court for a fact-finding hearing. (R. 55, R. 78, R. 95-96). The case was remanded, and on August 27 and October 5, 2020, the circuit court held a hearing on D.B.'s postdisposition motion. (R. 110 and 111). The court issued an oral ruling denying D.B.'s request for a new trial and a written order followed on October 6, 2020. (R. 108; App. 44-45). The case was returned to the Court of Appeals. (R. 112).

On August 10, 2021, the Court of Appeals issued its order affirming the trial court's decision. (App. 1).

III. Additional Facts

D.B. will accept the facts as stated in the Court of Appeals' opinion on pages 3-8 (App. 3-8) with the addition of the following:

D.B.'s progress towards meeting conditions of return is detailed below in section I.A.

D.N.B.'s extended overnight visits at the home D.B. shared with his parents in Duluth, Minnesota ended when Minnesota declined to issue the grandparents a foster care license. (R. 110:31-34, App. 61-67). Because D.N.B. was placed in Greenwood, WI, which is a 3-hour drive from Douglas County, it was far more difficult for D.B. to see D.N.B. regularly once the visits in Duluth stopped. (R. 90:115).

ARGUMENT

I. It was fundamentally unfair to strip D.B. of a central defense to TPR without timely notice to him and counsel was ineffective for failing to argue as much.

Parents facing termination of their parental rights have a due process right to fundamentally fair procedures. ***Santosky v. Kramer***, 455 U.S. 745, 752-754 (1982). In Wisconsin, a parent who has been warned that his or her rights are in jeopardy is entitled to notice of any change that substantially changes the type of conduct that may lead to the loss of his or her rights. ***State v. Patricia A. P.,*** 195 Wis. 2d 855, 863 (Wis. Ct. App. 1995). This court recently held that the 2018 statutory amendment permitting termination of parental rights based on continuing CHIPS, even if parents were within 9 months of meeting court-ordered conditions of return, was not a substantial change in conduct and not automatically requiring notice be given under ***Patricia A. P.*** See ***Eau Claire Cnty. Dep't of Human Servs. v. S.E.*** *(In re Termination of Parental Rights to T.L.E.-C.)*, 2021 WI 56, 28 (Wis. 2021).

In this case, which deals with the same 2018 amendment, this court should find that application of the new version of the law violated D.B.'s due process rights not for reasons described in ***Patricia A.P.*** but because, as applied to him, it deprived him of a winning argument without notice. Moreover, to avoid the risk of future similar due process violations resulting from legislative changes to the TPR statutes, this court should go beyond ***Patricia A.P.*** and order that when the legislature makes it easier to terminate parents' rights, parents subject to TPR warnings in ongoing CHIPS cases must be given timely updated warnings in the CHIPS proceedings.

A. D.B. would not have lost his parental rights had he been given prompt notice of the statutory change when it took effect in April 2018.

The prior version of the Continuing CHIPS statute only applied to parents who were not within nine months of meeting conditions of return. This means it would not have applied to D.B. At the time of the grounds trial, D.B. had completed both intensive outpatient and intensive inpatient alcohol and drug treatment. (R. 90:238). He was, and always had been, in compliance with random drug testing. (R. 90:142-144). He found housing suitable for himself and D.N.B. midway through the case, which the ongoing social worker at the time described as "clean," "organized," and "nice." (R. 90:170). He completed a parenting skills program even though the Department did not offer him this court-ordered service. (R. 90:237-238). He was having regular visitation with his son. (R. 11:22-23, App. 106-107). He was in regular contact with his ongoing case manager to discuss conditions of return. (R. 90:239). This accounts for all or nearly all the conditions of return detailed in the CHIPS dispositional order. (R. 49, App. 37-38). Any reasonable jury prior to April 2018 would have found that D.B. was likely to meet conditions for D.N.B.'s return, if he had not already, within nine months of trial.

More to the point, D.B. would also have prevailed under the new 2018 version of the law if he had been given prompt notice of that law after it went into effect in April. A revision hearing notifying him that he had just lost his best defense to termination of parental rights would have permitted him the opportunity to respond based on accurate information.

D.B.'s best evidence that the notice would have prompted him to respond is that when he found out about the change he did, in fact, respond. The first notification D.B. had of the shortened timeline was the text of the bill attached to the petition to terminate his parental rights. (R. 1 at 6; App. 32-34). Soon after the petition was filed, he entered drug and alcohol treatment (R. 90:238) and, when he was able, resumed visits with his D.N.B. (R. 111 at 6, App. 97) and enrolled himself in the above-mentioned parenting class. If D.B. had been notified of the shortened timeline when it was shortened, rather than seven months later, he would likely have had his son back in his care by August 2019 instead of beginning a TPR trial.

The legislative intent of the notice portion of the continuing CHIPS statue is to give parents the opportunity to avoid TPR. ***Waukesha County v. Steven H.***, 233 Wis. 2d 344, 355-56 (Wis. 2000). The procedures here violated D.B.'s due process rights because he was given to believe that less was required of him to prevent TPR than was actually required. Just because the change related to the amount of time he had to complete conditions to avoid TPR instead of the "quality of the nature of the acts," to use the language of ***Patricia A. P.***, does not mean that this was no change at all. ***Id.*** at 864. As D.B. discovered, to his detriment, there is a critical difference between "if you don't have your child back by the time of trial you will lose your rights" and "being within nine months of getting your child back is close enough." Our legislature has decided that "nine months is close enough" is too permissive and has gotten rid of that protection. But no matter how justified the change was, fundamental fairness required D.B. to be given prompt notice once it took effect. Telling D.B. he had a specific protection, observing him to actually have availed himself of that protection, and then terminating his rights anyway was fundamentally unfair.

B. Requiring human service departments to revise dispositional orders to reflect legislative changes to TPR grounds is eminently sensible and will have only salutary effects.

More changes to TPR statutes are probably coming. For example, 2019 Assembly Bill 559-566 proposed, among other things, several new grounds for termination of parental rights. (App. 127-131). Should new grounds be created, or existing grounds be amended again, courts and county departments will no doubt wish to apply those grounds to cases subject to

dispositional orders that went into effect prior to the change. Everyone—from defense counsel wishing to avoid ineffective assistance of counsel claims, to county departments wishing to honor parents' rights to fundamentally fair TPR procedures, to foster families desiring permanency for themselves and the children in their care—will benefit from clear instructions as to what notice must be given to parents after legislative changes, how precisely to give that notice, and how much time must pass before termination proceedings can be brought on the new grounds. Without such guidance, courts will be unsure how to balance care for parents' due process with the evident desire of the legislature to achieve permanency for children more quickly. In addition, this court's finding in ***Eau Claire County v. S. E.*** vis-à-vis ***Patricia A. P.*** will give courts the unenviable task of having to decide whether a legislative change in law is a "change of the quality of the nature of the acts." ***Id***. at 864. This is a subjective standard, and reasonable judges will doubtless disagree about which type of change is which. It would be far better to err on the side of caution and require that the parent be given notice every time.

The demands of notice requirements after legislative changes to TPR statutes created a flurry of litigation. Whether notice was given and when and how notice was given varied from county to county. The parent in ***Dane Cnty. Dep't of Human Servs. v. J. R.*** *(In re Termination of Parental Rights to K. T.)*, 390 Wis. 2d 326, 333 (Wis. Ct. App. 2019) was given updated warnings less than a month after it took effect, and Dane County appears to have then waited six months from the revision to file the TPR petition.[1] The parent in ***Eau Claire Cnty. Dep't of Human Servs. v. S.E.*** only received updated warnings in October 2018, after the TPR had already been filed. 2021 WI 56, 7-8. Unpublished case law also shows courts contending with the change. A Brown County parent was notified of the change in July 2018, before the TPR was filed. ***Brown Cnty. Dep't of Human Servs. v. H. P.*** *(In re Termination of Parental Rights to R. B.)*, Appeal No. 2019AP1324, at *4 (Wis. Ct. App. May 13, 2020). (App. 152). Two more cases alleged due process violations relating to the statutory change: ***Iron Cnty. Dep't of*** **Human Servs. v. N. H.-D.** (In re Termination of Parental Rights to C. P.-D.), Appeal No. 2019AP1520 (Wis. Ct. App. Feb. 12, 2020) (App. 163) and ***Racine Cnty. Dep't of Human Servs. v. S. M. F.*** *(In re Termination of Parental Rights to M. J. S.),* Appeal No.

[1] Had this been done for D.B., he would not now be challenging due process.

2019AP2346 (Wis. Ct. App. July 15, 2020). (App. 175). D.B., of course, never got updated warnings in the CHIPS case at all.

In any case, this matter is far better suited than ***S.E.*** for a clear decision on this question of updated warnings of changed TPR grounds. ***S.E.*** was essentially a facial challenge, asking the court to find that there were no circumstance under which use of the changed law in question without notice to a parent did not violate due process, as described in ***United States v. Salerno***, 481 U.S. 739, 745 (1987). Facial challenges, for many reasons, are disfavored. ***Wash. State Grange v. Wa. State Repub. Party,*** 552 U.S. 442, 1, 6-8 (2008). As the Court of Appeals noticed, ***S.E.*** had no facts to show how the lack of notice would make a difference in the outcome of her case. ***Eau Claire Cnty. Dep't of Human Servs. v.*** **S. E.** *(In re Termination of Parental Rights to T. L. E.-C.),* 392 Wis. 2d 726 at ¶11 fn. 10 (Wis. Ct. App. 2020) That is because ***S.E.*** was a permissive appeal and there had not yet been any fact-finding. The parent in ***Brown Cnty. Dep't of Human Servs. v. H. P.*** ran into the same problem: She had no facts to show that she would have prevailed under the old law but not the new one. Appeal No. 2019AP1324, at *9-10. As was explained above, D.B. can robustly make such a showing.

C. The evidence presented at trial was insufficient to prove the notice element of the continuing CHIPS statute.

By this petition, D.B. requests that this court also review the finding that the Department produced enough evidence to terminate D.B.'s parental rights even though it never presented the court with an updated CHIPS dispositional order. This court's decision ***Eau Claire County v. S.E.*** does not conclusively establish that it was enough for Douglas County DHS to use the old warnings, and only the old warnings, to satisfy the notice requirement of the new version of Wis. Stat. s. 48.415(2)(a)(1) at trial.

After the statutory amendment in April 2018, after the TPR petition was filed in November 2018, and all the way until the final termination order in October 2019, the document that served as D.B.'s official notice as to the state of the law was his original 2016 CHIPS dispositional order. (App. 35). A hard copy of that document had been placed into D.B.'s hands and read out loud to him when it took effect in July 2016. And that document told him, long after it was no longer true—some 500 days after it was no longer

true, counting from the date of the change until the date of disposition—that he had nine months from the time of trial to meet conditions of return. (R. 49, App. 40).

The law in effect at the time of the TPR proceeding was the 2018 law. The law of which he had notice was the old law. But only the new law existed at the time of trial. In fact, the Department could not have tried D.B. under the old law even if it wanted to. ***Dane Cnty. Dep't of Human Servs. v. J. R.*** *(In re Termination of Parental Rights to K. T.)*, 390 Wis. 2d 326, 336-37 (Wis. Ct. App. 2019). Without showing that the warnings matched the new law, it is D.B.'s position that there was insufficient evidence to support the continuing CHIPS ground for termination of his parental rights.

The Court of Appeals found that D.B.'s case was foreclosed by ***Eau Claire County v. S.E.*** A close reading of that case reveals that it is not nearly that simple. This court limited its decision in ***S.E.*** to whether the Department could *initiate* TPR proceedings without first amending the underlying CHIPS dispositional order. ***Id***. at ¶25, 26. It did not discuss what might happen if the order was never amended at all, or if no amended order was presented as evidence at trial to prove that the parent received notice under the amended version of the statute.

This court in its majority in ***S.E.*** supported its decision by noting several times that the parent received notice in her CHIPS case of both versions of the grounds, both before and after the TPR was filed. ***Id***. at ¶24, ¶30. "The test of the adequacy of notice is fairness." ***In Interest of D. H.***, 76 Wis. 2d 286, 299 (Wis. 1977). The majority's repeated reference to the CHIPS revision suggests that the additional element of fairness that the revised dispositional order provided influenced its decision. After all, by the time this court decided S.E.'s case she would have had the benefit of that notice for years. The Court of Appeals ignores this. But if the majority had wished to find that it did not matter whether the CHIPS dispositional order was ever amended with the new warnings, then there would have been no reason for it to repeatedly emphasize that the order was eventually amended.

II. Review is warranted to reaffirm the importance of adequate representation of parents in TPR proceedings.

The Court of Appeals avoided making a finding as to whether or not D.B.'s trial counsel performed ineffectively when counsel failed to introduce evidence that D.B. visited with and provided care for his son far more often than the Department claimed. As described in the statement of facts in the Court of Appeals' decision, the Department relied heavily on the calculation that social workers had made in September 2018 that D.B. missed 57% of his supervised visits with his son. ¶11.

Only the jury never heard that this number did not include monthly overnight visits—some lasting longer than a week—at the home D.B. was sharing with his parents for the first year of the CHIPS case. ¶116-17. Nor did they hear that, after receiving drug treatment, D.B. re-started visitation and did not miss a single visit for roughly six months. ¶17. Trial counsel had been provided with all this information in discovery and had apparently reviewed it, although there is some question as to whether he was aware that visits were happening in the months leading up to trial. (R. 111:12, App. 103). In any case, the jury was left with the impression that D.B. had been missing every other supervised visit for three and a half years without variation or explanation.

It is obvious that failing to present this kind of evidence of regular, direct care for D.B. to rebut the Department's narrative was prejudicial as to the failure to assume ground, and that if failure to assume had been the only ground pled there would be a reasonable possibility of a different outcome. The Court of Appeals limited itself to deciding whether counsel's omission was prejudicial as to the continuing CHIPS ground—whether, if the information about the additional visits had come in, there is a reasonable probability that the jury would have found that the Department did not make reasonable efforts.

The Court of Appeals said that there is no reasonable probability that the evidence of additional visits would have led to a different outcome on continuing CHIPS. ¶38. But if the jury had heard that D.B. was seeing D.N.B. up to a week out of each month for the first 12 months of the case, and that when the visits abruptly stopped D.B. saw D.N.B. far less frequently—for reasons that had nothing to do with D.B.—he would have been able to argue that reasonable efforts required the Department to do more to put the focus

on reunification with D.B. instead of with D.B.'s parents. The Department could have authorized continued visits at the grandparents' home, since the barrier to them taking placement did not have to do with any safety concerns but with the interstate compact on the placement of children and the Minnesota foster care licensing standards. The Department could have looked for a different foster home closer to Duluth to facilitate more frequent visits between father and son. Instead, the Department seems to have watched impassively as D.B. gradually saw his son less and less. Trial counsel argued that Douglas County should have offered drug treatment services more actively to D.B. and timed it to his changing circumstances. (R. 90:98, 261). But trial counsel did not support that argument with any evidence of how D.B.'s circumstances and needs changed over time and how the different timing would have made a difference. The details about the grandparent visits, why they stopped, and why they started again would have given trial counsel facts to support his argument where he otherwise had none.

The Court of Appeals' decision in this case fails to hold trial counsel responsible for manifestly poor representation. It does not explain how, exactly, it can be so confident that counsel's deficient representation on the failure to assume ground did not also create doubt as to the quality of his representation to the continuing CHIPS ground. Both grounds were tried together. The length of time that D.N.B. had been out of the home, D.B.'s alleged failure to meet various conditions of return, and spotty visit record during the middle part of the case, to name a few, all were relevant to both grounds. This degree of overlap between the two grounds is not unique to D.B.'s case; see, for example, ***Oneida Cnty. Dep't of Soc. Servs. v. Scott H.*** *(In re Daman H.)*, 816 N.W.2d 352 at ¶ 24 (Wis. Ct. App. 2012). (App. 186). Jurors cannot be expected to collate the evidence into one ground or another and consider them completely independently.

Certainly, when defense counsel puts on a robust defense, contesting the petitioner's narrative, calling witnesses, and otherwise demonstrating that there is a lot more to the story than the petitioner wants to let on, it is reasonable to assume that the jury will consider both grounds more critically. Simply put, the court should take this case because TPR defense counsel should be admonished to provide zealous representation.

III. Review is warranted to clarify that evidence solely relevant to the best interests of the child is inadmissible during the grounds phase of TPR proceedings.

At the fact-finding stage of a TPR proceeding, the best interest of the child is not to be considered. ***Door County DHFS v. Scott S.,*** 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999). Because of this, parents like D.B. are precluded from arguing to the jury that termination would not be in a child's best interest. Departments are supposed to be likewise precluded from arguing that the child would be better off being raised by someone else.

D.B. would have surely been better positioned at trial if he had been allowed to argue, for example, that it would be in D.N.B.'s best interest to be raised with the help of D.B.'s parents, who loved and wanted their grandson, had cared for him since his birth and for much of the first year he was in foster care, and who would have taken placement of him if they had not been living in another state and ineligible for a foster care license there. (R. 110: 8-10.) The Department should likewise not have been allowed to try to show the jury it was in D.N.B.'s best interest to stay with his foster parents. The Department found a way to suggest what would be best for D.N.B. anyway, using irrelevant and prejudicial testimony that had nothing to do with either of the TPR grounds and everything to do with manipulating the jury. Trial counsel stood by and watched it happen, citing his experience with TPRs as justification, as if his experience absolved him of the need to consider the admissibility of each piece of evidence. (R. 110:73, App. 169).

Evidence of D.N.B.'s apparent aversion to D.B. and the child's preference for his foster mother was completely irrelevant to either ground. The text of the statute regarding failure to assume parental responsibility is exclusively concerned with the parent's actions towards the child. It is only after grounds have been found that the fact finder considers the child's attitudes and behavior towards the parent, including such considerations as the type of relationship that in fact existed between the parent and child, whether or not ending the relationship would be harmful, and the child's wishes about the matter. Wis. Stat. § 48.426(3).

This is important because the statute does not require direct care. If petitioners were allowed to establish lack of substantial parental relationships by showing that the child did not demonstrate affection for or attachment to the parent, then many parents, including those who are separated from very young children because of, for example, military service or career demands, would be unfairly prejudiced. The government does not have an interest in depriving parents of their children merely because the children are not used to their parents. Its interests are limited to what is described in the grounds statute: parents who have not adequately performed the objective duties of parenthood. A small child's reaction to seeing a parent after a long car ride does not provide meaningful information as to whether or not the parent assumed responsibility for the child.

In other words, the testimony about D.N.B.'s apparent aversion to D.B. and preference for his foster mother at the outset of certain supervised visits had no tendency to make the existence of any fact having do with the TPR grounds more or less likely, as required by Wis. Stat. § 904.01. It did not tend to prove that D.B. exposed D.N.B. to any danger, or took inadequate care of him, or reacted inappropriately to his behavior. It did not tend to suggest that D.B. had not met conditions of return. Although he claimed that what happened at visits was relevant, trial counsel was not able to articulate any fact related to either ground that the evidence tended to prove. (R. 110:42, App. 73). There was none. A parent can in fact have accepted and exercised significant responsibility for a child's daily care and supervision, as required by Wis. Stat. § 48.415(6), without having an instant, easy rapport with the child.

The Court of Appeals stated that any harm related to this failure to object was entirely mitigated by the fact that the court read the standard limiting instruction at the close of evidence. ¶52. (App. 46). However, the instruction was so general and removed from the improper best-interest evidence as to be worthless. ***State v. Gavigan***, 111 Wis. 2d 150, 162, 330 N.W.2d 571, 578 (1983). Repeated testimony describing a young child who desperately wants to stay with his foster mother, combined with the knowledge that the fate of this child is to some extent in the jury's hands, is highly emotionally charged. It conjures up an image of a frightened, vulnerable child and, absent complete information, any adult coming on

this scene would feel some desire to protect the child. In the absence of any probative value, this was unreasonably prejudicial under Wis. Stat. § 904.03.

CONCLUSION

For the reasons stated above, D.B. asks this Court to vacate the order terminating his parental rights, to dismiss the continuing CHIPS ground, and to order a new grounds trial.

Dated this 8th day of September, 2021.

Respectfully submitted,

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I, D[redacted] B[redacted] authorize my attorney, Kimberley Bayer, to file a petition for review on my behalf.

Dated this 26 day of August, 2021.

D[redacted]

[redacted]

CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,572 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12) and § 809.62(4). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

I hereby certify that filed with this petition, either as a separate document or as a part of this brief, is an appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the finding or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

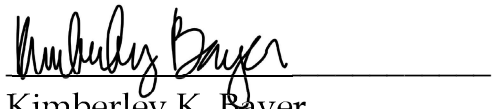
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 8th day of September, 2021.

Signed:



Kimberley K. Bayer