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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In the Interest of N.A.,
a person under the age of 18:

Appeal No. 2021AP1683

Portage County,

Petitioner-Respondent,

Portage County Circuit Court
Case No. 2021JC000001

R.A.,

Respondent-Respondent,

-v.-

D.A.,

Respondent-Appellant.

In the Interest of D.A.,
a person under the age of 18:

Appeal No. 2021AP1685

Portage County,

Petitioner-Respondent,

Portage County Circuit Court
Case No. 2021JC000002

R.A.,

Respondent-Respondent,

-v.-

D.A.,

Respondent-Appellant.

In the Interest of N.A.,
a person under the age of 18:

Appeal No. 2021AP1686

Portage County,

Petitioner-Respondent,

Portage County Circuit Court
Case No. 2021JC000003

R.A.,

Respondent-Respondent,

-v.-

D.A.,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT D.A.

Appeal from Orders of the Portage County Circuit Court,
Case Nos. 2021 JC 00001, 2021 JC 00002, and 2021 JC 00003,
the Honorable Patricia Baker, presiding

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STATEMENT OF ISSUES PRESENTED

I. Did the circuit court err when it found that Portage County presented clear and convincing evidence of neglect or substantial risk of neglect based on a single allegation of domestic violence that allegedly occurred more than a year before the petitions were filed?

The circuit court answered: No.

II. Did the circuit court err when it found that Portage County presented clear and convincing evidence that the children were emotionally damaged at the time the petitions were filed and that the parents were unable or unwilling to ameliorate their symptoms?

The circuit court answered: No.

III. Did the circuit court err when it removed the children from David's home and placed them with Rachel?

The circuit court answered: No.

IV. Did the circuit court deprive David of procedural due process when it barred him from impeaching Petitioner-Respondent Portage County's witnesses and introducing evidence to rebut the allegations?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs should fully address the facts and applicable law of the case.

Publication is not appropriate pursuant to Wisconsin Statutes section 809.23(1)(b)4 because this is an appeal decided by one court of appeals judge under Wisconsin Statutes section 752.31(2).

INTRODUCTION

This case revolves around Petitioner-Respondent Portage County's insertion of itself into a family custody dispute between separated parents due to what appears to be a fundamental misunderstanding and mistrust of Respondent-Appellant D.A.'s (hereinafter, "David") religion.

Following a month-and-a-half-long joint investigation with Waushara County into unsubstantiated reports of physical abuse by David and his wife, Respondent-Respondent R.A. (hereinafter, "Rachel"), Portage County unilaterally commenced a separate investigation and, within three weeks, filed petitions alleging that David and Rachel's three children were in need of protection and services, due not only to allegations of physical abuse, but also based on allegations of emotional damage, neglect, and substantial risk of neglect.

At trial, the court limited David's ability to cross-examine Portage County's witnesses regarding their bias against David and inaccuracies in their submissions to the court. The court thereafter found that, based on a single allegation of domestic violence more than a year before the petitions were filed, the children were in need of protection or services due to neglect or substantial risk of neglect. The court also determined that the children had suffered emotional damage, based on psychological assessments administered two months after the petitions were filed. Contrary to the requirement of Wisconsin Statutes section 48.13(11), the court did not make a finding that the parents neglected, refused, or were unable to obtain

necessary treatment or to take necessary steps to ameliorate the symptoms, and the evidence presented at trial did not support such a finding.

In dispositional orders, the court thereafter awarded placement of the children to Rachel, and left David's visitation with his children to the discretion of Portage County for the duration of the one-year order.

The court erred. The evidence was insufficient to establish that the children were in need of services or protection due to neglect, substantial risk of neglect, or emotional damage. Furthermore, the court's dispositional orders that gave Portage County complete control over whether David sees his children for the next year violate David's parental rights and constitute an abdication of the court's discretion. For those reasons, the orders should be vacated.

STATEMENT OF THE CASE

David and Rachel were married on June 19, 2010 in Rachel's native country of India. (R.93:10).[1] Following their marriage, they lived in New Zealand and California before they settled in Wisconsin. (Id.). They have three children: N.A., born on August 17, 2012 (hereinafter, "Nancy"); D.A., born on October 26, 2013 (hereinafter "Donald"); and N.A., born on December 25, 2017 (hereinafter, "Natalie"). (R.93:1-2).

Religion is an important part of David's life and central to how he raises his children. (R.108:2; R.109:2). David spent years exploring different theologies before he chose to follow the Messianic Judaism religion. (R.98:110-11, 151; R.108:2). Messianic Judaism is more than just a theological choice for David: it is a way of life that guides how he raises, disciplines, and educates his children, as well as with whom he associates, and how he views the world. (R.108:2). After settling in Wisconsin, David chose to take his children to a Mennonite church because of the model it provides of a strong family. (R.98:110). He home-schooled his children using a religious-based curriculum, and disciplined his children using a Puritanical method. (R.55:45-46; R.98:166).

Significant problems emerged in David and Rachel's relationship not long after their youngest child was born. In late November 2019, Rachel took Natalie with her to California, never to return to David's home. (R.98:84, 106). David filed a custody action after Rachel refused to come back to Wisconsin, and got a court order requiring the baby to return. (R.98:114-15). Rachel and Natalie returned to Wisconsin in January 2020. (R.98:116). Following Rachel's return, David and Rachel lived in separate residences

[1] Unless otherwise noted, all references to the appellate record use the numbering system for Portage County v. D.A., Appeal No. 2021AP1683.

and shared placement of the children, with David exercising primary placement during the school year so that he could home-school the children, and Rachel exercising primary placement during the summer. (Id.; R.93:9; R.108:2).

About this same time, David sent the children to counseling because of disturbing things that they said they heard from their mother, and due to concern about the effect of her recent absences. (R.97:210-11, 213-14; R.98:117-18). He got a list of recommended counselors from Waushara County, but because none of those counselors had immediate availability, he took the children to a counselor whom he found on the Internet. (R.98:118). David subsequently took the children to one of the counselors on Waushara County's list, and when that counselor ended his practice, David started sending his children to Pam Wellbrock, who has more than three decades of experience in faith-based counseling. (R.97:225-26; R.98:118-19; R.121:53, 58). David had scheduled an appointment for his children with another counselor in November or December 2020 to take place after the holidays; however, he canceled that appointment after Rachel texted him her objection because she needed more information about the new counselor. (R.98:73-74, 121-22, 137).

Six months after her return to Wisconsin, Rachel filed a petition for legal separation in Waushara County. (R.93:9; R.97:211). The family court proceedings were contentious, with custody and placement of the children vigorously contested. (R.96:8, 99; R.97:212; R.54:26).

Investigations of Allegations

In late October of 2020, following a placement change in the family court, Waushara and Portage counties commenced a joint investigation into allegations of physical abuse of the children. (R.96:93-94; R.98:134).

Waushara County closed its case after initial assessment social worker Emma Dahl failed to substantiate any allegations of abuse. (R.97:155-56). During her investigation, Dahl formed the following impressions of David and his children:

> That [David] is a loving father of the kids and the kids really enjoyed his time – their time with him.
>
> When speaking with the kids, I got the opportunity to see the home and where they sleep and their playroom, and the playroom is full of toys. I was able to see that there was books for school and that they were very proud to show me how far along they've come in schooling and that they were proud of the classes that they were taking. I have also – was able to speak with the kids on things that they like to do with Dad and, like, some fun – fun memories that they've had. They talked, over the winter – because it was close to – it started snowing at this home visit. And that they talked about going sledding and getting pulled behind a tractor on a sled, talked about going ice fishing, talked about going to a big snow hill. They also talked about going to, like, a youth group. I believe it was at night. I'm not – I don't recall what day it was. But going to youth group and have built relationships through there.

(R.97:132-33).

Portage County initial assessment worker Stephanie Knutson reached a very different conclusion from Dahl. Just three hours into her investigation, Knutson decided that Rachel should withhold the children from going to David's house in accordance with their family-court-ordered placement plan. (R.96:23-28, 91-92). Even after David requested that Knutson expedite the investigation so that he could see his children again, Knutson did not meet with David until more than nine days into her investigation, and she did not talk to the children herself, before concluding that the children were emotionally damaged and had been subjected to parental alienation.

(R.96:32, 39-40). These conclusions were largely based on statements the children made in response to questions posed by Rachel, which Rachel recorded while the children were in her care. (R.96:53-69, 83; R.98:47-61). Dahl and other Waushara County officials who reviewed the recordings disagreed with the conclusions reached by Knutson and Portage County.[2] (R97:152-53).

Dahl was concerned about the content of some of Knutson's questions about David's religion at one of the interviews that she witnessed,

> I felt like there were some questions about religion that was brought up, and I – as a worker, I don't – I don't think questioning someone's religion for an extensive period of time is appropriate. [David] shared with me that the last contact they had when I wasn't there, there was a lot of questioning about scripture and the Bible and that information.

(R.97:167-68).

Portage and Waushara counties were ending their investigation in mid-December 2020 when Portage County got a second report. (R.96:108-09). This time, Portage County declined Waushara County's assistance with its investigation, (id.), and proceeded to court with allegations against David and Rachel that were largely based on Knutson's investigation from the first report.

In an unsigned request and referral for in-home services made prior to the petitions that are the subject of this appeal, Portage County focused on David's use of religion in teaching and disciplining his children, stating in relevant part as follows:

---

[2] Both Knutson and the circuit court acknowledged that they were unable to hear certain portions of the recordings. (R.96:120).

> .... Mother is reliant on the father and is raising concerns of domestic abuse and use of the Bible to establish roles in the family and maintain a patriarchal family. ¿ You shall obey your husband as unto the Lord.¿ Ephesians 5:22 and Colossians 3:18-25.
>
> The children are being used as a tool by dad and maternal grandmother; they come from their father¿s house telling their mother she should obey her husband, she is breaking up the family, calling her a ¿wicked¿ woman and good [*sic*] sees her as a ¿fool.¿ They yell at their mother stating they need to have a ¿bible study¿ with her....
>
> When the children are at their mother¿s house, they are allowed to watch TV; including Bible type movies. Dad doesn¿t like this and they will get disciplined for it at their father¿s house. ... . They get disciplined for watching movies at mom¿s house, answering questions wrong in their studies (they¿re home schooled using a Christian curriculum dated 1991), or any misbehavior at dad¿s house. They go to their mother¿s house and are out of control yelling at her ¿May God put a curse on your head for being a wicked woman and not obeying your husband.¿ ... .

(Symbols in original). (R.109:2-3; A-App. 131-32). Knutson acknowledged that she did not understand Rachel and David's religious beliefs and that she had questioned both parents about their religion. (R.96:103). Knutson and Portage County's focus on David's religion as part of its abuse investigation greatly concerned David, and soured his relationship with Portage County. (R.98:159, 169-70; R.121:83).

On January 8, 2021, Portage County filed Petitions for Protection or Services, alleging that all three children were in need of protection or services (CHIPS) because they were victims of physical abuse, at substantial risk of abuse, suffering emotional damage, and that the parents neglected or were at substantial risk of neglecting the children. (R.3 in 2021AP1683,

2021AP1685, & 2021AP1686; A-App. 091-129). Portage County took custody of the children on January 23, 2021, and placed them exclusively with Rachel on the basis that David was questioning the children about the CHIPS proceedings. (R.54:17; R.9 & R.11 in 2021AP1683, 20211685, & 2021AP1686). David admitted that he had asked the children questions about statements attributed to them in the CHIPS petitions because those allegations were extreme and untrue, but denied that he interrogated them in a way that would upset them. (R.54:68). Following a hearing where David was not represented by counsel and was not provided with Portage County's supplemental request prior to the hearing, the court ordered that the children be temporarily placed with Rachel, with David allowed visitation at Portage County's discretion. (R.54:16, 34, 77-78; R.13:3 in 2021AP1683, 2021AP1685, & 20211686). In delivering its decision, the court stated that it had "heard very little evidence that meets the statutory definition of emotional damage regarding, to a severe degree, anxiety, depression, withdrawal, outward aggressive behavior. However, that being said, there certainly was evidence that these children are living in fear and fear of repercussions of their comments and being truthful comments. Certainly, that is, without a doubt, a very damaging and difficult situation to put a child in." (R.54:78).

Fact-finding Hearing

A fact-finding hearing was held on the allegations. See Wis. Stat. § 48.31(1). At the hearing, Portage County adduced testimony related to a statement Nancy provided at her forensic interview in which she described an incident she and her siblings witnessed between her parents in November 2019 where Rachel hit David and David pushed Rachel to get her off of him. (R.88:1; R.98:90, 122-23, 142-43). This incident occurred more than a year before the petitions were filed, while David and Rachel were living in the

same household. (R.98:122). Although the circuit court reviewed a videotape of the forensic interview provided by Portage County, the court did not accept the video of the interview into evidence when requested by David's counsel. (R.55:138-43; R.97:19, 31; R.121:123-28).

At trial, Portage County relied heavily on audio and video recordings made by Rachel in which, among other things, the children stated that they were afraid that Rachel might put glass in their food or poison them, and that she would take them to India where the girls would be thrown in the river if they did not stay cute and the boy would be sold into slavery if he did not behave. (R.97:50; R.98:47-61). Portage County also introduced evidence that Rachel and David had discussed aspects of the divorce and CHIPS cases with the children, (R.97:191), and that the information relayed to the children from family and CHIPS courts caused them distress. (R.97:82-83).

On March 16, 2021, a court-appointed psychologist, Dr. Christina Engen diagnosed Nancy and Natalie with unspecified trauma and other stressor-related disorders and four out of five criteria for post-traumatic stress disorder (PTSD). (R.97:61, 82; R.60; R.44 in 2021AP1683; R.40 in 2021AP1686). Donald was found to meet all five criteria for PTSD, although Engen said it was possible that some of his PTSD symptoms were actually the result of attention deficit hyperactivity disorder. (R.97:74; R.60; R.40 in 2021AP1685). Engen's assessments were primarily based on clinical contacts with the children made on March 5, 2021, and on questionnaires given to Rachel on that same date and to David on April 2, 2021 seeking information about their children for the preceding month. (R.44 & R.60 in 2021AP1683; R.40 in 2021AP1685 & 2021AP1686; R.97:97-98). Engen testified that she requested information from the parents pertaining to the previous thirty days "[t]o put a timeframe around that. And to offer updated information around the child, it certainly – if you start asking – if you go

back too far, you can kind of open a can of worms and not be tapping into recent functioning." (R.97:98).

Both Rachel and David testified that some of the statements made by the children were blatantly false, and even the circuit court found one of the statements unbelievable. (R.98:63-67, 104, 129-32, 135-36). Engen also stated that all of the children engaged in an abnormal amount of "fantasy thinking" and possibly confused religious teachings with reality. (R.97:50, 75). Engen recommended "some type of support/education" for Rachel and David and "some type of therapy" for the children. (R.97:66-67).

David testified that most of his children's behavioral and emotional issues seemed to commence with and grow worse after Portage County became involved and interfered with his placement with his children. (R.98:132-34, 140-41, 164-65). David testified that the children seemed to exhibit bad behaviors he had not seen prior to Portage County's involvement, (R.55:50-53; R.121:89-92), and Engen agreed that an indeterminate leave of absence of a parent from a child's life is an "adverse childhood event" that could not be ruled out as a possible contributing factor to emotional damage for the child. (R.97:96-97).

David testified that by removing the children from his home, Portage County was taking his children away from the one stable parent they had in their lives and their source of education, religious practice, and socialization. (R.98:166; R.55:27-28, 48, 78, 101). After the children were removed from David's care, the children no longer celebrated Biblical feasts but were being taught pagan feasts, contrary to David's religion. (R.121:87, 106).

At the end of the fact-finding hearing, the court dismissed the allegations related to physical abuse on the basis that they involved discipline of the children that is "completely within the bounds of parental discipline,

which is allowed in the state of Wisconsin." (R.98:170-71). The court thereafter found that the grounds for neglect and significant risk of neglect had been satisfied, based on the statement Nancy had made regarding witnessing an incident of domestic violence between her parents a year and a half before the fact-finding hearing. (R.99:22-26; A-App. 057-061). The court also found, based on Engen's testimony, that "these children have exhibited to a severe degree anxiety, depression, withdrawal, or other substantial and observable changes in behavior, emotional response, or cognition that is not within the normal range for the children's age and stage of development. Therefore, I am finding that each of these children, all three of them, are in need of protection or services based on emotional abuse." (R.99:25-26; A-App. 060-061). The court made no finding that David and Rachel had neglected, failed or were unable to provide the necessary treatment for their children's emotional damage. (See 99:22-26; A-App. 057-061).

Dispositional Hearing and Order

Following the court's order at the fact-finding hearing, relations between David and Portage County deteriorated further. Portage County supervised visitations between David and his children at David's farm, monitoring all of their interactions minute by minute. (See R.104:6-9, 17-19). Following a disagreement between David and Portage County regarding whether Donald could ride his bicycle in the road, Portage County placed rules on David's visitation and moved the visits to a public place. (R.104:3, 6, 9, 15-16; R.121:73-74).

David denied that his children ever were in danger, (R.121:73-74), and he chafed at the rules and the oversight by Portage County, which he attributed to bias against his way of life and religion due to the previous statements and questions by Portage County workers. (R.104:10-16; R.121:83-87). More than once, David referred to Portage County social workers as

"Nazis." (R.104:9). At the dispositional hearing, Portage County admitted that none of the children were hit by a truck, injured by farm equipment, broke any legs or arms, or even needed stitches as a result of any safety issues during their placement with David. (R.121:32). However, Portage County claimed that David's children required extra protection because they were not "of average emotional and well-being – mental health." (R.121:34).

David testified that he would be willing to work with Waushara County, but not Portage County, because of the Portage County's bias against him. (R.121:85-86). David's counsel also attempted to introduce evidence showing that Portage County's repeated errors in its presentation of the facts related to David permeated the case. To this end, David disputed Portage County's contention that he had been dishonorably discharged by the military, or that Donald was ever in danger of being hit by a truck driven down the road by a neighbor. (R.121:69-74, 88, 114-15). Portage County stipulated to both points. (R.121:13, 72).

David also introduced evidence that demonstrated that Wellbrock's qualifications as a counselor had been misrepresented, and that she had a theology degree that included counseling, not a nutrition degree as Portage County repeatedly stated, and she had done faith-based counseling since 1987. (R.121:53-54). Lastly, David attempted to introduce into evidence the forensic interview made of Nancy, which had been reviewed by the court. (R.121:124-28).

At the end of the dispositional hearing, the court ordered that supervision of the children would continue for a year and the children would be placed in Rachel's home with David's visitation at Portage County's complete discretion. (R.121:138-41; R.119 in 21AP1683; R.103 in 21AP1686; R.105 in 21AP1685; A-App. 004-035, 078-081). The circuit court based its decision almost entirely on testimony that Rachel was complying with

Portage County's rules and David was not. (R.121:133-41; A-App. 073-081). The court also chastised David for "not accepting responsibility" for being disciplined by the military due to his conscientious objection to the First Gulf War, for referring to Portage County workers as "Nazis," and for not following Portage County's rules during his visitation with the children. (Id.). However, the court also stated that it found the descriptions of David's interactions with his children to be "delightful," stating as follows:

> .... [F]rankly, when I read the reports of the visits to your house, you know, the first few lines, the first couple of visits – I read them all – I thought they were delightful. I – I just thought they were delightful. These are children out on a farm, playing with animals, riding their bikes, having a good time.
>
> .... [M]y perception of the visits was that they looked like they were delightful. They looked to me like they were happy. And they looked, to me, like your children love you, and you love your children, and you take delight in being a father. And I want you to have that full experience, but you have got to turn the corner with us today.

(R.121:136-38; A-App. 076-078). The court thereafter outlined the conditions for the return of the children. (R.121:141-46; A-App. 081-086). Written dispositional orders were entered on September 7, 2021. (R.119 in 2021AP1683; R.105 in 2021AP1685; R.103 in 2021AP1686; A-App. 004-035).

ARGUMENT

The evidence in this case was insufficient to support the court's determination that the children were in need of protection or services due to neglect, substantial risk of neglect, or emotional damage pursuant to Wisconsin Statutes section 48.13(10), (10m), & (11).

The court's determination that there were jurisdictional grounds due to neglect and substantial risk of neglect was based on a single allegation of domestic violence that occurred more than year before the petitions were filed at a time when Rachel and David were living in the same house. Not only was there no evidence presented to show that any other instances of domestic violence occurred or were witnessed by the children, but by the time that the petitions were filed, circumstances had changed dramatically, making any reoccurrences extremely unlikely.

Furthermore, the evidence also did not support the court's determination that the children were emotionally damaged or that the parents were unable or unwilling to treat any emotional damage at the time that the petitions were filed. The court's determination was based solely on Engen's assessment of the children, which relied on clinical contacts and questionnaires regarding the children's mental status following the filing of the petitions. There was no evidence that the children suffered from any emotional damage at the time of the petitions were filed or before Portage County removed the children from David's home.

The court also erred when it placed the children with Rachel and removed them from David's home. In making its placement determination, the court did not fashion an order that was least restrictive to David's parental rights, and improperly abdicated its discretionary authority to Portage County.

Lastly, the circuit court violated David's constitutional right to procedural due process when it prevented his counsel from impeaching Portage County's witness by limiting questions at the fact-finding and dispositional hearings. Accordingly, the court's dispositional orders should be ordered vacated.

I. The circuit court erred when it found that the children were in need of protection or services due to neglect, substantial risk of neglect, or emotional damage.

The circuit court erroneously found that Nancy was in need of protection or services due to neglect and emotional damage, pursuant to Wisconsin Statutes section 48.13(10) & (11), and that Donald and Natalie were in need of protection or services due to substantial risk of neglect and emotional damage, pursuant to Wisconsin Statutes section 48.13(10m) & (11). The evidence presented at trial did not clearly and convincingly establish any of these grounds. State v. Gregory L.S., 2002 WI App 101, ¶33, 253 Wis. 2d 563, 582, 643 N.W.2d 890, 899 (allegations must be proved with clear and convincing evidence at the fact-finding hearing). This so-called middle burden of proof is a higher standard of proof than is normally required in civil action. State v. Walberg, 109 Wis. 2d 96, 102, 325 N.W.2d 687, 691 (1982).

Whether the evidence supports the exercise of a court's jurisdiction involves an application of the law to the facts. A trial court's factual findings will be set aside if they are clearly erroneous. S.O. v. T.R., 2016 WI App 24, ¶44, 367 Wis. 2d 669, 695, 877 N.W.2d 408, 419. A trial court's application of law is reviewed *de novo*. Id.

A. The court erred when it found that Portage County presented clear and convincing evidence of neglect or substantial risk of neglect based on a single allegation of domestic violence that allegedly occurred more than a year before the petitions were filed.

Wisconsin Statutes section 48.13(10) provides that a circuit court has grounds to establish jurisdiction over a child in need of protection and services if "[t]he child's parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." A court may also exercise jurisdiction in the following circumstances:

> The child's parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home.

Wis. Stat. § 48.13(10m).

The circuit court in this case determined that Portage County had established the grounds to find neglect pursuant to Wisconsin Statutes section 48.13(10) for Rachel and David's eldest child, Nancy, based on a written statement by Nancy that she had witnessed Rachel strike David and David push Rachel in November 2019, when Rachel and David were still living together prior to their separation. The court also found that Rachel and David's other children were at substantial risk of neglect pursuant to

Wisconsin Statutes section 48.13(10m) based on their sister's alleged witnessing of this incident. The circuit court erred.

"Neglect" is defined as "failure, refusal or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." Wis. Stat. § 48.02(12g). "'Physical health' refers to bodily health and safety and does not include mental or emotional health of the child. The physical health of the child is 'seriously endangered' if the failure to provide creates a significant risk that the child will be seriously harmed or injured." WIS JI-Children 250 Neglect. Serious endangerment "encompasses not only those situations where past conduct brought a child into peril, but also those situations where conduct can be anticipated that will bring a child into peril. In either scenario, the child's physical health is put into danger." Z.E. v. State, 163 Wis. 2d 270, 275, 471 N.W.2d 519, 521 (Ct. App. 1991).

The court reasoned that, by failing to prevent their daughter from witnessing an incident of domestic violence between them, Rachel and David failed to provide "necessary care" to Nancy "so as to seriously endanger the physical health of the child." The court did not explain how witnessing violence amounts to failure to provide "necessary care" to a child or how it seriously endangers the physical health of a child, and Portage County did not cite a single case to support its legal argument that exposure to domestic abuse constitutes neglect. (R.98:173). All that Portage County pointed to were Department of Children & Family standards that domestic violence constitutes a safety concern of the risk of imminent harm to children. (R.98:174).

Determining that witnessing domestic violence is grounds for a finding of neglect due to non-precedential safety standards established by

one of the parties is an erroneous exercise of discretion, because it does not involve an appropriate application of the law to the facts of the case. S.O., ¶44, 367 Wis. 2d at 695, 877 N.W.2d at 419. Contrary to the trial court's determination, failure to prevent a child from witnessing a single incident of domestic violence does not amount to failure to provide necessary care, pursuant to Wisconsin Statutes section 48.13(10). "'Necessary care' means that care which is vital to the needs and the physical health of the child. Parents have the right and duty to protect, train and discipline their children and supervise their activities. In determining what constitutes necessary care, [a court] may consider all of the facts and circumstances bearing on a child's need for care, including his or her age, physical condition and special needs." WIS JI-Children 250.

The court in this case did not explain exactly what constitutes "necessary care" for Nancy in light of her age, physical condition and special needs, or how the domestic violence event that she stated that she witnessed in November 2019 affected care that is vital to her needs and physical health. Certainly, it is unfortunate for a child to witness domestic violence between his or her parents; however, that in itself does not equate to a failure to provide the basic necessities for a child to live, nor does it seriously endanger the physical health of the child, as the court found here. There was no evidence presented by Portage County that Nancy had suffered any physical ailments as the result of the incident, nor was there any expert testimony establishing that a child who witnesses an incident of domestic violence is automatically in serious danger of physical harm as a result. Although Rachel and David's failure to prevent their oldest child from witnessing a fight between them is not an ideal circumstance, the law does not require perfection from parents for them to avoid judicial interference. Something more is required before a court can intervene into what are exclusively matters of parental oversight and control. See State v. Aimee M., 194 Wis.

2d 282, 299-300, 533 N.W.2d 812, 819 (1995) ("[T]he best interests of the child are not served by allowing state intervention under ch. 48 except when there is strict compliance with legislative intent.").

In addition, assuming *arguendo* that witnessing domestic violence meets the definition of neglect, this single incident was too remote in time and too isolated to provide the grounds for a finding that there were grounds to find Nancy in need of protection and services due to neglect. In fact, both the remoteness and the isolation of this incident show the opposite. Not only is there no evidence in the record that Nancy saw any other instances of domestic violence between her parents, but the fact that Rachel and David no longer live together means the incident is unlikely to be repeated, and therefore there is little risk that Nancy will suffer bodily injury due to domestic violence between them in the future. If the court's determination that a child's witnessing a single incident of domestic violence is sufficient to establish jurisdiction, it will lead to a boundless number of new cases in which courts will be allowed to trammel parents' rights to raise their children without state interference.

The court's finding that Donald and Natalie are at substantial risk of neglect because of this same incident is even more tenuous. It is hard to explain how the court could have found a substantial risk of neglect of the two children where there is no showing of any other instances of domestic violence between David and Rachel, either before or after the alleged incident a year and a half before the fact-finding hearing, and where David and Rachel no longer live together and will likely never live together ever again. Not only is there not a substantial risk that Donald and Natalie will be exposed to harm due to domestic violence in their homes, there is not even a likelihood that it will occur again due to the drastic change in circumstances between the one alleged incident and the circumstances as they

existed at the time the petition was filed and at the time of the fact-finding hearing. Therefore, the trial court's determination that there was a "risk" of neglect due to domestic violence was error.

B. The circuit court erred when it found that Portage County presented clear and convincing evidence that the children were emotionally damaged at the time the petitions were filed or that Rachel and David were unable or unwilling to ameliorate their symptoms.

The circuit court also found that there were grounds to exercise jurisdiction due to emotional damage to the children for which "the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms," pursuant to Wisconsin Statutes section 48.13(11). This was error.

Portage County did not present clear and convincing evidence that the children were suffering from emotional damage at the time that the petitions were filed in the case. Furthermore, there was evidence that both parents had enrolled the children in counseling and were making attempts to find new counselors that would be acceptable to Portage County at the time that the petitions were filed.

1. The evidence did not support the court's determination that the children suffered from emotional damage at the time that the petitions were filed.

Wisconsin Statutes section 48.02(5j) defines "emotional damage" as harm to a child's psychological or intellectual functioning" manifested through a severe degree of "anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development." A court's determination of whether a

child is in need of protection or services due to emotional damage is based on the facts as they existed at the time that the petitions were filed. Gregory L.S., 2002 WI App 101, ¶29, 253 Wis. 2d at 579, 643 N.W.2d at 898.

The circuit court found that the children suffered from emotional damage "based on the testimony and testing by Dr. Engen." (R.99:25; A-App. 060). However, Engen did not provide psychological assessments of the children as of January 8, 2021, which is the date that the petitions were filed. Her assessments were silent as to the onset of the children's symptoms. (See R.44 & R.60 in 2021AP1683; R.40 in 2021AP1685 & 2021AP1686).

Furthermore, all indications are that her assessments were tied to the dates that she met with the children to administer the Trauma Symptom Checklist for Children, which was nearly two months after the petitions were filed. (R.44 in 2021AP1683; R.40 in 2021AP1685 & 2021AP1686). Questionnaires given to Rachel and David regarding their identification of symptoms in their children requested that they limit their answers to a time period that followed the filing of the petitions. (See id.; R.60; R.97:97-98). However, David, who had not seen his children alone since the filing of the petitions, provided information for his children from December 2020 to January 2021. (R.60; R.98:203-04). Significantly, Engen found that David reported fewer behavioral issues in the children in December 2020 and January 2021 than Rachel did in February 2021. (R.97:57, 73, 80).

David attributed the difference in his children's symptoms between December and February to Portage County's intervention and removal of the children from his home, their alienation from him, his mother, entire extended family, friends, and animals, and abrupt changes in their education and religious teachings. (R.98:140-41, 164-65). Engen conceded that the intervening separation between David and his children could explain the differences in the parents' evaluations of their children.

(R.97:120). Engen testified that separation of a child from a parent for an indeterminate period of time would constitute an "adverse event" and a contributing factor to emotional damage. (R.97:88, 115-17). This evidence indicates that although Engen found emotional damage in each of the children as of early March 2021, this followed a two-month time period after the petitions were filed during which the children underwent a significant number of changes, including a significant disruption in their relationship with their father, and demonstrated increasing emotional and behavioral difficulties.

Even the circuit court expressed its opinion at the temporary physical custody hearing, held shortly after the petitions were filed in January 2021, that it did not believe the allegations in the petitions or Knutson's testimony met the standard for emotional damage. (R.54:78). The only difference between the evidence that was before the court at the temporary physical custody hearing in January and the evidence presented at the fact-finding trial was Engen's report and the passage of time during which David's interactions with his children were severely limited. Although Portage County attempted to present evidence that David believed his children were emotionally damaged before the petitions were filed, David differentiated between his accusations of emotional abuse of the children by Rachel from assessments of whether the children were emotionally damaged. (R.97:184, 201-03, 237).

There simply was not clear and convincing evidence that any emotional damage found in the children existed at the time that the petitions were filed. The court's error in finding to the contrary should be vacated.

2. *Portage County did not produce clear and convincing evidence that the parents neglected, refused, or were unable to obtain necessary treatment for their children or take necessary steps to ameliorate their children's symptoms.*

There also was not sufficient evidence that the parents neglected, refused, or were unable to obtain necessary treatment or take necessary steps to ameliorate their children's emotional damage, which is the second requirement under Wisconsin Statutes section 48.13(11) before a court can exercise jurisdiction over the children. In fact, the circuit court in this case made no finding in either its oral ruling or its written order that either Rachel or David had neglected, refused, or been unable to obtain treatment or take necessary steps to ameliorate the children's symptoms of emotional damage. Accordingly, the court's determination that Portage County established the Wisconsin Statutes section 48.13(11) grounds was in error and should be reversed.

The evidence presented at trial showed that David had taken the children to no fewer than three different counselors in the year leading up to the petitions, due to concerns about what he heard from the children during that tumultuous time and the impact of their mother's recent absences on them. (R.97:210-11, 213-14, 225-26; R.98:117-19). David changed counselors after his children saw the first counselor when he learned that a counselor recommended by Waushara County had availability. (R.98:118). He was forced to change his children's counselors again when the second counselor retired. (Id.). David thought his children were making great progress with their third counselor, a theologian who shares the same faith as he and his children, but was discouraged by Portage County's criticism of her qualifications and therefore ended his children's sessions with her. (R.97:227-28, 232-34; R.98:120-21). At the time the petitions were filed, David had an

appointment pending with another counselor for the children at the time that the petitions were filed. (R.98:73-74, 121-22, 137).

Even though Rachel acknowledged that she did not take the children for counseling before the petitions were filed, she testified that she knew David was taking the children to counselors, received reports from those counselors, and did not object to the counseling. (R.98:68, 72). Rachel also testified that she had tried to engage a counselor for the children from a list provided to her by Portage County a couple of weeks before the petitions were filed, and Knutson acknowledged at the temporary physical custody hearing that the holiday season preceding the filing of the petitions likely interfered with Rachel's efforts. (R.98:69-70; R.54:37).

This evidence does not show any inability or unwillingness by David and Rachel to provide necessary help for their children; in fact, it shows the exact opposite. David and Rachel admittedly were not communicating with each other about their mutual efforts; however, each expressed a willingness to do so in the future for the sake of their children. (R.98:72-76, 145, 162-64).

That Portage County did not like David's choice of counselors for his children does not mean that David was "neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate" his children's symptoms of emotional damage. See Wis. Stat. § 48.13(11). It just means that he was unable to satisfy the Portage County social workers overseeing his case. But there is nothing in the statute that states that a parent cannot determine the course of treatment for his or her child. In fact, the statutes expressly permit a parent to rely on religion in their treatment and care of their children. Wisconsin Statutes section 48.981(3)(c)4. expressly instructs counties as follows with respect to their investigations into child abuse or neglect: "A determination that abuse or

neglect has occurred may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child."

In addition, there is no evidence that provides any grounds for the court to determine that the Portage County-recommended counselors would provide "necessary treatment" where the counselors chosen by David would not. There is no evidence in the record about any of the qualifications or success rates of the Portage County-preferred list of providers. (See R.66:1). There is, however, evidence that Portage County had a distinct lack of knowledge about David's counselors. In particular, Portage County repeatedly misrepresented to the court that Wellbrock's college degree was in nutrition, when, in fact, Wellbrock has a degree in theology, a component of which includes counseling. (R.96:52-53; R.97:113; R.98:147; R.121:53). David impressed upon Portage County and the court the importance that his children receive faith-based counseling with someone who understands his and his children's religion and will take that religion into consideration in his children's treatment. (R.97:226, 231-32). David testified that when he attempted to arrange for therapy from a treatment provider on Portage County's list who could provide such faith-based counseling, the cost was so great that it would not have been sustainable. (R.97:231-32). David's inability to pay these fees should not be held against him. See Wis. Stat. § 48.13(11).

Because Portage County did not present clear and convincing evidence that David and Rachel were unable or unwilling to provide necessary care to treat any emotional damage suffered by their children, the grounds to establish Wisconsin Statutes section 48.13(11) were not met and the court's order should be vacated.

II. The circuit court erred when it removed the children from David's home and placed them with Rachel.

Wisconsin Statutes section 48.355(1) provides, in relevant part, that any dispositional order relating to a child adjudged in need of protection or services "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 … and which assure the care, treatment or rehabilitation of the child, consistent with the protection of the public." Further, "[w]hen appropriate, and, in cases of child abuse or neglect …, when it is consistent with the best interest of the child or unborn child in terms of physical safety and physical health, the family unit shall be preserved and there shall be a policy of transferring custody of a child from the parent … only when there is no less drastic alternative." Id.

The court's dispositional orders technically did not remove the children from their parents' home as they granted placement to Rachel, the children's mother. (R.119 in 2021AP1683; R.105 in 2021AP1685; R.103 in 2021AP1686; A-App. 004-035). However, the orders did not provide David with placement and gave Portage County complete discretion over his visitation with his children. (See R.119:9 in 2021AP1683; R.105:10 in 2021AP1685; R.103:10 in 2021AP1686; A-App. 012, 023, 034). This was contrary to the statutory requirement that the court employ the least restrictive means necessary to assure the care, treatment, or rehabilitation of the child.

The evidence did not support the court's determination that it is in the best interests of the child to award sole placement to Rachel and indeterminate placement or visitation with David. A circuit court's determination of a child's best interests is reviewed for an erroneous exercise of discretion. F.R.

v. T.B., 225 Wis. 2d 628, 637, 593 N.W.2d 840, 844 (1999). Pursuant to this standard, a circuit court's determination will be affirmed so long as it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a conclusion that a reasonable judge could reach. Id. A circuit court erroneously exercises its discretion when it applies an improper legal standard, which is a matter subject to *de novo* review. Id.

The Children's Code does not expressly define what constitutes the best interests of the child for purposes of determining appropriate placement in a CHIPS dispositional order. However, Wisconsin Statutes section 48.355(1) asserts that the child's best interests are served by placing the least restrictions on the parent's rights to full physical custody as is necessary to protect the safety and well-being of the child and assure the care, treatment, or rehabilitation of the child. The court's order failed in this regard with respect to David.

There was no evidence that David posed any danger to his children's safety or well-being or that his interactions with his children needed to be severely limited to assure the care, treatment, and rehabilitation of his children. The restrictions in place on David's visitation at the time of the final dispositional hearing already were disproportionate to the needs of the children. Portage County admitted at the dispositional hearing that it had increased the restrictions on David's visitation due to safety concerns, even though the children had not suffered any injuries while in his care, before or after the petitions. In fact, the children's physical well-being was not an issue in the case. Although allegations of physical abuse of the children had been lodged by both parents, the court found that evidence of physical abuse was scant, and dismissed those allegations at the fact-finding hearing. Further, there was evidence that both David and Rachel were interested in getting

treatment for their children and that Rachel actually was engaging the regular services of a therapist after the petitions were filed. Thus, the evidence did not support the restrictions placed on David's custody rights to his children, which were not necessary to assure the care, treatment, or rehabilitation of the children.

If anything, there was more evidence that Rachel posed a threat to the children's safety and well-being than David did. Although David was limited in his ability to present evidence regarding Rachel's conduct, there was evidence that Portage County had enough concerns about Rachel's use of implements to discipline the children that Portage County had to remove the wooden spoons from her home at one point in time. (R.96:44-45, 71). Portage County also intervened to instruct Rachel to stop making videotapes of the children's statements for the CHIPS case. (R.96:79).

In addition, because the court gave Portage County complete discretion over David's visitation with his children, not only did the court not ensure that David's parental rights would be restricted only to the extent necessary to protect his children, it abdicated its discretionary authority to Portage County. See State v. Verhagen, 198 Wis. 2d 177, 191, 542 N.W.2d 189, 193 (Ct. App. 1995) (trial court's discretionary act will not be reversed "if the record reflects *discretion was in fact exercised* and there was a reasonable basis for the court's determination" (emphasis supplied)).

At the time of the dispositional hearing, Portage County permitted David only two hours of supervised visitation with his children in a public location each week, subject to Portage County's chosen rules. (R.93:23; R.104:3). Although the court expressed its "hope" that the limitations on David's interactions with his children would be eased by Portage County in the coming months, (R.121:141), it did not require any such action by Portage County in its dispositional order nor did it "set any reasonable rules of

parental visitation" for either David or Portage County to follow. See Wis. Stat. § 48.355(3)(a). In fact, in an earlier hearing, the court expressly stated that it was "hesitant to micromanage" Portage County and was "uncomfortable" telling Portage County even on a temporary basis "you're going to do two visits a week or three visits a week ... ." (R.55:136).

The court provided no standard for what David needs to do to increase his time with his children, to be able to exercise visitation at his home, or to be able to see his children without supervision by Portage County. There is no timeline for when within the one-year term of the dispositional order the restrictions placed on David's visits with his children by Portage County may be eased. "What seems like a short wait to an adult can be an intolerable separation to a young child to whom a week can seem like a year and a month forever." M.G. v. La Crosse County Human Services Dep't , 150 Wis. 2d 407, 412, 441 N.W.2d 227, 230 (1989). In fact, if Portage County wishes, it could cease David's visitation entirely in the exercise of the discretion that was granted to it by the court. Because the dispositional order did not provide any standards for Portage County to employ in the exercise of its "discretion" over David's ability to see his children, it did not meet the legal standard set by Wisconsin Statutes section 48.355 to place the least restrictions on David's parental rights.

The court compounded its error by seeming to align itself with Portage County when it discussed its order, to the point that it displayed objective bias. See State v. Rochelt, 165 Wis. 2d 373, 377-78, 477 N.W.2d 659, 661 (Ct. App. 1991). At the outset of its ruling, the court told David that he was wrong to believe that Portage County had caused his children's emotional damage, stating "I work with these guys every Tuesday all day long." (R.121:134; A-App. 074). The court thereafter repeatedly used the word "we" to describe Portage County's and the court's aligned positions and roles in the case,

stating with respect to Portage County's supervision of David's visitation: "[W]e – we –we want to be done. We want to solve this problem. We want to be out of your life. We don't want to be a part of your lives. We just want to fix the problems and have you move on with happy, healthy children." (R.121:138; A-App. 078). These statements could objectively be viewed by a reasonable person as indicating that the court considering itself *part* of Portage County rather than a third-party arbiter in this case. See id. at 380, 477 N.W.2d at 662 (judge's referral to "us" in letter seeking to excuse two of prosecutor's witnesses created an appearance the judge considered himself part of the prosecution). Objective bias by a judge is a structural error that automatically triggers the need for a new trial. Miller v. Carroll, 2020 WI 56, ¶35, 392 Wis. 2d 49, 70-71, 944 N.W.2d 542, 552-53; see also State v. Gudgeon, 2006 WI App 143, ¶10, 295 Wis. 2d 189, 199, 720 N.W.2d 114, 119.

Because the evidence did not support the court's decision to award sole placement to Rachel and only indeterminate visitation to David, and because the court impermissibly abdicated its discretionary authority over placement of the children to Portage County, the dispositional orders were in error and should be vacated.

III. The court deprived David of procedural due process when it barred him from impeaching Portage County's witnesses and introducing evidence to rebut the allegations.

At multiple points during both the fact-finding and dispositional hearings, David's counsel attempted to elicit testimony with the aim of impeaching Portage County witnesses. The court severely limited the presentation of this testimony, to such an extent that it infringed on David's constitutional right to procedural due process. Accordingly, the court's dispositional order should be reversed.

The procedural due process clause of the Fourteenth Amendment to the U.S. Constitution "protects individuals from governmental 'denial of fundamental procedural fairness.'" Thorp v. Town of Lebanon, 2000 WI 60, ¶53, 235 Wis. 2d 610, 642, 612 N.W.2d 59, 76. When confronted with an allegation of a procedural due process violation, a reviewing court "must determine first whether there exists a liberty interest of which the individual has been deprived, and if so, whether the procedures used to deprive that liberty interest were constitutionally sufficient." State v. West, 2011 WI 83, ¶ 83, 336 Wis. 2d 578, 615, 800 N.W.2d 929, 947. Whether a person's right to procedural due process was violated presents a question of law subject to *de novo* review. State v. McGuire, 2010 WI 91, ¶26, 328 Wis. 2d 289, 300, 786 N.W.2d 227, 233.

David undeniably has a fundamental liberty interest in the care, custody, and management of his children. See State v. Patricia A.P., 195 Wis. 2d 855, 862, 537 N.W.2d 47, 50 (Ct. App. 1995) (*quoting* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982)). Further, denying a party the right to access and use evidence for impeachment purposes constitutes a denial of due process. Myers v. State, 60 Wis. 2d 248, 266, 208 N.W.2d 311, 320 (1973). Because that is exactly what the court did with its evidentiary rulings in this case, David was denied procedural due process.

Prior to the fact-finding hearing, the court granted Portage County's motion in limine to prevent David and Rachel from presenting evidence regarding the cause of the emotional damage to their children and limiting the scope of the hearing to prevent litigation of fault. (R.55:147-48). Thereafter, during the trial, the court limited and cut off questions by David's counsel regarding: (1) the timing of Portage County's investigation, which commenced within a month of a change in placement ordered in the family court, and other matters from the family court case, (R.96:99-100;

R.98:108-09, 115-17); (2) evidence that Rachel was not as dependent on David as she testified or as Portage County claimed in its petitions, (R.98:93-94, 124-25); (3) the children's false statements during Portage County's and Waushara County's investigations, (R.98:129-30; R.102:35-37); (4) manipulation of the videos relied on by Portage County for its investigation, (R.102:36-38); and (5) numerous inaccuracies contained in Portage County's reports, (R.102:72-73; R.121:22-26). Although the court permitted David's counsel to question Knutson about her focus on David's religion in the petitions, it characterized such questioning as "little stuff" and interrupted and limited David's examination of Knutson due to time concerns. (R.96:103-04, 113). Lastly, although the court stated that it had reviewed the video of Nancy's forensic interview and admitted into evidence a written statement that Nancy made at that interview, it declined to admit the video into evidence when requested by David's counsel.[3] (R.43; R.55:138-44; R.121:127-28). David's counsel sought to introduce this video into evidence to refute some of the evidence that had been relied upon by Engen in her assessment of the children. (R.55:139-40).

The court's error in limiting David's presentation of defense had prejudicial consequences upon him in the court's orders. Even though the court granted Portage County's motion in limine to prevent testimony regarding fault, the court stated in its oral ruling on disposition, "I don't buy the argument that the Department caused this problem. Not for a second." (R.121:134; A-App. 074). The court's decision might have been different if it

[3] Notably, Portage County initially objected to the admission of the video on the basis that it was relevant to only the allegations of physical abuse, which it planned to voluntarily dismiss due to lack of substantiation. (R.55:145, 147). At the fact-finding hearing, however, Portage County refused to dismiss the physical abuse allegations, (R.96:6-8; R.97:12-21), which eventually were dismissed by the court. (R.98:170-71). When David's counsel thereafter attempted to have the video of the forensic interview introduced into evidence, Rachel objected on the basis of timeliness. (R.121:125-26).

had allowed the parties to present evidence of fault. In addition, after the court initially informed the parties that it wanted to hear evidence regarding David's military discharge because it considered that to be "a big incongruency" in Portage County's report, (R.102:69), it later told counsel that it was not going to put much weight on the circumstances of David's military discharge, but chastised David for disputing that he had been dishonorably discharged even though Portage County stipulated to that fact. (R.121:133-34). These findings on matters where the court limited David's ability to present evidence and testimony deprived David of a fair trial. See State v. Disch, 119 Wis. 2d 461, 477, 351 N.W.2d 492, 500 (1984) ("Due process guarantees the accused a fair trial, and any violation of fundamental fairness will constitute a denial of that guarantee.").

Furthermore, the limitations placed on David's ability to cross-examine Portage County's witnesses for possible religion-based bias and inaccuracies in reports to the court denied him due process. See id. Portage County's investigation reflected an inappropriate obsession with David's religion from the outset. Both the petitions and an unsigned referral and request for services linked David's religion to domestic abuse and control of Rachel. (R.3; R.109:2). Portage County continued to rely on this portrayal of David and his religion as oppressive and abusive to Rachel to justify Rachel's video-recording of the children and to portray Rachel as unknowledgeable about basic American systems. (R.98:44-45, 86-88). However, when David's counsel attempted to question Rachel about her familiarity with basic finances and other matters to show that David's religion was not material to these proceedings, that line of questioning was terminated by the court. (R.98:92-94). This was error.

Due process requires "that a party has notice, actual or constructive, that is reasonably calculated to inform him or her of the pending decision as

well as an opportunity to appear and be heard with respect to the defense of his or her rights." Guelig v. Guelig, 2005 WI App 212, ¶32, 287 Wis. 2d 472, 494, 704 N.W.2d 916, 927. This includes an opportunity to confront his accusers through thorough cross-examination and use of impeachment evidence. Myers, 60 Wis. 2d at 266, 208 N.W.2d at 320. As outlined above, due process was denied to David when the circuit court limited his ability to impeach Portage County's witnesses through the introduction of evidence and testimony, or to fully put forth a case on issues that ultimately were material to the court's decision. Because these violations occurred both at the fact-finding and dispositional hearings, both orders should be reversed.

CONCLUSION

Because the evidence was insufficient for the court to determine that the children were in need of protection or services based on neglect, substantial risk of neglect, or emotional damages, the court's orders should be vacated.

In addition, the court's dispositional orders should be reversed and remanded to provide placement to David because they are overly restrictive of David's parental rights disproportionately to the safety and well-being of the children.

Finally, because David's right to procedural due process was violated due to limitations on his ability to impeach Portage County's witnesses, the court's orders should be reversed.

Dated at Brookfield, Wisconsin on November 23, 2021.

SCHMIDT, RUPKE, TESS-MATTNER & FOX, S.C.

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ATTORNEYS FOR RESPONDENT-APPELLANT D.A.

COMBINED BRIEF & APPENDIX CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of those portions of the brief referred to in sections 809.19(1)(d), (e), and (f) is 9,918 words.

I also certify that filed with this brief is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; (3) a copy of any unpublished opinion cited under s. 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 at Brookfield, Wisconsin on November 23, 2021.

SCHMIDT, RUPKE, TESS-MATTNER & FOX, S.C.

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