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COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT TWO

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

Appeal No. 2021 AP 1865-CR

KIMBERLY A. HOWELL,  
Defendant-Appellant.

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ON APPEAL FROM THE JUDGMENT OF THE MANITOWOC COUNTY  
CIRCUIT COURT, HONORABLE MARK R. ROHRER, PRESIDING

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ISSUE PRESENTED	4
STATEMENT ON ORAL ARGUMENT	4
STATEMENT ON PUBLICATION	4
STATEMENT OF THE CASE	4
1. Nature of the Case	4
2. Proceedings Below	5
3. Facts of the Offenses	5
ARGUMENT	
I. Defendant/Appellant was not deprived of basic Due Process when the Court sentenced her to probation with a condition that she not have guardianship of any child during the period of probation.	5
A. Standard of Review	5
B. Additional Facts	5
C. Discussion	6
II. The probation condition prohibiting the Defendant of being a guardian during her period of probation was reasonable and appropriate and did not violate the governing statute.	7
A. Standard of Review	7
B. Discussion	7
CONCLUSION	10
SEPARATE APPENDIX	
CERTIFICATES	11

## TABLE OF AUTHORITIES

<i>State v. Schwind</i> , 2019 WI 48, 386 Wis.2d 526, 926 N.W.2d 742	6,8
<i>State v. Dowdy</i> , 2012 WI 12, 338 Wis.2d 565, 578, 808 N.W.2d 691	6
<i>State v. Dean</i> , 102 Wis.2d 300, 306 N.W.2d 286 (Ct. App. 1981)	6
<i>State v. Edwards</i> , 2013 Wi App 51, 347 Wis2d 526, 830 N.W.2d 109	7
<i>State v. Horn</i> , 226 Wis.2d 637, 594 N.W.2d 772 (1999)	7
<i>Edwards v. State</i> , 74 Wis.2d 79, 246 N.W.2d 109 (1976)	7,9
<i>State v. Rowan</i> , 2012 WI 60, 341 Wis.2d 281, 814 N.W.2d 854	7,9
<i>State v. Nienhardt</i> , 196 Wis. 2d 161, , 537 N.W.2d 123 (Ct. App. 1995)	7
<i>State v. Miller</i> , 2005 WI App 117, 283 Wis.2d 465, 701 N.W.2d 47	8
<i>State v. Koenig</i> , 2003 WI App 12, 259 Wis.2d 833, 656 N.W.2d 499	8
<i>State v. Agosto</i> , 2008 WI App 149, 314 Wis.2d 385, 760 N.W.2d 415	8
<i>State v. Beiersdorf</i> , 208 Wis.2d 492, 561 N.W.2d 749 (Ct. App. 1997)	8
In <i>State v. Oakley</i> , 2001 WI 103, 245 Wis.2d 447, 629 N.W.2d 200	8,9
<i>Krebs v. Schwarz</i> , 212 Wis.2d 127, 568 N.W.2d 26 (Ct.App.1997)	9
 Wisconsin Statutes	
§ 970.02	8
§ 973.09	8
§ 968.01	8
§ 971.03	8

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RESPONDENT'S BRIEF

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ISSUE PRESENTED

1. Whether the probation condition “banning” the Defendant, Kimberly Howell from acting as a guardian as a condition of probation is constitutional and properly authorized by statute.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

The Respondent agrees with the Appellant’s position.

STATEMENT OF THE CASE

1. Nature of the case

The Respondent agrees with the Appellant's Statement of the Nature of the Case.

## 2. Proceedings Below

The Respondent agrees with the Appellant's Statement of the Proceedings below.

## 3. Facts of the Offense

The respondent agrees that the only judicially determined facts of the offenses were found when the Court accepted the parties stipulation at the plea hearing of the facts recited in the complaint. The Complaint indicated that the Defendant/Appellant was a guardian of Child A (age 11) (2: 2). It also went on to say that the Defendant/Appellant admitted that she was ordered physical placement and guardianship of Child D, Child B, Child C, Child E and Child A because of a prior CPS investigation (2:5). Additionally, at the time of the plea the Defendant/Appellant admitted that she was currently receiving treatment for mental illness or disorder (93:13-14). Also, at the time of the plea hearing the Defendant/Appellant stated the she understood that the Court was not bound by the agreement and could sentence her to the maximum penalties for each of the sentences (93:8). At the time of sentencing the Defendant/Appellant admitted, "I became very stressed out and didn't know how to deal with [Child A]'s behavior. I was responsible for four other children, one of them is autistic. And I have lots of problems myself." (93:40). The Court sentenced the Defendant/Appellant as a condition of probation "that Ms. Howell not be permitted to act as a guardian of any child during the period of probation." (93:56).

## ARGUMENT

I. Defendant/Appellant was not deprived of basic Due Process when the Court sentenced her to probation with a condition that she not have guardianship of any child during the period of probation.

### A. Standard of Review

The Respondent admits that the Due Process errors are reviewed de novo.

## B. Additional Facts

The matter was scheduled for a jury trial on February 23, 2021 pursuant to the scheduling order dated December 2, 2020. (41:1) The parties were in negotiation prior to the jury trial date and had a status conference with the Court on March 4, 2021 which had been scheduled on February 18, 2021. Then after the status conference the matter was scheduled for plea and sentencing hearing on March 11, 2021 to which a Notice of hearing was sent to the Defendant's attorney. A written plea questionnaire/waiver of rights was signed by Defendant and filed with the Court on March 11, 2021. (19:1) Said plea questionnaire advised the Defendant that the Judge is not bound by any plea agreement. (19:1) As previously stated in this brief, the Defendant was advised by the Court during the hearing on March 11, 2021 that the Court was not bound by the agreement and Defendant acknowledged that she understood (93:8).

## C. Discussion

The granting of probation is a matter of grace or privilege and not a right--a disposition of probation is not a matter of right to a defendant, but instead it is a privilege extended to a defendant by the grace of the state. *State v. Schwind*, 2019 WI 48, ¶ 25, 386 Wis.2d 526, 542-43, 926 N.W.2d 742. The authority of a court to place a defendant on probation and to impose conditions of probation, like other sentencing options, is derived solely from statute/statutory authority. Probation is available only to the extent permitted by the legislature. *State v. Schwind*, 2019 WI 48, ¶¶ 26, 28, 386 Wis.2d 526, 543-44, 926 N.W.2d 742; *State v. Dowdy*, 2012 WI 12, ¶ 27, 338 Wis.2d 565, 578, 808 N.W.2d 691; *State v. Dean*, 102 Wis.2d 300, 302, 306 N.W.2d 286 (Ct. App. 1981). Section 973.09(1)(a) is the statutory authority for a court to place a defendant on probation and to impose conditions of probation. *Dowdy*, 2012 WI at ¶ 28, 338 Wis.2d at 578; *Fearing*, 2000 WI App at ¶ 15, 239 Wis.2d at 116.

In *State v. Edwards*, 347 Wis.2d 526 the Court of Appeals held, Probation is not a sentence; it is an alternative to sentence. *State v. Horn*, 226 Wis.2d 637, 647, 594 N.W.2d 772 (1999). Probation is a privilege, not a right. *Edwards v. State*, 74 Wis.2d 79, 83, 246 N.W.2d 109 (1976). Unlike with a maximum sentence or a penalty enhancer, there is no statutory requirement that an accused be advised of potential probation terms or conditions. Conditions of probation may infringe upon constitutional rights as long as they are not overly broad and are reasonably related to the defendant's rehabilitation. *State v. Rowan*, 2012 WI 60, ¶¶ 4, 10, 341 Wis.2d 281, 285-86, 292, 814 N.W.2d 854; *State v. Nienhardt*, 196 Wis. 2d 161, 168- 69, 537 N.W.2d 123 (Ct. App. 1995); *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976).

Defendant/Appellant was given notice of her plea and sentence and was given an opportunity to be heard. Pursuant to statute the Court is granted authority to place a defendant on probation and to set conditions that may infringe upon constitutional rights. (Although Respondent does not concede that being a guardian is a constitutional right). The statute does not require that the Court advise a defendant of potential terms or conditions of probation. Therefore, Defendant/Appellant was not deprived of due process rights.

- II. The probation condition ordering the Defendant not be a guardian during the term of her probation was reasonable and appropriate and did not violate the governing statute.

- A. Standard of Review

The Respondent agrees that the standard of review is de novo.

- B. Discussion

The Circuit Court is granted power through Wis. Stat. 973.09(1)(a) to fashion terms of probation to meet the rehabilitative needs of the Defendant. *See* WIS. STAT. § 968.01(2) (complaint must state essential facts constituting the offense charged); WIS. STAT. § 970.02(1) (complaint furnished to defendant at initial appearance must contain possible penalties) *see also* WIS. STAT. § 971.03 (form of information).

The dual goals of probation are: (1) rehabilitation of the defendant/those convicted of a crime and (2) protection of a state or community interest. *State v. Schwind*, 2019 WI 48, ¶ 25, 386 Wis.2d 526, 542, 926 N.W.2d 742; *State v. Miller*, 2005 WI App 117, ¶ 11, 283 Wis.2d 465, 474, 701 N.W.2d 47. While rehabilitation is the goal of probation, judges must also concern themselves with the imperative of protecting society and potential victims-when a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. *State v. Koenig*, 2003 WI App 12, ¶ 7, 259 Wis.2d 833, 837, 656 N.W.2d 499; *Oakley*, 2001 WI at ¶ 12, 245 Wis.2d at 460.

The reasonableness and appropriateness of a condition of probation is determined/reviewed by how well the condition effectuates/serves the dual goals/objectives of probation--the rehabilitation of the defendant and the protection of the state and community interest. *State v. Agosto*, 2008 WI App 149, ¶ 12, 314 Wis.2d 385, 393, 760 N.W.2d 415; *State v. Beiersdorf*, 208 Wis.2d 492, 502, 561 N.W.2d 749 (Ct. App. 1997).

In *State v. Oakley*, 245 Wis.2d 447 the Supreme Court of Wisconsin stated “the theory of probation contemplates that a person convicted of a crime who is responsive to supervision and guidance may be rehabilitated without placing him or in prison. This involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is risk that the legislature has empowered the courts to take in the exercise of their discretion.” The Court went on to say “ Thus, when a judge allows a convicted individual to



escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. To that end—along with the goal of rehabilitation—the legislature has seen fit to grant circuit court judges broad discretion in setting the terms of probation.” In *State v. Oakley*, 2001 WI 103, ¶ 12, 245 Wis.2d 447, 460-61, 629 N.W.2d 200, the Court stressed that a court, when imposing conditions of probation, must concern themselves with the imperative of protecting society and potential victims in addition to the goal of rehabilitation of the defendant.

In *State v. Rowan*, 341 Wis.2d 281 the Supreme Court of Wisconsin held that the test set forth for analyzing the constitutionality of conditions of probation has two parts: “[C]onditions of probation may impinge upon constitutional rights as long as they [1.] are not overly broad and [2.] are reasonably related to the person's rehabilitation.” A condition is reasonably related to the person's rehabilitation “if it assists the convicted individual in conforming his or her conduct to the law.” It is also appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized probation conditions are appropriate for a particular person. See *Edwards v. State*, 74 Wis.2d 79, 83, 246 N.W.2d 109 (1976) (stating that probation “is granted with the goals of rehabilitation and protection of society in mind” and that a condition forbidding association with co-defendants “was designed for [the defendant's] rehabilitation and the protection of society”); *Krebs v. Schwarz*, 212 Wis.2d 127, 132, 568 N.W.2d 26 (Ct.App.1997) (finding constitutional a probation condition requiring an agent's approval for a sexual relationship on the grounds that “the condition is narrowly drawn and is reasonably related to [his] rehabilitation, as well as the protection of the public”).

The Circuit Court in this case did take into consideration that the condition was not overly broad and was reasonably related to the Defendant's rehabilitation. The Circuit Court stated, “And my concern from a rehabilitation standpoint is with all these things

going on and past behaviors I don't want to set her up for potential failure by putting her in a situation where she has a difficult child and she's having to deal with – like she did with this other child—and here we go again.” (85:33). Therefore, the condition of probation that Defendant/Appellant not be a guardian of any child during her period of probation is not overly broad and is in relation to the Defendant's rehabilitation and is for the protection of the community ie. children.

### CONCLUSION

The Respondent requests that this Honorable Court affirm the ruling by the Circuit Court and find that in this case, the Appellant/Defendant was not denied due process as the Circuit Court need not advise a Defendant of every possible condition for probation when sentencing a Defendant.

The Respondent also request that this Honorable Court affirm the Circuit Court's condition of probation that the Appellant/Defendant not be a guardian during her term of probation as such condition of probation was narrowly drawn and is reasonably related to her rehabilitation, as well as the protection of the public.

Wherefore, the Appellant's appeal should be denied.

Dated: March 24, 2022

Respectfully submitted,



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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b), (bc) & (c) for a brief produced with a proportional serif font. The length of this brief is 1884 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated: March 24, 2022

**Signature:** 

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