STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2023AP1229; 2023AP1230; 2023AP1231; 2023AP1232

In re the termination of parental rights to N.H., A.R.H., M.H.H., M.R.M.K., persons under the age of 18:

JACKSON COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,

v.

R.H.H.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Is partial summary judgment appropriate when one of the conditions for visitation is impossible to meet?

The circuit court granted partial summary judgment to the county on the continuing denial of periods of physical placement or visitation ground, rejecting the father's argument that the conditions were impossible for him to meet. (103; App.65-80).

The court of appeals held that partial summary judgment was appropriate because the unfitness finding was not based solely on an impossible return condition but also on the failure to meet other attainable conditions. *Jackson County DHS v. R.H.H.*, Nos. 2023AP1229, 2023AP1230, 2023AP1231, 2023AP1232, slip op. ¶35 (Wis. Ct. App. November 16, 2023) (App.3-28).

2. Was the circuit court's admission and reliance on a more than decade-old assessment an improper consideration at disposition?

The circuit court overruled the father's objection and admitted the report, noting "well, based on what I heard, it sounds like his opinion wouldn't change for the next 40 years, so." (161:95; App.89).

The court of appeals held that the circuit court did not erroneously exercise its discretion in admitting the report. (App.3-28).

CRITERIA FOR REVIEW

The circuit court granted the county's motion for partial summary judgment on the termination of parental rights ground of continuing denial of physical placement or visitation. Wis. Stat. § 48.415(4). In the circuit court and on appeal, the father argued that this partial summary judgment violated his substantive due process rights because one of the conditions for visitation was impossible to meet. The court of appeals held that even if one condition is impossible for a parent to meet, the termination remains valid if it "is also based on failure to meet other conditions that were attainable." *Jackson County DHS v. R.H.H.*, Nos. 2023AP1229, 2023AP1230, 2023AP1231, 2023AP1232, slip op. at ¶35 (Wis. Ct. App. November 16, 2023) (App.3-28).

This court should accept review and hold that it is a violation of a parent's substantive due process rights when the government imposes any impossible condition for visitation.

The court of appeals in this case applied *Kenosha County DHHS v. Jodie W.*, 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, in a way that permits the county to impose impossible conditions on parents. In *Jodie W.*, the county imposed a condition requiring the mother to provide suitable housing for her son. The mother was incarcerated, making this an impossible condition. This court concluded that basing a finding of unfitness solely on an impossible condition of return violated the mother's constitutional rights. *Id.* at ¶56.

In this case, the court of appeals held that "the holding in *Jodie W.* is inapplicable in situations like this, in which the finding of unfitness was based on the

parent's failure to meet multiple conditions and there is no argument that it was based solely on an impossible condition." Slip op. at ¶31 (App.17-18). The problem with this reasoning is simple: if one condition is impossible for a parent to meet, the parent can never satisfy the conditions for visitation. Regardless of how the parent addresses the other conditions, the parent would still fail due to the one impossible condition. It's analogous to telling a child she can have a new toy if she meets four conditions: (1) eats all of her vegetables; (2) keeps her room clean; (3) gets all As in school; and (4) learns how to fly. The motivation to meet the first three conditions is wholly undermined by the impossibility of meeting the fourth condition. Yet this is exactly the standard the court of appeals has applied to parents facing the termination of their parental rights.

The court of appeals application of *Jodie W.* means that the county can intentionally set an impossible condition and successfully terminate a parent's rights. This court should take a close look at the implications of such a ruling and accept review to reinvigorate the intent of *Jodie W.* and protect parents from this kind of governmental overreach.

A ruling on this issue will help clarify and harmonize the law in termination of parental rights cases. Wis. Stat. § (Rule) 809.62(1r)(c). Because this claim raises an issue of constitutional due process, a decision also implicates real and significant questions of constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a).

If the court grants review, it should also resolve the remaining issue set forth in the petition, as this issue was litigated in the circuit court and on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an order terminating Ryan's[1] parental rights to his four children. (137; App.29-37).[2] Although Ryan requested a jury trial, the circuit court found him unfit and subsequently terminated his parental rights after granting the county's motion for summary judgment on the continuing denial of periods of visitation ground in Wis. Stat. § 48.415(4). (103; App.65-80). The circuit court's grant of summary judgment is the focus of Ryan's appeal although Ryan also raises a challenge to the disposition.

Ryan's case has a complicated procedural history. A multitude of errors led to the county's failed initial attempt at terminating Ryan's parental rights. First, a CHIPS (child in need of protection and/or services) dispositional order in 2011 containing the conditions for return of the children did not contain the required written TPR (termination of parental rights) warning. (90:1). In 2013, Ryan's conviction in Ashland County led to an order suspending all contact between Ryan and the children. This order contained the TPR warnings but it failed to include the conditions. (90:2). In 2016, a new order was entered that contained the conditions but did not contain the TPR warnings. *Id.* Later in 2016, after Ryan was sentenced in the Ashland County case, the circuit court entered an order that modified the conditions and also included the TPR warnings. (90:2-3). The following year, Ryan was released from prison when his Ashland County

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[1] Pursuant to Wis. Stat. § (Rule) 809.19(1)(g), R.H.H. will be referred to by a pseudonym, Ryan.

[2] Counsel will refer to the record in 2023AP1229 unless otherwise indicated.

conviction was reversed on appeal. An order was entered that contained revised conditions and the TPR warnings. (90:3).

The county filed a petition to terminate Ryan's parental rights in December 2017. The circuit court granted partial summary judgment on the continuing denial of periods of physical placement or visitation ground[3] and terminated Ryan's parental rights after a disposition hearing. Ryan appealed, and this court reversed on April 4, 2019, holding that the county failed to meet its burden that it provided Ryan with the required written notice. *Jackson County DHS v. R.H.H., Jr,* Nos. 2018AP2440, 2018AP2441, 2018AP2442, 2018AP2443, unpublished slip op., (Wis. Ct. App. April 4, 2019) (App.90-94).[4]

Ryan was then detained on new charges in Dane County, and a single CHIPS order encompassing all the prior orders was entered on October 1, 2019. This new order included conditions and TPR warnings. The conditions for regaining contact with his children included Ryan complete intensive, high-risk sex offender treatment, domestic violence programming, criminal thinking programming, signing releases for the release of information to verify compliance and that Ryan demonstrate an understanding of the effect his incarceration had on his children. (90:3).

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[3] Hereinafter referred to as the "continuing denial" ground.

[4] All of the unpublished, authored opinions are cited in this brief for their persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

On May 12, 2020, the county filed a new TPR petition alleging two grounds: continuing CHIPS and failure to assume parental responsibility. (4). The circuit court later granted the county's August 5, 2022, motion to amend the petition by adding the continuing denial ground. (69; 167:6).

On October 21, 2022, the county filed a motion for partial summary judgment on the continuing denial ground, alleging that there was no genuine issue of material fact. (90). Ryan objected, and the circuit court ordered briefing and held a hearing on the motion. (164).

At the December 2, 2022, hearing, the county argued that the October 1, 2019, order contained both the conditions for resuming contact and the TPR warnings and also that one year had elapsed since that order without modification. (164:4). Ryan argued that the conditions were impossible to meet because they required him to admit to a criminal offense that he not only denied but was actively appealing. (96:3).

The circuit court issued a written order granting the county's motion for partial summary judgment and found Ryan to be an unfit parent. The court rejected Ryan's due process arguments by finding he was not put in an "impossible situation" because Ryan failed to request modification of the CHIPS orders. Further, the circuit court found that Ryan's ongoing appeal "is not relevant" to his meeting the conditions. (103:10-11; App.74-75).

The circuit court terminated Ryan's parental rights to all four of his children following a dispositional hearing. (137, 161; App.29-37).

Ryan appealed from those termination orders and the court of appeals affirmed the termination order. *R.H.H.*, slip op. ¶1. (App.5). The court of appeals rejected both of Ryan's claims. Because the court determined that Ryan failed to meet other conditions for visitation, the court was not persuaded that the condition requiring completion of sex offender treatment violated his substantive due process rights. *Id.* at ¶35. (App.20). As for his challenge to the admission of a decade-old report at disposition, the court of appeals found that the report was relevant. *Id.* at ¶52. (App.27).

R.H.H. petitions from that decision.

ARGUMENT

I. This court should accept review and hold that where a parent faces a condition for visitation that is impossible to meet his substantive due process rights have been violated.

A. Introduction and standard of review.

Ryan was found to be an unfit parent based upon the circuit court's conclusion that the county was entitled to summary judgment on the continuing denial ground. (103; App.65-80). That determination cannot stand. The county was not entitled to partial summary judgment because it was impossible for Ryan to satisfy the condition that he successfully complete sex offender treatment when he denied committing an assault. Therefore, terminating his parental rights on this basis violated his right to substantive due process. *See* 14th Amendment and

Article 1, Sections 1 and 8 of the Wisconsin Constitution. Because it was impossible for Ryan to meet the conditions for return, this court should reverse the summary judgment order.

A parent can raise an as-applied substantive due process challenge to the TPR ground. *See Dane County DHS v. P.P.*, 2005 WI 32, ¶15, 279 Wis.2d 169, 694 N.W.2d 344. Ryan's claim, that the circuit court's application of Wis. Stat. § 48.415(4) to Ryan violated his substantive due process rights, presents a question of law that is reviewed independently by this court. *Monroe County D.H.S. v. Kelli B.*, 2004 WI 48, ¶16, 271 Wis.2d 51, 678 N.W.2d 831. To establish the as applied substantive due process claim, Ryan must demonstrate that he has been deprived of a liberty or property interest that is constitutionally protected. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶46, 235 Wis.2d 610, 612 N.W.2d 59. A parent has the fundamental right to the care and custody of his children, thus, the county may not terminate his right without an individualized determination that the parent is unfit. *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶40, 293 Wis.2d 530, 716 N.W.2d 845.

In the context of a summary judgment, this court reviews the case independently, applying the same methodology as the circuit court. *Oneida County DSS v. Nicole W.*, 2007 WI 30, ¶8, 299 Wis.2d 637, 728 N.W.2d 652. This court views the record in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Novell v. Migliaccio*, 2010 WI App 67, ¶9, 325 Wis.2d 230, 783 N.W.2d 897.

B. The use of summary judgment in the grounds phase of a termination case.

The legislature has set forth a two-part statutory procedure for cases seeking to involuntarily terminate a parent's rights to his or her child. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis.2d 170, 648 N.W.2d 402. In the first, or "grounds" phase of the proceeding, the petitioner must prove by clear and convincing evidence one or more grounds for termination enumerated in Wis. Stat. § 48.415. Wis. Stat. § 48.31(1). If a ground is proven, the court must find the parent unfit. Wis. Stat. § 48.424(4). *Julie A.B.*, 255 Wis.2d 170 ¶26. Then, the case proceeds to the second phase, the dispositional hearing, at which the court determines whether termination is in the best interests of the child. Wis. Stat. § 48.426(2).

At issue here is the first phase of the termination proceeding, during which "the parent's rights are paramount." *Julie A.B.*, 255 Wis.2d 170, ¶24. In that phase, the parent is entitled to a jury trial on the ground alleged to support a conclusion that he is an unfit parent. Wis. Stat. § 48.422(2). However, the supreme court has held that "partial" summary judgment may be granted in the grounds, or "unfitness" phase of a TPR case. *Steven V. v. Kelley H.*, 2004 WI 47, ¶6, 271 Wis.2d 1, 678 N.W.2d 856. The moving party must establish that there is no genuine issue as to any material fact regarding the ground alleged and that the moving party is entitled to judgment as a matter of law. *Id.*

The supreme court noted that some of the grounds for unfitness in Wis. Stat. § 48.415 are "expressly provable by official documentary evidence, such as court orders or judgments of convictions." *Id.*, ¶37. The court listed the continuing denial ground under Wis. Stat. § 48.415(4) as one of the "paper grounds" particularly appropriate for summary judgment. *Id.* But summary judgment should not be granted when, as is the case here, a condition is impossible for the parent to meet. *Jodie W.*, 293 Wis.2d 530, ¶3. Although the statutory grounds for termination in Ryan's case are different from the grounds in *Jodie W.*, Ryan presents the same constitutional issue in a similar circumstance: whether a finding of unfitness impermissibly burdens the substantive due process rights of an incarcerated parent where it is impossible for the incarcerated parent to meet a condition. The condition that Ryan complete high-risk sex offender treatment despite his assertion of innocence and his ongoing appeal violated his substantive due process rights, thus making Wis. Stat. § 48.415(4) unconstitutional as applied to the facts in Ryan's case.

C. The condition that Ryan complete intensive sex offender treatment was impossible to meet.

In *Jodie W.*, the Wisconsin Supreme Court held that "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit...these conclusions are required by the Wisconsin and United States Constitutions, which preclude a state from terminating a parent's fundamental right without an individualized

determination of unfitness." (internal citations omitted) *Jodie W.*, 293 Wis.2d 530, ¶49.

Ryan is in an impossible situation, like Jodie.

The CHIPS order established "conditions for [Ryan] to complete before having any contact with his children." One of those conditions required Ryan to "*complete* intensive, high-risk sex offender treatment." (emphasis added)(93:50).

The condition that he complete an intensive, high-risk sex offender treatment program put Ryan in an impossible position because Ryan maintained his innocence. The necessary admission of guilt to complete a treatment program would require him to choose from untenable options: (1) admit his guilt in order to complete the intensive, high-risk sex offender treatment, which would result in him incriminating himself, undermining his criminal appeal and also for all practical purposes compromising his parental relationship with his children; or (2) refuse to admit guilt and face termination of his parental rights for not meeting the condition.

In his interrogatories presented as an exhibit at the summary judgment hearing, Ryan articulated these concerns, "if they're trying to do stuff as far as, you know, get me into a program, that would take away my constitutional right to an appeal. No. I won't do that." (93:77-78).

Ryan's commitment to preserving his criminal appeal and maintaining his innocence was warranted by his previous successful litigation. He litigated two cases in the Wisconsin Supreme Court, with one resulting in the reversal of his Clark County

conviction. *See State v. Harrison*, 2015 WI 5, 360 Wis.2d 246, 858 N.W.2d 372; *State v. Harrison*, 2020 WI 35, 391 Wis.2d 161, 942 N.W.2d 310. He prevailed on a federal habeas petition in his Ashland County case. *See Harrison v. Tegels*, 216 F.Supp.3d 956 (W.D. Wis. 2016). He won a reversal of his prior TPR order on appeal in this court. *Jackson County DHS v. R.H.H., Jr,* Nos. 2018AP2440, 2018AP2441, 2018AP2442, 2018AP2443, unpublished slip op., (Wis. Ct. App. April 4, 2019) (App. 64-68). With this background, it was not unreasonable for Ryan to assess the situation as an impossible Hobson's choice: his freedom/exoneration or his children.

In granting the county's motion for summary judgment, the circuit court held that Ryan was not put in an impossible situation. (103:10; App.74). The circuit court relied on three main points to support its ruling. First, the circuit court found that Ryan should have challenged the condition during the CHIPS proceeding, that Ryan "did not pursue the due process rights he had available to him to address these issues while the order was in place denying physical placement or visitation with his children." The circuit court continued "if [Ryan] is required to accept responsibility for the conviction to successfully complete an intensive high-risk offender treatment program he could have brought that issue to the attention of the CHIPS court to see if the condition could somehow be modified." (103; 10-12; App.74-76).

There was no affirmative obligation for Ryan to move to modify the CHIPS order. To find otherwise is improper burden shifting.

In the CHIPS case, the county is required to provide services tailored to the parent. *Sheboygan County DHHS v. Tanya M.B.*, 2010 WI 55, 325 Wis.2d 524, 785 N.W.2d 369. Pursuant to *Jodie W.*, court-ordered conditions in Wis. Stat. § 48.415(2) must be "tailored to the particular needs of the parent and child." *Jodie W.* 293 Wis.2d 530, ¶51. The same analysis applies to Wis. Stat. § 48.415(4); it is simply illogical to claim that court-ordered conditions in a CHIPS order must be specifically tailored to the parent when applied to conditions for return but need not be specifically tailored to the parent when applied to court-ordered conditions regarding contact and visitation.

Therefore, the failure in this case lies with the county, not with Ryan, because the county failed to tailor the conditions to Ryan's particular needs. Ryan was incarcerated on a case where he maintained his innocence and where he was pursuing a direct appeal. The county should have tailored the conditions to take these critical facts into account. A simple approach would have been to delete the requirement that Ryan "complete" the program. The circuit court agreed with Ryan's argument that an admission was necessary to successfully complete sex offender treatment in prison. (161:24). But the circuit court found that fact to be unpersuasive, stating "that's to complete it. He could have started it. I've had plenty of offenders that have started sex offender treatment and can't get to that stage, but he could have started it…" *Id.*

Following the circuit court's statement, if the county had tailored the condition to Ryan's unique legal situation and required him to *participate* in the program, the condition might not have been

impossible. Yet the county failed to make this simple change. The county was setting up Ryan to fail, knowing that after his successful challenge to the Ashland County case he would maintain his innocence and pursue an appeal in his Dane County case and, consistent with that process, would refuse to participate in a treatment program that required him to admit his guilt.

And regardless of whether participation would even be possible without an admission of guilt, it is illogical to expect Ryan to both maintain his innocence and participate in a program that must conclude in an admission of guilt.

Further, finding fault with Ryan for failing to challenge the impossible condition during the CHIPS proceeding is a red herring. Certainly the county would argue that Ryan is precluded from collaterally attacking the CHIPS order in the TPR proceeding. But the county is applying the same tactic by reaching back into the CHIPS order to sustain the validity of the condition that sustained the TPR.

Whether Ryan filed motions or requests on visitation or placement is not relevant to the TPR proceeding because only under the TPR proceeding do the statutes grant Ryan express authority to attack the reasonableness of the county's efforts. In CHIPS proceedings, the county only has to provide "visitation on terms and conditions set by the Department in consultation with the GAL..." See Wis. Stat. § 48.415(2)(a)2. In other words, only in the TPR proceeding does Ryan have legal standing to accuse the county of being unreasonable for failing to set forth attainable conditions.

Next, both the circuit court and court of appeals refused to find *Jodie W.* applicable to Ryan's case. The circuit court would not apply *Jodie W.* because "Jodie W. was a continuing CHIPS case." (103:10; App.74). The circuit court factually distinguished *Jodie W.* by finding that Ryan "could have" completed the conditions while he was incarcerated. (103:11; App.75). But *Dane County DHS v. P.P.*, 279 Wis.2d 169, ¶15, made clear that an as applied substantive due process challenge like the one in *Jodie W.* can be raised in a case with the continuing denial ground. And the *Jodie W.* decision did not hold that its analysis could only be applied to continuing CHIPS cases. Whether Ryan "could have" successfully completed the intensive sex offender treatment program while maintaining his innocence is a point the circuit court already addressed when it conceded that the program requires an admission "I've had plenty of offenders that have started sex offender treatment and can't get to that stage..." (161:24). Thus the circuit court acknowledged that while Ryan could have started the program he would not have been able to "complete" the program, which is what the condition required.

The court of appeals found *Jodie W.* inapplicable because it determined that Ryan failed to meet other conditions for visitation and that made the impossible condition irrelevant "*Jodie W.* does not govern situations where, as here, a finding of unfitness is not based solely on an impossible return condition, but is also based on failure to meet other conditions that were attainable." Slip op at ¶35 (App.20).

As discussed in the Reasons for Granting Review section, this reasoning is a dangerous application of *Jodie W.* It permits the county to

intentionally insert impossible conditions in orders, knowing that a parent will be powerless to raise a constitutional challenge if any other condition is not wholly satisfied. The analysis shifts away from the impossible condition with no consideration of how the impossibility might impact a parent's commitment to satisfying the other conditions. If, for example, a parent is given an impossible condition by the county the parent has little motivation to complete the other conditions. In the parent's eyes, no matter what he does regarding the other conditions he will still not be able to visit or regain custody of his child because he will never meet the impossible condition.

The circuit court attempted to consider factors in addition to incarceration, as noted in *Jodie W.* and WIS JI-Children 335, but the circuit court's analysis failed for the same reasons discussed above. (103:13-15; App.77-79). The factors include "the nature of the crime committed by the parent" "the length and type of sentence imposed" and the "parent's level of cooperation with the responsible agency and the Department of Corrections." *Jodie W.*, 293 Wis.2d 530, ¶51-52.

These considerations are all inexorably bound up in Ryan's assertion of innocence and active pursuit of his direct appeal. Ryan disputes the nature of the crime, by implication disputes the sentence and certainly that affects his cooperation with the Department of Corrections. The only way Ryan can satisfy these considerations is by stating he is guilty of the offense because that is his only path to meeting the condition.

Because the condition was impossible to meet, the condition violated Ryan's substantive due process rights and the remedy should be an order for summary judgment in Ryan's favor. If this court does not agree with Ryan's argument that it should order summary judgment in his favor, Ryan requests that this court reverse the summary judgment order and remand to allow Ryan to have a jury trial.

As already discussed above, there are genuine issues of material fact that could have been presented at a jury trial. Ryan argued in the circuit court: "as for the sex offender treatment, it is known that one must, under the rules of DOC, must admit to any convictions – or, excuse me, admit to any sex offenses. He currently has one in appeal that would be for him to have to admit to something that he's currently litigating...for him to be able to meet the criteria, which includes asking them – they put them under lie detector test. To be able to go through that, he'd have to essentially – they wouldn't let him graduate unless he admits to something that's in appeal...He can't get through sex offender treatment unless he comments on the current case before appeal. It's just how they get through treatment, whether you graduate or not." (164:10-11). The jury could evaluate the fact question of whether the condition was possible for Ryan to meet.

That leads to yet another flaw in the court of appeals' (and the circuit court's) reasoning: that Ryan's argument fails because he could have at least started the programming. Whether or not Ryan started the treatment program is wholly irrelevant when it was impossible for him to complete the treatment program. The condition did not simply

require him to "try" the program. It required him to "complete" the program. There is no argument that it was possible for Ryan to complete the program with his assertion of innocence, therefore the condition was impossible for him to meet.

Finally, the court of appeals analysis on the sufficiency of the record completely misses the mark because it failed to take into account the specific statutory procedure in termination of parental rights cases. In its decision, the court of appeals improperly focused on what it perceived to be deficiencies in the circuit court record "[Ryan] failed to identify any evidence in the summary judgment record to show that he was required to admit to sexual offenses as part of a sex offender treatment program, and he therefore failed to create a genuine dispute of material fact." Slip op. at ¶21 (App.12-13). The court of appeals analysis was specious at best.

First, the court of appeals logic is procedurally faulty. In TPR cases, the appellate process begins with the filing of a notice of appeal. Wis. Stat. § 809.107(5). If an appellant wants to present additional facts, as the court of appeals appears to believe should have happened in Ryan's case, the appellant must first file a motion for remand in this court and assert that "postjudgment fact-finding" is required. Wis. Stat. § 809.107(6)(am). What postjudgment fact-finding would be necessary in Ryan's case, where the circuit court had already accepted the premise that a defendant must admit to the sex offense before he can complete sex offender treatment? Ryan argued in the circuit court: "as for the sex offender treatment, it is known that one must, under the rules of DOC, must admit to any convictions – or, excuse me, admit to any

sex offenses…" (164:10-11). The circuit court conceded that point, stating "that's to complete it. He could have started it." (161:24). Because the circuit court had already accepted as true the fact that a denial prevents successful completion of the sex offender treatment program, a motion for postjudgment fact-finding would have been redundant. It would have asked the circuit court to find a fact it had already found.

With an understanding of the remand statute, it's obvious that the court of appeals reliance on the timing of the circuit court's concession (at disposition) is completely irrelevant. Not only is factfinding not necessary because the fact has already been found, but on appeal the standard of review on this issue is de novo. *Oneida County DSS v. Nicole W.*, 299 Wis.2d 637, at ¶8. The court of appeals had the full record before it to apply the law to the facts regardless of whether the circuit court made a statement at the grounds phase or the dispositional phase.

II. Because the circuit court admitted an irrelevant, decade-old report at disposition, Ryan should receive a new disposition hearing.

Over Ryan's objection, an "attachment assessment" from 2013 written by Dr. Stephen P. Dal Cerro was admitted at disposition. (161:63-64; App.81-83). This nearly decade-old assessment, made when the children were all under six years old and Ryan's conviction in Ashland County had not yet been reversed, was irrelevant to a best interests determination regarding children who were now teenagers. The use and reliance on this irrelevant evidence was improper and this court should remand

for a new dispositional hearing where the out-of-date, irrelevant report is not considered.

Any party involved in a TPR proceeding "may present evidence relevant to the issue of disposition" and the circuit court "shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony." Wis. Stat. §§ 48.427(1), 48.299(4)(b). Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

Dr. Dal Cerro, a clinical psychologist, did an evaluation of Ryan in 2013. (161:72). Back in 2013, Dr. Dal Cerro had been retained by the county to do a Child Protective Services examination. The issue was whether Ryan could continue to have phone contact with his children while he was incarcerated in the Ashland County case, the conviction that was later reversed on appeal. (161:73).

Ryan objected to the admission of Dr. Dal Cerro's report at the 2022 dispositional hearing, arguing that it was not "relevant based on the age of it and based on the materials that were available to him, knowing now that we know that, I think, he had limited materials to some degree to even make an analysis for some of these – for some of what he wrote down as his opinions…" (161:95; App.89).

The circuit court overruled this objection and admitted the report, holding "I still think it's relevant if the State wants to or the county wants to make their position here to support the grounds that they've

identified clearly here on the record, 2 and 3 or B and C, [Wis. Stat. § 48.426(3)] as did Mr. Schaumberg [guardian ad litem], so." (161:69; App. 61). The circuit court added "well, based on what I heard, it sounds like his opinion wouldn't change for the next 40 years, so." (161:95; App. 63). Thus the report was admitted as an Exhibit and Dr. Dal Cerro testified. (131; 161:72-95).

The information presented was extremely damaging to Ryan. Dr. Dal Cerro, who had not met with Ryan or the children in over a decade, pronounced Ryan "sort of like a textbook psychopath" who scored in the 98th percentile in terms of severity. (161:74-75, 78). Dr. Dal Cerro also told the court that he diagnosed Ryan as a pedophile although he conceded that at the time of the diagnosis "because I only had the one established episode of pedophilia, it was technically inappropriate to diagnose with that." (161:76). He stated that Ryan was "virtually certain to reoffend" if released from prison and that psychopathy does not improve and that "treatment doesn't work." (161:76).

Dr. Dal Cerro also stated in his report that it was unrealistic to think that the Ashland County case would be overturned on appeal. (131; 161:80). Dr. Dal Cerro was wrong, of course, as the case was reversed on appeal and Ryan was not ultimately convicted of a sexual assault in that case. (161:80).

The county and the guardian ad litem argued that Dr. Dal Cerro's assessment was relevant as it related to Wis. Stat. § 48.426(3)(b) "the age and health of the child" and Wis. Stat. § 48.426(3)(c) "whether the child has a substantial relationship with the parent…

and whether it would be harmful to the child to sever these relationships." (161:66-67; App.84-85).

The doctor's report was not relevant to these or any of the dispositional factors in Wis. Stat. § 48.426(3). Whether, more than a decade ago, a doctor assessed Ryan in a negative way and in reliance on a conviction that would later be reversed, assessing relationships with children who were under 7 years old at the time and were teenagers at the time of disposition, does not impact the dispositional factors. In fact, the passage of time and the dramatic change in circumstances simply makes the doctor's assessments obsolete.

Finally, this error was not harmless. The burden of proving harmless error is on the county "the burden of proving no prejudice is on the beneficiary of the error." *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

The 2013 report was admitted into evidence, Dr. Dal Cerro testified at the disposition hearing and the county and the guardian ad litem relied on the report in their arguments. (161:69, 72-98, 141, 145-146). Most importantly, the circuit court relied on the report when making its ruling. (161:151-152). The error in admitting this report, with its inflammatory conclusions, affected Ryan's substantial rights.

As the United States Supreme Court observed in *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982):

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even

> when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, person faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Irrelevant, outdated information unfairly impacted Ryan's dispositional hearing. This court should reverse and remand for a new dispositional hearing.

CONCLUSION

For these reasons, R.H.H. respectfully requests that this court grant the petition for review.

Dated this 15th day of December, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 this brief is 5,791 words.

CERTIFICATION AS TO APPENDIX

I hereby 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 opinion 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 rules 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 or 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 15th day of December, 2023.

Signed:

Electronically signed by
Susan E. Alesia
SUSAN E. ALESIA
Assistant State Public Defender

SIGNATURE OF APPELLANT

IN SUPPORT OF NOTICE OF APPEAL[1]

[1] The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children.