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STATE OF WISCONSIN

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.

RESPONSE TO PETITION FOR REVIEW

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ISSUES PRESENTED

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

The court of appeals determined that the conditions for visitation were not impossible to meet and therefore summary judgment was appropriate.

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

The Court of Appeals held that the trial court did not erroneously exercise discretion in the admission of the report and therefore consideration of it was proper.

CRITERIA FOR REVIEW

The issue presented to this court is whether summary judgment was appropriate where the grounds for termination of parental rights was continued denial of visitation pursuant to Wis. Stat. § 48.415(4). R.H.H. (hereinafter referred to by the pseudonym "Ryan") contended that at least one of the conditions for resumption of visitation was impossible for him to meet and therefore summary judgment was not appropriate. Specifically, Ryan claimed that he could not successfully complete sex offender treatment because that would require him to admit to a sex offense that he was actively appealing.

The issue of whether a condition is impossible to meet and therefore not subject to summary judgment was previously decided in this Court. *See*, *Kenosha County Dept. Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845.

This Court held that where summary judgment is based solely upon an impossible condition, summary judgment is inappropriate. The Court of Appeals in this case followed *Jodie W.* and thus, there is no real and significant question of state or federal constitutional law presented here.

This case does not demonstrate the need for this Court to consider establishing, implementing or changing a policy within its authority. The law concerning appeals of summary judgment decisions is well-established. Moreover, this case involves application of these well-settled principles to the factual situation, which indicates that review by this Court is not warranted.

There is no question presented in this appeal that will help clarify or harmonize the law. The questions presented by this appeal are not novel, and therefore its resolution does not have statewide impact. Ultimately, the way in which the facts of this case fit into summary judgment law is not likely to recur.

Finally, the decision of the court of appeals is not in conflict with opinions of the U.S. Supreme court, this Supreme Court, nor other Court of Appeals' decisions. The decisions upon which this appeal was based are relatively new, and therefore not subject to re-examination.

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The issue of whether a condition is impossible to meet and therefore not subject to summary judgment was previously decided in this Court. *See*, *Kenosha County Dept. Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845. This Court held that where summary judgment is based solely upon an impossible condition, summary judgment is inappropriate. The Court of Appeals in this case followed *Jodie W.* and thus, there is no real and significant question of state or federal constitutional law presented here.

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STATEMENT OF ADDITIONAL FACTS

The underlying CHIPS related to this termination of parental rights proceeding began with a dispositional order entered on February 3, 2011.

R.92:1-24[1]. During the CHIPS case, Ryan was accused of child sexual assault in Ashland County case no. 11CF82, in a criminal complaint filed on September 16, 2011. R.91:2. On May 2, 2013, DHHS filed a request to revise the dispositional order, which sought to limit Ryan's contact with this children based on the fact that his sentence in the Ashland County case included an order to not have contact with anyone under age 17. R.91:1. On June 12, 2013, the court held a hearing on the request. At the hearing, the court ordered visitation to be suspended, but that phone calls between Ryan and the children continue until an attachment assessment had been completed. *Id.*

The attachment assessment was completed on August 18, 2013, by Dr. Stephen Dal Cerro. On that same date, Dr. Dal Cerro completed a psychological evaluation of Ryan. As a result of the evaluations, Dr. Dal Cerro opined that Ryan would be inappropriate to have custody of the children due to his history of child sexual victimization and interpersonal violence, coupled with career criminality, personality pathology and parenting deficits. R.91:2. Based on Dr. Dal Cerro's findings, on September 3, 2013, the department filed a request to revise the dispositional order to prohibit any contact between Ryan and the children. R.92:37-44.

A hearing on the request to revise the dispositional order was held on September 10, 2013, at which time the court suspended all contact between Ryan and the children. R.91:2; R.92:33.

Ryan subsequently sought to terminate the no contact order and a hearing on his motion was held on June 13, 2016. At that time, the CHIPS court found that it was still in the children's best interests to suspend contact between them and Ryan. The court ordered conditions for Ryan to complete before requesting reinstatement of contact with the children. Conditions

[1] References to the record are to the Index in 2023AP1229 and designated "R." followed by the document number and page number.

included high risk sex offender treatment. R.92:57. Ryan never sought review of the circuit court decision.

On February 9, 2017, DHHS sought revision of the dispositional order because Ryan had been released from incarceration due to his criminal conviction in Ashland County having been reversed. The Ashland County criminal case had not yet been concluded following reversal of the conviction, and the bond in that case required that Ryan have no contact with anyone under the age of 18. R.75:11. On February 21, 2017, the court revised the conditions for return of the children to the parental home, but kept the conditions for resumption of contact, including the requirement of high risk sex offender treatment. R.91:3; R.93:1; R.93:17.

The Ashland County criminal case was resolved on January 11, 2019 when Ryan entered a no contest plea to causing mental harm to a child, contrary to Wis. Stat. § 948.04(1). R.75:9; R.166:10. The factual basis for the causing mental harm charge was the same as that in the original criminal complaint, which had charged Ryan with Repeated Sexual Assault of a Child as a repeater, contrary to Wis. Stat. §§ 948.025 and 939.62. R.75:12

Ryan was re-incarcerated on March 22, 2017, based on an allegation of child sexual assault in Dane County. R.91:3. On December 1, 2017, the State filed a criminal complaint accusing Ryan of first degree sexual assault of a child and three counts of felony bail jumping in Dane County circuit court case no. 17CF2770. As a condition of bond in that case, Ryan could not have contact with any person under the age of 18 unless supervised by a responsible adult. R.91:3-4; R.93:37, 43.

Ryan was convicted of First Degree Sexual Assault of a Child in Dane County following a jury trial held November 22, 2019. He was sentenced to prison on January 23, 2020. His sentence requires incarceration until 2052. R.93:37-38. R.App.2-3.

After the condition of sex offender treatment was ordered on September 10, 2013, Ryan never began sex offender treatment. His justification for not complying with this court order was that if the department tried to get him into a program that would "take away" his constitutional right to an appeal, he "wouldn't do that." R.91:4. R.App. 4.

However, Ryan had no case on appeal between January 11, 2019, until the petition for termination of parental rights case was filed on May 12, 2020. The Ashland County case had been resolved on January 11, 2019, with a conviction of causing mental harm to a child (contrary to Wis. Stat. § 948.04(1)) based on facts that included child sexual assault. R.75:9; R.91:3-4; R.App. 5. Thus, Ryan could have engaged in sex offender treatment during that time period without any effect on an appeal.

STANDARD OF REVIEW

The constitutionality of a statute presents a question of law the appellate court reviews *de novo. State v. Allen M.,* 214 Wis. 2d 302, 313, 571 N.W.2d 872 (Ct. App. 1997)*;* citing *State v. Post,* 197 Wis. 2d 279, 301, 541 N.W.2d 115, 121 (1995), *cert. denied,* 521 U.S. 1118, 117 S. Ct. 2507, 138 L.Ed.2d 1011 (1997). A party challenging the constitutionality of a statute bears a heavy burden of persuasion. *Id.,* citing *Winnebago County DSS v. Darrell A.,* 194 Wis. 2d 627, 637 534 N.W.2d 907, 911 (Ct. App. 1995). The statute is presumed constitutional and the party challenging it must demonstrate its unconstitutionality beyond a reasonable doubt. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *Id.*, citing *Bachowski v. Salamone,* 139 Wis. 2d 397, 404, 407 N.W.2d 533, 536 (1987) (internal quotation marks and quoted source omitted).

To determine whether partial summary judgment was properly granted in this case, the court must interpret Wis. Stat. § 48.13(4). The interpretation of a statute is a question of law that this Court also reviews independently, "but benefiting from the analyses of the court of appeals and the circuit court." *Marder v. Bd. of Regents of the Univ. of Wis. Sys.,* 2005 WI 159, ¶ 19, 286 Wis. 2d 252, 706 N.W.2d 110.

This Court has concluded that summary judgment may be employed in the grounds phase of a termination of parental rights proceeding when there is no genuine factual dispute that would preclude finding one or more of the statutory grounds by clear and convincing evidence. *Steven V.,* 271 Wis. 2d 1, ¶¶ 28–44, 678 N.W.2d 856 (citing Wis. Stat. § 802.08(2)-(3)). This Court explained that nothing in the statutes prohibits summary judgment in the grounds phase and that § 802.08 sets the procedure to be followed. *Id.,* ¶ 33. Further, "[s]ome statutory grounds for unfitness ... are expressly provable by official documentary evidence, such as court orders or judgments of conviction." *Id.,* ¶ 37. Grounds under Wis. Stat. § 48.415(4) is one that this Court found amenable to summary judgment.

An appellate court reviews a trial court's decision to admit or exclude evidence in a termination trial under the erroneous exercise of discretion standard. An appellate court will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. *In re the Termination of Parental Rights to Teyon D.*, 2002 WI App. 318 ¶ 19, 259 Wis. 2d 429, 443, 655 N.W.2d 752, 759.

It is well established that the decision whether to terminate parental rights is committed to the trial court's discretion. *See, In re J.L.W.,* 102 Wis. 2d 118, 131, 306 N.W.2d 46, 52 (1981). The determination of the child's best interests is also committed to the trial court's discretion. *In re Brandon S.S.,* 179 Wis. 2d 144, 150, 507 N.W.2d 94, 107 (1993).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS IT WAS NOT IMPOSSIBLE FOR RYAN TO MEET THE CONDITIONS FOR REINSTATEMENT OF VISITATION.

There is no dispute that the right of a parent to the care, custody and management of their child is protected by the Due Process Clause of the U.S. Constitution. *See, Santosky v. Kramer,* 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-1395, 71 L.Ed.2d 599 (1982). The Wisconsin Supreme Court has also held that a parents' desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. *Kenosha County Department of Human Services v. Jodie W.,* 2006 WI 93, ¶ 40, 293 Wis. 2d 530, 555, 716 N.W.2d 845, 857. Therefore, any statute that impinges on that right must withstand strict scrutiny. *Id.; Monroe County Department of Human Services v. Kelli B.,* 2004 WI 48 ¶ 17, 271 Wis. 2d 51, 62, 678 N.W.2d 762, 835.

It has been decided that Wis. Stat. § 48.415(4) serves a compelling state interest. *Dane County DHS v. P.P.,* 2005 WI 32 at ¶ 24, 279 Wis. 2d at 183, 694 N.W.2d at 352. The compelling state interest is to protect children from unfit parents. *Kelli B.*, 2004 WI 48 at ¶ 17, 271 Wis. 2d at 62, 678 N.W.2d at 835. This interest has a temporal component, as the legislature recognized the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family. *Dane County DHS v. P.P.*, 2005 WI 32 ¶ 21, 279 Wis. 2d 169, 182, 694 N.W.2d 344, 351; citing Wis. Stat. §48.01(1)(a).

In this case, Jackson County filed for termination of parental rights under Wis. Stat. § 48.415(4) – Continuing Denial of Periods of Physical

Placement or Visitation. Termination of parental rights on the basis of continued denial of periods of physical placement or visitation must be proven by showing that the parent has been denied placement or visitation by a court order that contained termination of parental rights warnings, and that at least one year has passed since the order denying periods of visitation was issued, without the court subsequently modifying its order to permit periods of visitation. Wis. Stat. § 48.415(4).

Ryan claims that the condition to complete sex offender treatment was impossible for him to achieve due to his right against self-incrimination and that Wis. Stat. § 48.415(4) is therefore unconstitutional as applied to him. His argument is based on the holding of *Kenosha County Department of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845.

In *Jodie W.*, Kenosha County filed a petition for termination of parental rights based upon a continuing need of protection or services (Wis. Stat. § 48.415(2)). The county alleged that Jodie had not met the requirement of obtaining a suitable residence and was unlikely to do so within 12 months solely due to her incarceration. Testimony showed that Jodie had attempted to meet the other conditions for return during her incarceration. Thus, the question before the appellate court was whether a court may find a parent unfit under Wis. Stat. § 48.415(2)(a), based solely upon the parent's failure to meet an impossible condition of return. *Id.*, 2006 WI 93 ¶ 19, 293 Wis. 2d at 543-544, 716 N.W.2d at 852.

The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair. *Jodie W.*, ¶ 39, 293 Wis. 2d at 554, 716 N.W.2d at 857, *citing Dane County DHS v. P.P.*, 2005 WI 32 ¶ 19, 279 Wis. 2d 169, 181, 694 N.W.2d 344, 350-351. In recognition of the temporal component to termination of parental rights cases the court said:

> The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.

Jodie W., at ¶ 44, 293 Wis.2d at 557, 716 N.W.2d at 858.

The amount of time a parent is unable to provide for his or her child due to the parent's incarceration can and should be considered by the circuit court. *Id.* While incarceration is relevant, it does not by itself establish that a parent is unfit. *Jodie W.*, at ¶ 48, 293 Wis.2d 559-560, 716 N.W.2d 860. The court went on to say 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. The Wisconsin and United States Constitutions preclude a state from terminating a parent's fundamental right without an individualized determination of unfitness. *Id., citing Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972).

Ryan argued in the Court of Appeals that in order to complete sex offender treatment he would have to admit to a sex crime and that could jeopardize his appeal of a criminal conviction. The trial court disagreed, finding Ryan was not put into an impossible situation when ordered to complete sex offender treatment:

> The Respondent argues that he will lose his due process rights if he is unable to argue his reasons for non-compliance to a jury. He should have pursued these efforts by obtaining alternate assessments or statements from providers to support his position to convince the dispositional judge that the orders should have been changed. He did not do this. He 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.

R.103:10.

Ryan filed a motion to terminate the denial of visitation order in 2016, which was denied by the CHIPS court. Ryan could have appealed that decision on the basis that the trial court was relying upon an impossible condition for return. Ryan could also have filed a motion to reconsider. Alternatively, Ryan could have filed a motion to terminate the 2019 order denying him visitation. Instead, Ryan did nothing.

The Court of Appeals determined that Ryan's argument of impossibility failed for two reasons. First, Ryan failed to identify evidence in the record to show that he was required to admit to sexual offenses as part of sex offender treatment, and therefore failed to create a genuine dispute of material fact. The court of Appeals noted:

> that to survive partial summary judgment, Ryan must identify evidentiary material in the summary judgment record sufficient to show that there is a genuine issue of fact as to this factual premise. However, Ryan failed to identify any such evidentiary material.

Jackson County Department of Human Services v. R.H.H., 2023AP1229; 23AP1230; 23AP1231; 23AP1232 (Wis. Ct. App. November 16, 2023) unpublished slip op. at ¶ 26.

The Court of Appeals noted that Ryan's claim of necessity to admit to sexual offenses was based on an assertion from his trial counsel, which is not evidence. *Id.* at ¶ 27. The Court found that "an attorney cannot manufacture a factual dispute by making assertions during a summary judgment hearing that are unsupported by the record." *Id.*

Ryan argues in his Petition for Review that the trial court acknowledged the necessity and therefore direct evidence is not required. The Court of Appeals found that the trial court statement regarding the necessity to admit to sex offenses in sex offender treatment was made at disposition, not during the summary judgment hearing. Therefore, the

statement could not be considered evidence for summary judgment. *Id.* at ¶¶ 27-29.

Even if evidence of a requirement to admit to a sex offense had been present in the summary judgment materials, the argument of impossibility still fails. The appeal of Ryan's Ashland County conviction was completed when he pled no contest to causing mental harm to a child.[2] From the time the Ashland County case was complete (January 11, 2019) until the date Ryan was convicted in the Dane County sexual assault case (November 22, 2019), which began his second criminal case appeal, Ryan could have completed sex offender treatment without any repercussion.

In fact, Ryan could have engaged in sex offender treatment based on the Ashland County conviction at any time after January 11, 2019, because that conviction alone would have proven sufficient to engage in sex offender treatment as ordered by the court. As the trial court in this case noted, "There is no evidence in the record that the Respondent must admit or acknowledge any element in the Dane County conviction in order that he receive the programming that had been previously ordered." R.103:11.

The Court of Appeals found that in contrast to Jodie W., Ryan contends that:

> the condition to complete sex offender treatment is impossible for a reason that is not obvious – that an admission would be required. But, there is no evidence in the record that Ryan did not believe he could complete this condition, or even that he believed that the conditions would have negative implications for his appeal.

Jackson County DHS v. R.H.H., November 11, 2023 slip op. at ¶ 34.

Second, the Court of Appeals determined that Ryan's argument failed because *Jodie W.* did not apply to his case. The trial court in Ryan's case

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[2] The trial court noted that that although Ryan's conviction for child sexual assault in the Ashland County case was overturned, he was not exonerated. R.103:12.

found unfitness based on more than just his failure to complete sex offender treatment.

As part of the conditions for reinstatement of visitation, the CHIPS court ordered Ryan to undergo domestic violence training. Despite this, Ryan refused to do so, stating: "[I]t's not something I need whatsoever." R.93:75. The willful refusal to comply with the court order is a factor that the CHIPS court considered: "Compliance with the domestic violence programming would have nothing to do with his appeal, yet he diagnosed himself as not needing that program and did not participate in that program." R.103:11.

Ryan argued in his brief that he had no convictions for domestic violence. However, a lack of conviction does not equate with a lack of domestic violence. The requirement was made based on the recommendations of Dr. Dal Cerro, who performed an assessment of Ryan for purposes of determining whether contact with the children should occur.

Further, the CHIPS order required that Ryan sign releases necessary for DHHS to verify compliance with the conditions. R.93:50. Yet, Ryan refused to sign releases, which the trial court noted. R.161:20, 24. The court order required Ryan to acknowledge and demonstrate an understanding of the effect of his incarceration had on the children. Ryan stated he did not work with a counselor while in prison. Instead, he simply acknowledged that his incarceration affected the children, but could not articulate an understanding of *how* it affected them. R.93:77. All of this evidence in the record distinguishes this case from *Jodie W.*

The Court of Appeals recognized these distinctions. The only fact in common between Ryan and Jodie W. is that the parents were incarcerated when the conditions at issue were established. In Jodie W., the mother was found unfit solely because she had no suitable housing for her children. Other evidence that the mother had completed or made significant progress toward

other attainable conditions was not considered by the trial court. That was not the case for Ryan.

Indeed, the trial court considered other factors which were set forth in *Jodie W.* to be analyzed when reviewing the relevancy of incarceration. These factors include: the parent's relationship to the child. In this case the court found that Ryan has no substantial relationship with his children. R.103:14; App. 52. The court considered the nature of the crime committed. R.103:12-14; App. 50-52. The length and type of sentence imposed, which was for lengthy incarceration. *Id.* The trial court also considered Ryan's lack of cooperation with DHHS, finding that he had not been cooperative. R.103:14; App. 52. And, finally, the trial court considered the best interests of the children. The trial court stated:

> [i]t is clear to this Court, after considering all of these factors, which are in addition to the Respondent's lengthy incarceration and failure to comply with the CHIPS court ordered conditions, that the best interests of the children would be to find the Respondent unfit and end the lengthy journey the children have had to endure to achieve permanency.

R.103:15; App. 53.

The children in this case have been in foster care for thirteen years, since October, 2010. The importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family must be considered. Ryan had the ability to litigate the denial of visitation at the trial court level and failed to do so after 2016. Ryan had the ability to engage in, and complete, sex offender treatment following his 2011 conviction in Ashland County and failed to do so. Ryan had the ability to sign releases, engage in domestic violence programming and counseling, but failed to do so. His failures to act should not now be used as a tool against finding permanence for these children.

The facts leading to the trial court's conclusion are not in dispute. There is simply no issue of material fact in this case and partial summary judgment was therefore appropriate and should be affirmed. Should this court disagree, the appropriate remedy is not summary judgment in Ryan's favor as advocated by Ryan. Rather, the appropriate remedy for finding summary judgment should have been denied is remand for further proceedings.

II. THE ADMISSION OF DR. DAL CERRO'S REPORT AT DISPOSITION WAS NOT ERROR AND NO NEW DISPOSITION HEARING SHOULD BE GRANTED.

Although more than one report of Dr. Dal Cerro was admitted into evidence at the disposition hearing, the report at issue is not clearly identified by Ryan. The County presumes the report at issue is the report of the assessment of Ryan.[3]

"Relevant evidence" means evidence having 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. § 940.01. Factors for the court to consider at disposition in a termination of parental rights case include, but are not limited to:

> (a) The likelihood of the child's adoption after termination.
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
> (d) The wishes of the child.
> (e) The duration of the separation of the parent from the child.
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the

[3] Three reports of Dr. Dal Cerro were admitted into evidence at the disposition hearing: a 2013 report of the assessment of the children, a 2013 report of the assessment of Ryan, and the 2016 report of Dal Cerro's suggestions for conditions to be met before attempting to create a relationship between the children and Ryan. R.131; R.132; R.133.

> conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

Wis. Stat. § 46.426(3).

The evaluation of Ryan was relevant to the question of whether the children had a substantial relationship with him. Within the assessment report, Dal Cerro provided test results from an MMPI (Minnesota Multiphasic Personality Inventory) and a Psychopathy Checklist – Revised. The trial court specifically ruled that the report was relevant to the factors under Wis. Stat. § 48.426(3)(b). R.161:69.

An appellate court reviews a trial court's decision to admit or exclude evidence in a termination of parental rights case under the erroneous exercise of discretion standard. An appellate court will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. *In re the Termination of Parental Rights to Teyon D.*, 2002 WI App. 318 ¶ 19, 259 Wis. 2d 429, 443, 655 N.W.2d 752, 759.

In the present case the witness, Dr. Dal Cerro, testified to his findings as a result of the testing and interview with Ryan. R.161:74. Dal Cerro testified that his diagnoses of Ryan were, "very stable and do not vary over time to any large degree." R.161:75. Dal Cerro stated that due to that stability, the condition of psychopathy would not change and there is no evidence that psychopathy changes for the better; the research indicates that treatment for the condition does not work. *Id.* Also of relevance, Dr. Dal Cerro stated that a core feature of psychopathy is the inability to form emotional bonds. "People are objects, not people." R.161:90.

Ryan's attorney then questioned Dr. Dal Cerro about the report having been authored a decade earlier. He also brought forth information through Dal Cerro that the Ashland County conviction for sexual assault had been overturned. Dal Cerro testified that his diagnosis of psychopathy was based

on a large amount of supporting information, not the Ashland conviction alone. Dal Cerro explained that he had reviewed at least two other psychological assessments of Ryan that were consistent with psychopathy. R.161:82. In addition to his resources, Dr. Dal Cerro testified that he worked for corrections for 12 years, was among the first evaluators sent for training in psychopathy and did a large amount of work with sexual and domestic violence offenders. R.161:83.

Ryan's attorney also stipulated to Dr. Dal Cerro's qualifications, which have not been disputed. R.161:87. The trial court accepted the stipulation and also noted that the court was familiar with Dal Cerro's work and the number of years he had been working in his field. *Id.*

At the conclusion of Dal Cerro's evidence, Ryan's attorney again objected to the admission of the exhibit report based on relevancy. The court concluded that Dr. Dal Cerro's report was admissible, and stated, "based on what I heard, it sounds like his opinion wouldn't change for the next 40 years, so." Implicit in the trial court's comments is a decision that the testimony of stability of diagnosis was accepted.

Dr. Dal Cerro also testified that based on his assessments, it would not be harmful to sever the children's ties to Ryan. In fact, Dal Cerro testified that it would be of no consequence whatsoever. The fact Ryan continued to try to "maintain some kind of control over them" would be anxiety provoking, but severing the relationship would not have any negative impact on them. R.161:78. Dal Cerro completed his direct testimony by opining that Ryan has no relationship with his children. *Id.* He further opined that Ryan had no bond with any of his children. R.161:90.

This testimony and the reports that led to the conclusions given are relevant to the question of whether Ryan had a substantial relationship with his children, and whether it would be harmful to sever any such relationship. The trial court weighed the testimony based on qualifications of the witness,

his methodology for determining diagnoses and then accepted the document. There has been no indication of an erroneous exercise of discretion in that decision. The fact that the information was damaging to Ryan does not in itself make Dr. Dal Cerro's findings irrelevant.

An appellate court reviews a trial court's decision to admit or exclude evidence in a termination trial under the erroneous exercise of discretion standard. An appellate court will uphold a trial court's decision to admit evidence if the court exercised discretion in accordance with accepted legal standards and the facts of record. *In re the Termination of Parental Rights to Teyon D.*, 2002 WI App. 318 ¶ 19, 259 Wis. 2d 429, 443, 655 N.W.2d 752, 759; *State v. Brewer*, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995) (quoting *State v. Whitaker*, 167 Wis. 2d 247, 252, 481 N.W.2d 649 (Ct. App. 1992).

As the Court of Appeals noted, the evaluation presents biographical background about Ryan and his extensive criminal history, including but not limited to his conviction in the Ashland County case. The evaluation notes that Ryan "has lived an exclusively criminal lifestyle," has been convicted for offenses that include theft, burglary, forgery, and battery, and has been "incarcerated or under community supervision for the majority of his life, beginning in his early teens." *Jackson County Department of Human Services v. R.H.H.*, 2023AP1229; 23AP1230; 23AP1231; 23AP1232 (Wis. Ct. App. November 16, 2023) unpublished slip op. at ¶ 44.

The court further noted that the evaluation recommended against permitting contact between Ryan and his children, opining that "[i]f exposed to [R.H.H.] in any meaningful fashion, his antisocial behaviors beliefs, and attitudes would pose a psychological risk to the children, in terms of modeling and influence." *Id.* at ¶ 47.

Both the trial court and Court of Appeals found that this report was relevant to whether termination of Ryan's parental rights would be in the

children's best interests. The report impacts the determination of whether severing Ryan's ties to the children would be harmful to them, as set forth in Wis. Stat. § 48.426(3)(c).

Dr. Dal Cerro relied upon several factors in his opinion, including the Ashland County conviction that was ultimately overturned. Ryan continues to contend that he was not convicted of a sexual offense in the Ashland County case. That is absolutely false. Ryan pled no contest to a charge of causing mental harm to a child in Ashland County based on the conduct criminal complaint that charged sexual ;assault of a child. Dr. Dal Cerro did not base his opinion on the existence of a conviction, rather he considered the behavior that was the basis of that conviction.

As the Court of Appeals noted, the evaluation referenced the Ashland County victim's videotaped interview, in which she described repeated acts of forced sexual intercourse and other physical abuse that began when she was five or six years old. These facts were the foundation of the later conviction following appeal. *Jackson County Department of Human Services v. R.H.H.*, 2023AP1229; 23AP1230; 23AP1231; 23AP1232 (Wis. Ct. App. November 16, 2023) unpublished slip op. at ¶ 45.

The fact that Ryan disagreed with Dr. Dal Cerro is a fact that was brought before the trial court and Court of Appeals. Ryan again asserts in this Court that the report was "extremely damaging to Ryan." Respondent-Petitioner's Petition for Review at p. 23. But the evaluation was not based on the fact of an Ashland County conviction. Rather it was based on the behavior underlying that conviction, which did not change following remand on appeal. The fact that Ryan disagrees with the report does not render it irrelevant.

Moreover, the report was not "obsolete" due to the passage of time as Ryan alleges. The trial court and Court of Appeals determined that psychopathy is a very stable condition and there is no evidence that the

condition changes for the better over time. *Jackson County Department of Human Services v. R.H.H.*, 2023AP1229; 23AP1230; 23AP1231; 23AP1232 (Wis. Ct. App. November 16, 2023) unpublished slip op. at ¶ 51. Dr. Del Cerro testified to the nature of the condition at the dispositional hearing. R.161. The fact that ten years had passed since the evaluation did not change his opinion and therefore did not render the report obsolete.

Since the trial court applied the principles of relevancy and probative value to the report, the court did not erroneously exercise discretion. Moreover, the report tended to make the existence of a fact that was of consequence to the action (any harm in severing parental ties to the children) more probable than it would have been without the evidence. Thus, the trial court properly exercised discretion in admission of the report and there was no error.

CONCLUSION

In this case the parent was not faced with an impossible condition for resumption of visitation with his children and therefore summary judgment was appropriate. Further, the trial court properly exercised its discretion when admitting the report of Dr. Stephen Dal Cerro. Therefore, the decision of the trial court and the Court of Appeals in this case should be affirmed.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of the brief is 6,583 words.

Electronically signed by:
Jeri Marsolek
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