No. 19-_____

In The
Supreme Court of the United States

T.R.C.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ANDREW J. SHAW
Counsel of Record
MARION KOLLER SHAW
SHAW LAW OFFICES
6815 West Capitol Drive
Suite 115
Milwaukee, Wisconsin 53216
(414) 535-9626
shawlawoffices@gmail.com

Counsel for Petitioner
T.R.C.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Is Wis. Stat. §48.415 unconstitutional as applied when it was used to terminate the Fourteenth Amendment fundamental right of familial integrity of a mother due to "continuing need of protection or services" when the mother did not endanger the daughter?

2. Does the Fourteenth Amendment require Wisconsin to protect a parent's fundamental right of familial integrity with strict scrutiny analysis and least restrictive means throughout the termination of parental rights (TPR) case until that right is terminated?

3. Did Wisconsin fail to protect a mother's Fourteenth Amendment fundamental right of familial integrity when the trial court told the mother that a dispositional hearing would be "a bit different" than a termination of parental rights (TPR) trial and the trial court would still consider "all of the evidence" if the mother signed a no-contest plea?

4. Was the guardian ad litem compromised beyond repair, in his role as advocate for the minor child involving her Fourteenth Amendment fundamental right of familial integrity in a termination of parental rights (TPR) case, when a search warrant was issued to seize his computer for child pornography during a "very close to reunification case?"

PARTIES TO THE PROCEEDING

Petitioner T.R.C., who was respondent-appellant below, is an African American citizen who is a resident of the City of Milwaukee, Milwaukee County, Wisconsin, and is biological mother to daughter D.U.C.

Respondent is State of Wisconsin, who was petitioner-respondent below.

RELATED CASES

- *In re the Termination of Parental Rights to D.U.C., a Person Under the Age of 18, State of Wisconsin v. T.R.C.*, Milwaukee County Case No.: 2016-TP-04. Judgment entered October 17, 2017.
- *In re the Termination of Parental Rights to D.U.C., a Person Under the Age of 18, State of Wisconsin v. T.R.C.*, State of Wisconsin Court of Appeals District I, No. 2018-AP-820 (Ct. App. 2019). Judgment entered April 2, 2019.

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The Order Concerning Termination of Parental Rights (Involuntary) was entered on October 17, 2017 (Pet. App. D). On June 28, 2018, the circuit court issued a decision denying the first postremand motion (Pet. App. C). On November 20, 2018, the circuit court denied the second postremand motion (Pet. App. B). On April 2, 2019, the Wisconsin Court of Appeals, District I, affirmed the circuit court's decision and orders in an unpublished decision, *In re the Termination of Parental Rights to D.U.C., a Person Under the Age of 18, State of Wisconsin v. T.R.C.*, No. 2018-AP-820 (Ct. App. April 2, 2019) (Pet. App. A). The Wisconsin Supreme Court declined to hear the Petition for Review on July 10, 2019 (Pet. App. E).

JURISDICTIONAL STATEMENT

The Wisconsin Supreme Court declined to hear the Petition for Review on July 10, 2019. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). This case involves issues regarding the Fourteenth Amendment fundamental right of familial integrity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section I of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, "No State shall . . . deny to any person

within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

Wis. Stat. §48.415 Grounds for involuntary termination of parental rights.

. . . Grounds for termination of parental rights shall be one of the following:

* * *

2) CONTINUING NEED OF PROTECTION OR SERVICES. . . .

> **(a) 1.** That the child has been adjudged to be a child . . . in need of protection or services and placed . . . outside his or her home pursuant to one or more court orders. . . .
>
> * * *
>
> **3.** That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., . . . that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months. . . .

Wis. Stat. §48.21 Hearing for child in custody.

* * *

(5) ORDERS IN WRITING.

(e) 2. The court shall order the county department . . . to conduct a diligent search . . . to locate and provide notice . . . to all adult relatives of the child. . . . The notice shall include . . . the following:

b. . . . options that the person . . . has under state or federal law to participate in the . . . placement of the child. . . .

c. . . . requirements to obtain a foster home license . . . or to receive kinship care or long-term kinship care payments. . . .

INTRODUCTION

Supreme Court Justice Lewis Powell, Jr. wrote the decision for *Moore v. City of East Cleveland*, in which the U.S. Supreme Court held that the Constitution protects the "sanctity of the family":

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we . . . pass down many of our most cherished values, moral and cultural. Ours is by no means a tradition limited to respect for the bonds uniting the

> members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . millions of our citizens have grown up in just such an environment, and . . . have profited from it. *Moore v. City of East Cleveland*, 431 U.S. 494, 504-505 (1977).

TPR = family death penalty.

In this case, Mom-T.R.C. had her parental rights terminated even though she did *not* endanger her Daughter-D.U.C. Causing more unnecessary destruction to this family, instead of using "least restrictive means" to place Daughter-D.U.C. with a fit biological relative, the State is still advocating to have Daughter-D.U.C. adopted to non-biological foster parents, in circumstances that Daughter-D.U.C. would never see her biological family again.

TPRs involving no child endangerment whatsoever unjustly happen to countless American families each year, in cases where the parents' Fourteenth Amendment fundamental right of familial integrity is not adequately protected by strict scrutiny analysis and "least restrictive means." This Petition asks this Court to resolve issues regarding constitutional safeguards for the family so this guidance can be realistically used to protect the integrity and sanctity of American families across the nation.

Mom-T.R.C. respectfully asks this Court to protect the sanctity of her family to require Wisconsin Courts

to enforce her Fourteenth Amendment fundamental right to familial integrity, by strict scrutiny analysis and use of "least restrictive means," which would reunite beloved Daughter-D.U.C. with her mother, brothers, grandmother, and her extended family.

STATEMENT OF THE CASE

This is a TPR case in which Mom-T.R.C.'s[1] parental rights were terminated regarding her 7-year-old disabled Daughter-D.U.C.[2] Mom-T.R.C. is an African American single mother from Milwaukee, Wisconsin, with a poverty background and a criminal conviction,

[1] Due to using initials for confidentiality, the following labels are being used when clarity is needed:

"Mom-T.R.C." – Respondent-Appellant mother of D.U.C.;

"Daughter-D.U.C." – 7-year-old disabled daughter of T.R.C.;

"Grandma-B.C." – D.U.C.'s maternal grandmother;

"Brother-J.H." – D.U.C.'s youngest biological teenage brother;

"Brother-K.C." – D.U.C.'s oldest biological adult brother;

"Cousin-M.M." – D.U.C.'s first cousin, a married registered nurse; and

"Foster Parent-F.L." – Foster parent of D.U.C. for 3½ months prior to the dispositional hearing.

[2] D.U.C. was nearly 6 years old during the October 17, 2017 disposition hearing.

who has three older sons, and Daughter-D.U.C., a medically disabled child. R96-1.

Mom-T.R.C. is self-employed as an African American hair braider, who was honored to be chosen to be a UMOS trainer, for a UMOS training program in 2017.[3] R133-27.

In 2011, Daughter-D.U.C. was born a micro-preemie at 25 weeks gestation, weighing one pound at birth, with a heart defect and gastrointestinal defects, requiring many surgeries, that D.U.C. will live with for the rest of her life. D.U.C. has 40 centimeters of small bowel left, leaving her with the lifelong disability of Short Bowel Syndrome. R105.

Mom-T.R.C. and Grandma-B.C. were at Children's Hospital of Wisconsin every day for 18 months until baby Daughter-D.U.C. was released into Mom-T.R.C.'s care. R96-2. Nurses taught Mom-T.R.C. and Grandma-B.C. how to draw blood, give blood thinner for D.U.C.'s heart defect, cleaning and care of a central line in her chest, cleaning and care of a G-tube (gastrostomy tube), and cleaning of the TPN tube site. R96-2.

Mom-T.R.C. fed via tube and medicated Daughter-D.U.C. for her heart issues, cleaned the G-tube, and kept the central line site and TPN tube site clean when she was an 18-month-old baby at her home for approximately 8 months, D.U.C.'s most medically difficult

[3] UMOS is a non-profit advocacy organization located in Milwaukee that provides programs and services to improve the employment, educational, health and housing opportunities of under-served populations.

time period out of the hospital during her entire life. R96-3.

On or about December 2013, Mom-T.R.C.'s sixth grade son, Brother-J.H., D.U.C.'s teenage brother, who was in trouble in juvenile court made allegations that his home was unsafe, which caused her son Brother-J.H. and Daughter-D.U.C. to be removed from Mom-T.R.C. R96-3. At that time, Mom-T.R.C. had taken Daughter-D.U.C. to Children's Hospital of Wisconsin. D.U.C. was a pediatric patient in Children's Hospital when Milwaukee County served papers on Mom-T.R.C. that the department was going to put Daughter-D.U.C. and her son, Brother-J.H. into protective custody. R96-3. There was no imminent endangerment of Daughter-D.U.C. by Mom-T.R.C. that caused D.U.C. to initially be removed. R96-3-4. Brother-J.H. received special education at school for anger management and related behavioral issues. R96-3. Brother-J.H. later recanted the false allegations. R103-1.

The department determined that Mom-T.R.C.'s home was safe for her son, Brother-J.H., and returned him to his mother's custody, where he currently resides. R103-1. However, Daughter-D.U.C. was not returned. R96-4.

For the next 4 years, several different caseworkers each re-started the process of reunification over. R96-4. Daughter-D.U.C. was sporadically bounced in and out of 10 out-of-home care placements:

12/17/2013 – 12/29/2013	Hospital/Inpatient Facility
2/30/2013 – 2/14/2014	Foster Home LOC3
2/15/2014 – 6/26/2014	Foster Home LOC4
6/27/2014 – 12/30/2014	Foster Home LOC2
12/31/2014 – 1/25/2015	Foster Home LOC2
1/26/2015 – 2/13/2015	Hospital/Inpatient Facility
2/14/2015 – 8/31/2016	Foster Home LOC4
9/1/2016 – 10/17/2016	Foster Home LOC3
10/18/2016 – 6/29/2017	Foster Home LOC4
6/30/2017 – 10/17/2017	Foster Home LOC2

R96-4. During these 4 years, Mom-T.R.C., D.U.C.'s brothers J.H. and K.C. and D.U.C.'s Grandma-B.C. were the only continuous people in her life, with Mom-T.R.C. having 3-day or 2-day unsupervised visitation of Daughter-D.U.C. at times, and at one point, Daughter-D.U.C. was given back to Mom-T.R.C. R96-4.

As Daughter-D.U.C. got older, Mom-T.R.C. went with D.U.C. to occupational therapy, physical therapy, speech therapy, and all doctor appointments including D.U.C.'s cardiologist, gastrointestinal specialist, eye doctor, and dentist. R96-5.

From February 2015 to November 2016, Mom-T.R.C. had unsupervised visits with Daughter-D.U.C. R132-104-105.

Kristen Hintz became a new caseworker in 2015, from South Dakota, and was assigned to this case in November 2016. R132-38-39, 104. Caseworker Hintz knew about D.U.C.'s African American adult Brother-K.C. who had attended college but failed to consider him for guardianship/adoption of D.U.C. R96-6. Hintz also failed to consider D.U.C.'s African American first cousin, Cousin-M.M., a married registered nurse with children about D.U.C.'s age. R96-6. Instead, Hintz put D.U.C. up for national adoption. R132-41.

Early December 2016, legal counsel for Mom-T.R.C. advised her to agree to a no contest plea. Mom-T.R.C. told her lawyer she wanted to go to trial and fight to keep her daughter. R103-1. On December 19, 2016, Mom-T.R.C., under the guidance of her lawyer, took a no contest plea. R103-2.

The Court, in its colloquy, described the disposition was "a bit different" than a TPR trial, the Court would consider "all of the evidence" and outcomes, including getting her daughter back or placement with a fit willing relative:

> Court: . . . by entering your no contest plea, you're not agreeing to termination of your parental rights. . . . at that dispositional hearing . . . you'll still have the ability to challenge whether I should in fact terminate your parental rights.
>
> Court: . . . at this dispositional hearing the issues are a bit different. The only focus at that point will be on what is in [D.U.C.'s] best interest. . . .

> Court: . . . at the dispositional phase of this case, I'll consider all of the evidence . . . it's possible that my decision will be to terminate your parental rights and . . . make [D.U.C.] available for adoption . . . [or] guardianship. It's possible that my decision will be not to terminate your parental rights . . . or . . . order long term placement in foster care or placement with a fit and willing relative. . . .
>
> R124-15-16.

Mom-T.R.C. understood that the Disposition would be "a bit different," as stated by the judge, but essentially a TPR trial and that she still had her full ability with "all of the evidence" to prove that she was a fit parent. R103-2-4.

Following the December 19, 2016 hearing, Mom-T.R.C. worked very hard to prove her fitness as a parent of Daughter-D.U.C. R103-3-4. (See Section I of this brief for details of numerous actions that Mom-T.R.C. did over the next 11 months to demonstrate parental fitness.)

On June 30, 2017, Foster Parent-F.L. became D.U.C.'s foster parent.[4] R96-4.

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[4] Foster Parent-F.L. knew D.U.C. for just 3½ months before caseworker Hintz quickly decided at the October 17, 2017 dispositional hearing that Foster Parent-F.L. should adopt D.U.C., instead of selecting a fit relative, from D.U.C.'s extended family, who knew D.U.C. her entire life.

On July 26, 2017, the circuit court learned caseworker Kristen Hintz intentionally shortened Mom-T.R.C.'s Sunday visitation hours, on Mom-T.R.C.'s day off from work, and added more visitation hours on Monday, during Mom-T.R.C.'s work hours, so that Foster Parent-F.L. had more Sunday hours to go camping with D.U.C. R129-5-6.

Mom-T.R.C. scheduled the August 16, 2017 doctor's visit to pediatric gastrointestinal specialist Dr. Praveen Goday, MD because Daughter-D.U.C. was having ongoing issues with loose stools after Dr. Goday instructed that D.U.C. could start eating table foods. R133-13-14. Mom-T.R.C. attended the August 16, 2017 doctor visit, during which Dr. Goday diagnosed D.U.C. as lactose intolerant and changed her diet to reduce dairy and fruit in an effort to resolve the "loose stools" problem. R103-4.

On August 17, 2017, caseworker Kristen Hintz, informed the Court that there was "new news" that Daughter-D.U.C. was diagnosed as lactose intolerant, "which may be . . . the difficulty with . . . her being sick":

> Ms. Hintz: . . . new news as of yesterday for an appointment . . . [Mom-T.R.C.] was present at, a doctor's appointment at the GI clinic with [D.U.C.] and [Foster Parent-F.L.] . . . It appears that [D.U.C.] is lactose intolerant and cannot also eat food [sic], which may be . . . the difficulty with her bowel movements and her being sick after her visits with her mother [Mom-T.R.C.]. . . . [Mom-T.R.C.] wasn't aware

> of these things. I wasn't aware that [D.U.C.] was possibly lactose intolerant and couldn't have food [sic], like one serving a week is now the recommended food intake for her. . . . [5]
>
> R130-4-5.

Caseworker Hintz told the court that it wasn't Mom-T.R.C.'s fault, "[Mom-T.R.C.] wasn't aware of these things." R130-4-5.

Caseworker Kristen Hintz testified Mom-T.R.C. reduced dairy and fruit as soon as it was identified by Dr. Goday as a problem. R132-60. By mid-September 2017, D.U.C.'s loose stools issue had already improved, just one month after Dr. Goday's new August 16, 2017 instructions, and this issue remained improved. R103-4.

At the October 17, 2017 disposition hearing, caseworker Kristen Hintz testified the State had been "very close to reunification," of Mom-T.R.C. and Daughter-D.U.C. on multiple occasions. R132-84. The "reunification barrier," claimed by caseworker Hintz was that Mom-T.R.C. was causing Daughter-D.U.C. to be "sick":

> Ms. Hintz: I am unaware of any service that we haven't provided to [Mom-T.R.C.] to move this case towards *reunification*.
>
> Q. Have you been able to figure out what the *barrier* is?

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[5] The word "food" is an error in the transcript; the correct word is "fruit." On August 16, 2017, Dr. Praveen Goday diagnosed D.U.C. as lactose intolerant, restricting dairy, and limited her *fruit* to one serving per week in order to resolve the loose stool issue. R132-60.

> Ms. Hintz: . . . I am confused in regards to why *[D.U.C.] is getting sick after visits* . . . when I do go out, [Mom-T.R.C.] knows how to give her the appropriate feeds and will verbalize that, and she can verbalize the special needs of [D.U.C.], but it just appears that it's not being appropriately met when she is unsupervised with [D.U.C.].
>
> R132-86. (Emphasis added.)

During testimony, caseworker Hintz omitted her new knowledge, that the loose stools reunification barrier issue had already been resolved when Dr. Goday diagnosed D.U.C. with lactose intolerance and limited dairy and fruit on August 16, 2017, and Hintz knew it was *not* Mom-T.R.C.'s fault. R130-4-5.

Foster Parent-F.L. alleged that one day, a diaper was left on D.U.C. during the entire multi-hour visit with Mom-T.R.C. R132-26-27.[6]

Caseworker Kristen Hintz testified her supervisor overruled Hintz when deciding that Mom-T.R.C. did not need supervised visits with D.U.C. R132-106. However, Hintz and her helper Alice supervised and scrutinized numerous tube feedings of D.U.C. performed by Mom-T.R.C. over many months, with no issues. R132-43-54. Hintz testified that Mom-T.R.C. properly administered tube feeds and medications to D.U.C. R132-68.

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[6] Foster parents have motives to lie about biological parents. Foster Parent-F.L. receives about $1,000 per month to keep D.U.C. in her home.

In contrast, caseworker Kristen Hintz was not concerned about D.U.C.'s 24 hours of loose stools after Foster Parent-F.L. gave D.U.C. pizza in October 2017, just days before the dispositional hearing. R132-17. Besides loose stools at the foster home, D.U.C. had an unexplained "seizure-like episode" just hours after being in care of Foster Parent-F.L. R132-50, and D.U.C. also fell on stairs twice and got a cut within just 3½ months of Foster Parent-F.L.'s foster care R132-97-98, all of which Hintz, the State, and the Assigned-GAL did *not* find were barriers for adoption.

On October 17, 2017, the court terminated Mom-T.R.C.'s parental rights based upon this reasoning:

> Court: . . . I think that [Mom-T.R.C.] has made considerable strides . . . because of that struggle . . . foster placement . . . appears to be . . . well suited to address those significant medical needs, I find . . . that this . . . weighs in favor of termination of parental rights. R133-47.
>
> Court: . . . [Mom-T.R.C.] spent considerable time there caring for her child [in the hospital] . . . in the N.I.C.U. . . . Nevertheless, [D.U.C.] spent a significant amount of time in out-of-home care. [Mom-T.R.C.] has tried very hard to reunify with her. . . . But [Mom-T.R.C] has not been able to successfully . . . reunify. R133-53.
>
> Court: I know that if I do not order termination of parental rights [D.U.C.] will continue to have a loving mother and other loving

> family members who are very committed to her. R133-54.
>
> Court: . . . I do believe that [D.U.C.] has not always received adequate care during her visits with [Mom-T.R.C.]. I do believe there have been significant stretches of time when [Mom-T.R.C.] has not changed [D.U.C.'s] diaper or attended to her feeding needs adequately during those visits. . . . R133-54.

The Order Concerning Termination of Parental Rights (Involuntary) stated Mom-T.R.C.'s parental rights were terminated due to "continuing need of protection or services." R75-1.

The deadline to appeal lapsed. On April 6, 2018, Mom-T.R.C.'s newly hired appellate attorney filed a motion to extend time to file notice of appeal, which was granted. On April 27, 2018, Mom-T.R.C. filed her notice of appeal.

On May 15, 2018, Mom-T.R.C. filed a motion for remand to the juvenile court. On May 18, 2018, the Court of Appeals issued an order to remand the case to the juvenile court.

On June 28, 2018, the circuit court issued a Decision denying the motion for remand. R99. The Decision on Remand Motion stated: 1) the rules of evidence did not apply to the dispositional hearing, pursuant to Wis. Stat. §48.299; and 2) this TPR case did not require expert medical testimony by D.U.C.'s doctor, Dr. Praveen Goday, to prove caseworker Hintz's alleged "sickness"

of D.U.C., because it could be proven by lay opinion testimony of the caseworker. R99.

On July 5, 2018 Mom-T.R.C. filed a motion for a second remand to the juvenile court. On July 16, 2018, the Court of Appeals issued an order for a second remand of the case to the juvenile court.

On July 25, 2018, Mom-T.R.C. filed a second postremand motion at juvenile court.

On November 6, 2018, Mom-T.R.C. filed a supplemental brief that Assigned-GAL's[7] independent judgment was compromised beyond repair by probable cause to seize his computer for alleged child pornography. R109. On November 19, 2018, a subpoena duces tecum was served on Milwaukee County District Attorney John Chisholm or designee. On November 20, 2018, prior to the second postremand hearing, Deputy District Attorney Elizabeth Mueller came to court to state that she would not be producing photocopies of the underlying documents for the search warrant. R134-5.[8]

On November 20, 2018, the juvenile court denied Mom-T.R.C.'s second postremand motion. R134.

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[7] "Assigned-GAL" refers to the guardian ad litem assigned to D.U.C. from approximately 2016 to August 2018, including during the no-contest plea and during the dispositional phase, up until he was removed from the case, due to alleged 900+ child pornography viewings at his office computer.

[8] The District Attorney's Office issued the search warrant that it would not produce.

On April 1, 2019, the Wisconsin Court of Appeals, District I denied Mom-T.R.C.'s motion for a three-judge panel.[9]

On April 2, 2019, the Wisconsin Court of Appeals, District I, affirmed the circuit court's decision and orders in an unpublished decision. *In re the Termination of Parental Rights to D.U.C., a Person Under the Age of 18, State of Wisconsin v. T.R.C.*, No. 2018-AP-820 (Ct. App. April 2, 2019). The Wisconsin Supreme Court declined to hear the Petition for Review on July 10, 2019.

Mom-T.R.C., D.U.C.'s brothers J.H. and K.C., and Grandma-B.C. have not seen R134-7 or heard from Daughter-D.U.C. since October 2017. R134-23-24.

REASONS FOR GRANTING THE PETITION

I. Mom-T.R.C. Demonstrated That She is A Fit And Willing Parent.

Mom-T.R.C.'s parental rights were unconstitutionally terminated for the overly broad and vague reason of "continuing need of protection or services," pursuant to the application of Wis. Stat. §48.415(2), despite no factual evidence that Daughter-D.U.C. was "endangered" in any way. The caseworker testified that the "reunification barrier" was "loose stools" of permanently gastrointestinal-disabled Daughter-D.U.C. after a few

[9] A proper motion for a three-judge panel was timely filed but the motion was denied, and Mom-T.R.C. was given only one judge for the TPR case, which is considered the "family death penalty."

visits with Mom-T.R.C. R132-86, which never "endangered" D.U.C. The application of Wis. Stat. §48.415 is overly broad such that unbridled discretion was used to terminate Mom-T.R.C.'s parental rights for the reason of loose stools with no child endangerment.

A few instances of loose stools in diapers is pretext for rationalizing this extremely lengthy case, involving racial bias. For 4 years, different caseworkers repeatedly re-started the process of reunification with Mom-T.R.C., thereby being "very close to reunification" on multiple occasions R132-84, while Daughter-D.U.C. was sporadically bounced in and out of 10 out-of-home care placements. R96-4.

In October 2017, when Foster Parent-F.L. ignored Dr. Goday's diet instructions and fed pizza to D.U.C., causing D.U.C. to have 24 hours of loose stools, just days before the dispositional hearing. R132-17. (App. 42), the State, GAL, and CPS still wanted Foster Parent-F.L. to adopt D.U.C.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution offers individuals "heightened protection against government interference with certain fundamental rights and liberty interests" regardless of the procedure employed by the government. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Unconstitutional "as-applied" means that the law is unconstitutional as applied to the challenger. *State v. Smith,* 323 Wis.2d 377, 780 N.W.2d 90 (2010). A party has standing to challenge a statute's constitutionality if that party has suffered a

threatened or actual injury and the interest asserted is recognized by law. *State v. Oak Creek*, 232 Wis.2d 612, 605 N.W.2d 526 (2000).

Caseworker Kristen Hintz testified that the State was "very close to reunification," of Mom-T.R.C. and Daughter-D.U.C. on multiple occasions. R132-84.

At the October 2017 dispositional hearing, caseworker Kristen Hintz testified regarding a long list of parental actions of Mom-T.R.C. that were *not* at issue for this TPR case:

- Mom-T.R.C. took care of D.U.C.'s medical needs at home, full-time from February 2013 to December 2013 (when D.U.C. was approximately 18-months-old). R132-61.
- Mom-T.R.C. had no cognitive issues, no mental health impediments, no domestic violence issues, and Mom-T.R.C. was not under the influence of drugs. R132-96-97.
- Mom-T.R.C. properly administers the feeds and medications to D.U.C. R132-68.
- Mom-T.R.C. understands D.U.C.'s medical issues and how to address them. R132-69.
- Mom-T.R.C. used the appropriate amounts of table food for D.U.C. and packed up appropriate amounts of foods into baggies to be visually reviewed by Hintz. R132-60.

- Even though Mom-T.R.C. did not own a car, Mom-T.R.C. went to D.U.C.'s "more important" doctor visits. R132-99-100.
- Mom-T.R.C. took photos of unsupervised feedings on her cell phone to send to Hintz. R132-55-56.
- Mom-T.R.C. consistently had cell phone conversations with helper Alice or Hintz about 15 minutes about their location prior to the many times that Alice or Hintz watched Mom-T.R.C. administer tube feedings. R132-52.
- Mom-T.R.C. consistently contacted Hintz about her work schedule. R132-103.
- Mom-T.R.C. called to verify dates/times of upcoming doctor visits. R132-100-101.
- Mom-T.R.C. was gainfully self-employed as an African American hair braider, honored to be chosen to train other people under a UMOS training program in 2017. R133-27.
- Mom-T.R.C. did not miss visits with Daughter-D.U.C. R132-35.
- Daughter-D.U.C. has a loving bond with Mom-T.R.C. and excitement to hug her mom and say "I love you" whenever she saw her mom. D.U.C. was always excited to see Brother-J.H. and Grandma-B.C. R132-71.

Neither the State nor the GAL disputes the above testimony regarding Mom-T.R.C.'s parenting.

II. Daughter-D.U.C. Was Not "Sick," She Has A Lifelong Disability Of Short Bowel Syndrome.

On August 17, 2017, caseworker Kristen Hintz told the Court that there was "very new news" that D.U.C. was diagnosed as lactose intolerant by Dr. Praveen Goday, her pediatric GI specialist, "which may be . . . the difficulty with her bowel movements and her being sick after visits with her mother":

> Ms. Hintz: . . . Very new news as of yesterday for an appointment that I was not present at [Mom-T.R.C.] was present at, a doctor's appointment at the GI clinic with [D.U.C.] and [Foster Parent-F.L.]. . . . It appears that [D.U.C.] is lactose intolerant and cannot also eat food,[10] which may be some of the difficulty with her bowel movements and her being sick after her visits with her mother. . . . [Mom-T.R.C.] wasn't aware of these things. I wasn't aware that [D.U.C.] was possibly lactose intolerant and couldn't have food, like one serving a week is now the recommended food intake for her. . . . R130-4-5.

Foster Parent-F.L. testified that D.U.C.'s loose stools issue after visits with Mom-T.R.C. had already significantly improved by mid-September 2017, just one

[10] The intended word is "fruit," not "food." See footnote 5.

month after following Dr. Goday's new August 16, 2017 food instructions, and this issue remained improved until the October 17, 2017 dispositional hearing. R132-17.

Daughter-D.U.C. was never "sick" with loose stools; D.U.C. has a lifelong disability of Short Bowel Syndrome, which causes loose stools. D.U.C. has only 40 centimeters (1.3 feet) of small intestines (R105), when the average person has 20 feet of small intestines. Short Bowel Syndrome is not a "sickness," but is a permanent disability, for which D.U.C. will experience problems with loose stools for the rest of her life.

According to the National Institute of Diabetes and Digestive and Kidney Diseases: 1) the main symptom of Short Bowel Syndrome is "loose watery stools" and; 2) people with Short Bowel Syndrome are more likely to develop lactose intolerance, which causes diarrhea:

> . . . The main symptom of short bowel syndrome is diarrhea – loose watery stools. . . .
>
> . . . People with short bowel syndrome are also more likely to develop food . . . sensitivities, such as lactose intolerance. Lactose intolerance is a condition in which people have digestive symptoms – such as . . . diarrhea . . . after eating or drinking milk or milk products. . . . [11]

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[11] *Short Bowel Syndrome*, The National Institute of Diabetes and Digestive and Kidney Diseases website, https://www.niddk.nih.

However, even after caseworker Hintz learned new information in August 2017 that D.U.C. was diagnosed as lactose intolerant and needed a more restrictive table food diet from Dr. Goday, limiting dairy and fruit, and it was not Mom-T.R.C.'s fault R130-4-5, Hintz maintained her former stance, testifying at the dispositional hearing on October 17, 2017, that the reunification "barrier" was that she still did not know why D.U.C. was "sick" with "loose stools," wrongly blaming Mom-T.R.C. R132-86.

The State failed to prove up its case because it had no medical expert testimony and no medical evidence that D.U.C. was "sick" or "endangered" as caused by Mom-T.R.C.'s care, which caseworker Hintz testified was the only barrier to reunification. R132-86.

The State did not meet Wis. Stat. §48.02(12g)'s Definition of "Neglect" because no medical expert testified that D.U.C.'s physical health was "seriously endangered" by Mom-T.R.C.:

> **48.02 Definitions. . . .**
>
> (12g) "Neglect" means failure, refusal, or inability on the part of the 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.

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gov/health-information/digestive-diseases/short-bowel-syndrome (last visited September 2, 2019).

Loose stools in diapers do not "seriously endanger the physical health of the child," and is, therefore, not statutory "Neglect," as defined in Wis. Stat. §48.02(12g).

Caseworker Kristen Hintz is not a medical expert because she lacks the "scientific knowledge" required to testify regarding the medical allegations of "sickness" that she raised, thereby not meeting the *Daubert* qualifications to testify as medical expert. The "trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589 (1993).

However, when appellate counsel produced pediatric gastrointestinal specialist Dr. Praveen Goday, D.U.C.'s doctor, at court to provide medical expertise for why D.U.C.'s loose stools did *not* mean that D.U.C. was "sick" or "endangered," the court ruled that Dr. Goday could not testify. R134-24.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision at the factfinding proceeding." *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388 (1982). The State and the Assigned-GAL did not object to the court refusing to allow Dr. Goday's medical testimony. R134-24.

Appellate counsel submitted an Offer of Proof for Dr. Praveen Goday, MD that he would have testified the following:

1) He has been a pediatric gastrointestinal specialist who has been treating physician regarding [D.U.C.'s] GI disability for several years.

2) [Mom-T.R.C.] attended many doctor visits with [Daughter-D.U.C.] over the course of several years at Dr. Goday's office, according to medical/office records.

3) In 2017, Dr. Goday instructed [Mom-T.R.C.] to experiment with [Daughter-D.U.C.'s] table foods.

4) During those same months in 2017 when [D.U.C.'s] experimentation with table foods took place, loose stools also took place.

5) The Gastrointestinal consequences of [D.U.C.] trying certain new table foods per Dr. Goday's instructions was loose stools.

6) [Mom-T.R.C.] was the person who requested the August 16, 2017 visit for [D.U.C.] at Dr. Goday's office in order to address loose stools, according to medical/office records.

7) On or about August 16, 2017, [Mom-T.R.C.] attended [D.U.C.'s] doctor visit with Dr. Goday.

8) On or about August 16, 2017, Dr. Goday diagnosed [D.U.C.] with lactose intolerance, and he made a new table food diet for [D.U.C.], omitting dairy, and limiting

> fruit, in order to reduce [D.U.C.'s] problem of loose stools.
>
> 9) Prior to August 16, 2017, [D.U.C.] had been allowed by Dr. Goday to eat table food that included dairy products, which caused loose stools.
>
> 10) The loose stools caused by trying new table foods per Dr. Goday's instructions did *not* mean that [D.U.C.] was "sick" or "endangered" from loose stools.
>
> 11) Terminating parental rights was *not* medically warranted based upon [D.U.C.'s] loose stools as a result of trying new table foods in 2017, due to Dr. Goday's table diet instructions.
>
> R111-1-2.

Dr. Goday's testimony was material and relevant. Had Dr. Goday been allowed to testify, his medical testimony would have proven that there is no merit for this TPR.

III. Least Restrictive Means Were Not Applied To Mom-T.R.C.

Mom-T.R.C. did all possible parental actions she could to prove her fitness to the caseworker. Further, two biological adult relatives, adult Brother-K.C. who informed the court he is willing to be guardian/adopt his sister (R97) and married registered nurse Cousin-M.M. (R96-6), are fit African American relatives capable of guardianship/adoption. R96-6. Instead, the State

still wants adoption to a non-biological foster parent who has severed all contact with D.U.C.'s mother, brothers, and extended family. R134-23-24.

The Illinois Supreme Court held that Illinois's statutory adoption of the Adoption and Safe Families Act of 1997 (ASFA)'s "15/22 months" technical presumption of parental unfitness, was "not narrowly tailored" and unconstitutional because it results in illogical "Alice-in-Wonderland rulings" of fit capable parents losing their children:

> As E.W. explains: A parent . . . could present evidence of her ability to care for her child as part of the best interest phase. . . . The court . . . could rationally conclude that a parent is . . . fit, . . . capable of safely and adequately caring for the child, yet still conclude that the child's best interests will not be served by returning the child to the parent's home. [It] compels trial court to make the Alice-in-Wonderland ruling that a fit parent is, by force. We agree with the position advanced by E.W.

In Re HG, 757 N.E.2d 864, 197 Ill. 2d 317 (2001).

Analogous to *In Re HG*, the trial court's application of Wis. Stat. §48.415 violated Mom-T.R.C.'s Fourteenth Amendment fundamental right to familial integrity by terminating her parental rights for reasons other than actual parental unfitness and in a manner "not narrowly tailored." The evidence that it is unconstitutional as applied is that there is a gross result where a family with *no* endangerment issues is

permanently destroyed, in the harshest means possible, by adoption to non-related foster parents who have refused to allow Daughter-D.U.C. to communicate with her mother and brothers since October 2017.

IV. The Court Did Not Apply Strict Scrutiny Analysis Required To Protect Mom-T.R.C.'s Fourteenth Amendment Right Of Familial Integrity.

The trial court did not use strict scrutiny analysis required to protect Mom-T.R.C.'s Fourteenth Amendment fundamental right of familial integrity. Mom-T.R.C. has the fundamental constitutional right, to keep a parent and child together, whenever possible. The fundamental right to familial integrity is protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95 (1982). The forced separation of parent from child, even for a short time, represents a serious infringement upon both the parent's and child's rights. *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) citing *Jordon v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994).

Mom-T.R.C.'s constitutional right of familial integrity with Daughter-D.U.C. is a fundamental right, requiring strict scrutiny analysis. The U.S. Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) held that "fundamental constitutional guarantees," require strict scrutiny analysis because "a government purpose to control or prevent activities constitutionally subject to state regulation may not be

achieved by means that sweep unnecessarily broadly." Professor Roy Spece and David Yokum, in their law journal article *Scrutinizing Strict Scrutiny*, explain the strict scrutiny analysis in simple terms:

> Even if a plaintiff shows a fundamental right . . . , he will only be protected by strict scrutiny if he shows a "substantial intrusion" on the fundamental right. Spece at 304.
>
> The Court's most common articulations of strict scrutiny . . . make explicit two component inquiries, with the government bearing the burden of proof on each. These components are *compelling state interest* and either *necessity* or *narrow tailoring*. Spece at 95.
>
> The government action must . . . [address] an actual problem, a problem that has not already been adequately dealt with, and a problem that cannot be addressed through the use of a less or least restrictive alternative. Spece at 296.
>
> . . . scrutiny looks to whether . . . a problem can be dealt with in an alternative way that treads less on individual rights. It ensures that a government will not gratuitously trammel rights. . . . Spece at 309.
>
> Roy G. Spece & David Yokum, *Scrutinizing Strict Scrutiny*, 40 Vt. L. Rev., 285-351 (2015).

The State has two main compelling interests: 1) Protection of Mom-T.R.C.'s fundamental constitutional right of familial integrity; Spece at 305; and 2) A

parens patriae interest in preserving and promoting the welfare of the child Daughter-D.U.C., which "favors preservation, not severance, of natural family bonds." *Santosky*, 455 U.S. at 766.

The court must use "least restrictive means" and "narrow tailoring" to restrict fundamental constitutional parental rights. *Griswold*, 381 U.S. at 485. The functional reason why "least restrictive means" is applied, is because it forces the State to methodically evaluate the full set of legal measures available in order to adequately achieve their goal of safety of the child while choosing the least harsh approach of restricting this fundamental right – such as doctor inspections at scheduled appointments or fit willing biological relatives for guardianship/adoption – with the purpose of avoiding, whenever possible, the harshest measure of adoption to a non-biologically-related person who has no interest in preserving the familial connection of the mother and child.

Without "least restrictive means" and "narrow tailoring," there is no objective standard applied to the parent's and the child's fundamental constitutional rights, which allows unbridled discretion that results in highly subjective illogical rulings that are arbitrary and manifestly unjust.

U.S. Supreme Court Justice Abraham Fortas was critical of attempts by juvenile court judges to replace constitutional rights with their own unbridled discretion, which, in *In re Gault*, resulted in the extraordinarily harsh punishment for obscene phone calls of a

maximum of 6 years custody for 15-year-old Gerald Gault as a "delinquent child" given no constitutional safeguards than had Gault been fully protected by constitutional rights as an adult to potentially receive a maximum of two months jail and a $50 fine:

> . . . the highest motives and most enlightened impulses led to a peculiar system for juveniles . . . in practice. . . . Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. *In re Gault*, 387 U.S. 1, 17-19 (1967).

Required Constitutional procedure and analysis are called "safeguards" because the required analysis helps protect U.S. citizens from egregious rulings based on unbridled discretion by lower courts.

With D.U.C. returned to Mom-T.R.C., there is already a built-in "least restrictive" means of protecting D.U.C. because D.U.C. regularly sees several different medical professionals every month (R132-99-100) who frequently inspect D.U.C.'s bodily integrity/safety and who have the authority to immediately act to get D.U.C. removed from her home if she is abused,

neglected, or otherwise endangered, pursuant to Wis. Stat. §48.981(2).

Wis. Stat. §48.21(5)(e)(2) requires the agency providing services to the child "conduct a diligent search" to locate and provide notice to "all adult relatives of the child," of options to participate in the care/placement of the child and the requirements to obtain a foster home license.

Caseworker Kristen Hintz testified that she believed it would *not* be harmful to D.U.C. to legally sever her ties with her mother, her brothers, her grandma, and her maternal family members. R132-81-82.

At appeal, the State claimed that Mom-T.R.C. did not even argue for placement of Daughter-D.U.C. with her biological family, instead of non-relative adoption:

> T.R.C. complains that the trial court did not consider relatives, but these relatives were never offered to the court as an alternative to TPR, as T.R.C. was fighting for D.U.C. to come home and not arguing for placement with family. State Appeal Brf. p. 34.

Of course, Mom-T.R.C. wants beloved Daughter-D.U.C. to stay within her biological family! A natural parent's "desire for, and right to, the companionship, care, custody, and management of his or her children" is an interest far more precious than any property right. *Santosky v. Kramer*, 452 U.S. at 27, quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Mom-T.R.C. could visit D.U.C. frequently if she lived with a biological relative. For the State to argue at appeal that

Mom-T.R.C., an African American mother, would not care whether a close family relative or a complete stranger got custody of her daughter evokes historical slavery arguments rationalizing taking African American slave children from their biological parents to sell to strangers.

Two African American relatives were good candidates for guardianship/adoption of D.U.C. but were not considered by the State. Caseworker Kristen Hintz fully knew that D.U.C.'s African American adult Brother-K.C. existed, who attended 2 years of college, was gainfully employed, and had no criminal record but she never considered him for guardianship/adoption of D.U.C. R96-6. Hintz's intentional decision to deliberately not provide K.C., a young African American man, of his options for guardianship/adoption of his sister D.U.C., required to be given to K.C. by Wis. Stat. §48.21(5)(e)(2), evokes the "Black baby daddy" stereotype of all young African American men automatically not being responsible enough to take care of children. The reality is that countless young African American men take good care of minor children across our nation.

Cousin-M.M., D.U.C.'s first cousin, biologically related, was a registered nurse employed at a hospital and married with young children around D.U.C.'s age, who lived in the Milwaukee area during 2017 R96-6, was another fit biological relative for guardianship/adoption of D.U.C. Instead of considering fit biological relatives, caseworker Hintz, instead, put D.U.C. up for national adoption. R132-41.

Daughter-D.U.C. is a little girl who dearly loves her family:

> Ms. Hintz: [D.U.C.] will ask me on the car ride if she is going to get to see nana or buba . . . I normally say well, buba might be at school. . . . Buba in reference is [Brother-J.H.], and she calls [Grandma-B.C.] nana. . . . at [Mom-T.R.C.'s] house, . . . she is excited by the time we are walking up the stairs, and when she sees her mom open the door, she does get excited and gives her mom a hug, and she says I love you right away. So [D.U.C.] has a level of excitement. . . .
>
> R132-71.

D.U.C., who cried after visits when she was taken away from Mom-T.R.C. R132-25, has been needlessly ripped from her mom, brothers, grandma, and her extended family.

The United States Government Accountability Office's research found that placement of African American children into their extended families was "less stressful to the child" and "maintain[s] familial ties":

> African American children are more likely . . . to enter into the care of relatives . . . child welfare researchers and officials . . . considered these placements [with relatives] to be positive options for African American children

> because they are less stressful to the child and maintain familial ties.[12]

Brother-K.C. informed the circuit court by affidavit that he *still* wants to be guardian/adopt his younger sister D.U.C., instead of his sister being adopted to non-biological foster parents. R97-1-2.

V. The Court Failed To Protect Mom-T.R.C.'s Fourteenth Amendment Fundamental Right Of Familial Integrity.

The parent must have knowledge of the Constitutional rights given up by a no contest plea in a TPR case. *Kenosha County, DHS v. Jodie W.*, 293 Wis.2d 530, 716 N.W.2d 845 (2006). The constitution requires an affirmative showing that a plea was entered knowingly, voluntarily, and intelligently. *State v. Bangert*, 131 Wis.2d 246, 257, 389 N.W.2d 12 (1986).

Trial counsel testified Mom-T.R.C.'s goal was getting "D.U.C. back and Mom-T.R.C. was "adamant" about wanting to go to trial:

> Q. . . . [Mom-T.R.C.] was pretty adamant about wanting to go to trial, correct?

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[12] *African American Children in Foster Care: HHS and Congressional Actions Could Help Reduce Proportion in Care*, United States Government Accountability Office, July 31, 2008, GAO-08-1064T, found at: https://www.gao.gov/assets/130/120982.pdf (last visited September 2, 2019).

> A. She was adamant about fighting to get [D.U.C.] back, so yes.
>
> R134-61.

Regarding parental fitness issues, trial counsel testified she had no concerns for Mom-T.R.C. regarding: cognitive abilities, drugs, alcohol, contraband, leaving D.U.C. unattended, and no issues of physical abuse or sexual abuse of D.U.C. R134-62, 65-67.

On December 19, 2016, the first judge, in her colloquy to Mom-T.R.C., erroneously minimized the significance of the no contest plea when characterizing a disposition hearing issues as "a bit different" than a TPR trial:

> Court: Do you understand by entering your no contest plea, you're not agreeing to termination of your parental rights . . . at that dispositional hearing . . . you'll still have the ability to challenge whether I should in fact terminate your parental rights.
>
> A. Yes.
>
> Court: . . . at this dispositional hearing the issues are *a bit different*. The only focus at that point will be on what is in [D.U.C.'s] best interest. . . . I will no longer need to decide whether grounds exist to terminate your parental rights or whether the State has proven grounds by clear and convincing evidence. Do you understand that?

A. Yes.

R124-15. (Emphasis added.)

The first judge continued the colloquy by explaining that the court would consider "all of the evidence" and could still choose to 1) not terminate parental rights; 2) place D.U.C. with a fit and willing relative; 3) continue long term foster care; 4) guardianship of D.U.C.; or 5) make D.U.C. available for adoption:

> Court: Do you understand that at the dispositional phase of this case, I'll consider *all of the evidence*, . . . its possible that my decision will be to terminate your parental rights and then to make [D.U.C.] available for adoption or . . . guardianship. It's possible that my decision will be not to terminate your parental rights . . . or still order . . . guardianship or order long term . . . foster care or placement with a fit and willing relative. Do you understand those are all possible outcomes of the dispositional hearing?
>
> A. Yes. R124-16. (Emphasis added.)

Based upon the court's colloquy, Mom-T.R.C. understood that the disposition hearing truly would be "a bit different" than a TPR trial and that she still had her full ability to prove that she was a fit parent and that her parental rights should not be terminated. R103-2-3. Mom-T.R.C. did not hear the judge explain to her that she was giving up her "constitutional rights" to help keep her daughter, if she agreed to the no contest plea. R103-3.

Mom-T.R.C. took the trial court's words "a bit different" literally, believed them entirely, and then proceeded to subsequently do numerous actions to prove her parental fitness. These facts of Mom-T.R.C. making such great effort to do numerous actions over the next eleven months to prove her parental fitness, directly contradicts waiving of the very rights that would assist her in achieving her family reunification goal, prove that Mom-T.R.C. did *not* knowingly, voluntarily, and intelligently waive her Constitutional rights to contest allegations in the petition by signing a no contest plea.

The Decision on Remand Motion demonstrates how drastic the difference was, because the second judge would *not* hear medical testimony of Dr. Praveen Goday, MD regarding the alleged "sickness" of D.U.C.:

> The post remand motion . . . ignores . . . the procedures for Disposition hearing set forth in of Wisconsin Statutes Section 48.299 . . . even if the testimony offered by both the case manager and the foster parent at the Disposition hearing was opinion testimony, none of the testimony required expert medical knowledge. R99-2.
>
> Since this testimony was something that anyone in the general population would be capable of observing and understanding, no medical expert was needed to introduce the testimony. . . . R99-4.

> Wisconsin Statute Section 48.299 provides that . . . the rules of evidence do not apply at disposition hearings.[13] R99-4.
>
> . . . the State did not rely on a medical diagnosis, but rather on the fact that loose stools occurred regularly after visits. . . . R99-4.

The first judge stated on the record, "I'll consider all of the evidence." R124-16. However, when appellate counsel brought Dr. Goday to court to testify, the court would *not* hear Dr. Goday's medical testimony R134-24, which would have resolved the loose stools/ "sickness" issue, which was the sole barrier for reunification as stated by caseworker Hintz. R132-86. Dr. Goday's medical testimony was relevant, material, had reasonable probative value, and was highly favorable to Mom-T.R.C.'s position. See Offer of Proof for Dr. Goday, R111.

So it was *not* "a bit different," and "all of the evidence" was *not* considered, as the first judge stated to Mom-T.R.C. during the no-contest plea hearing. R124-15-16.

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[13] **Wis. Stat. 48.299(4)(b)** Except as provided in s. 901.05, neither common law nor statutory rules of evidence are binding at . . . a dispositional hearing, . . . revision of dispositional orders, ... At those hearings, the court shall admit all testimony having reasonable probative value. . . . The court shall apply the basic principles of relevancy, materiality, and probative value to proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

Mom-T.R.C.'s constitutional rights were violated when the circuit court misinformed Mom-T.R.C. by describing a dispositional hearing as being "all of the evidence" considered and "a bit different" to a TPR trial to Mom-T.R.C., which Mom-T.R.C. completely believed to her detriment.

VI. The Guardian Ad Litem Was Compromised Beyond Repair.

Constitutional rights and protections apply to minor children. *In re Gault*, 387 U.S. 1 (1967). Daughter-D.U.C. has the fundamental constitutional right of familial integrity, and she wants to be reunited with Mom-T.R.C., her brothers, her grandma, and her extended family.

The Wisconsin Supreme Court Rule 60 Preamble explains that integrity of Wisconsin's judicial system requires that *all* of the parties of our legal system cannot be compromised.

> **SCR 60 Preamble.** Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all provisions of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes

> and a highly visible symbol of government under the rule of law.

On or about November 19, 2018, Mom-T.R.C.'s appellate counsel subpoenaed the Affidavit and Search Warrant that supported the Search Warrant to seize Assigned-GAL's[14] computer on or about August 2018. The State told counsel that the file was sealed. R134-4.

On November 19, 2018, the day before the Second Remand Motion hearing for this case, the District Attorney's Office revealed that the search warrant alleged that:

> 1) Authorities began investigating [Assigned-GAL] between April and July 2018 for a "suspected child pornography incident."
>
> 2) [Assigned-GAL] had "downloaded suspect child pornography" on his docked laptop.
>
> 3) Authorities uncovered "966 web browsing reports" that showed "almost every web browsing search were pornographic related."[15]

The State and new GAL do not dispute Assigned-GAL's secret activity of allegedly over 900 child pornography viewings, allegedly happening during this case. R134-6.

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[14] See Footnote 7.

[15] The search warrant is quoted in: Suzanne Spence, *Former County Lawyer Who Often Represented Kids Investigated For Allegedly Searching Child Porn*, Fox 6 Milwaukee, November 19, 2018, https://fox6now.com/2018/11/19/former-county-lawyer-who-often-represented-kids-investigated-for-allegedly-searching-child-porn/ (last visited September 2, 2019).

On November 20, 2018, a deputy district attorney came to court to questionably explain why the district attorney's office would not produce photocopies of its search warrant and the underlying affidavit requested by the subpoena:

> I contacted our downtown office and was informed that the assistant DA who assisted or approved the search warrant does not have [a] finalized copy of the search warrant, . . . the original is in the clerk's office. That information was provided by ADA Kiefer to Attorney Shaw earlier today once we learned that it had – the seal, it was no longer under seal. I did . . . reach out to our investigators to see if they had a signed copy, but I have not heard back . . . it was my understanding based on the deputy district attorney . . . that our office is not in possession of a signed copy. R134-5.

As a result of the district attorney's office not producing these subpoenaed documents, Mom-T.R.C.'s appellate counsel had no underlying documents regarding Assigned-GAL's actions. At the Second Postremand Motion hearing, Mom-T.R.C.'s appellate counsel stated "we don't know if any of the [porn] photos pertain to [D.U.C.] in this particular case," and the State and new GAL did *not* disagree. R134-8. Without knowing the contents of these documents, the court proceeded with the second postremand hearing.

Given this "very close to reunification" case, the State and Assigned-GAL advocated for the termination of parental rights of Mom-T.R.C. Assigned-GAL

acted as guardian ad litem for D.U.C. during the no-contest plea and during the dispositional phase, which resulted in the parental termination of Mom-T.R.C. from Daughter-D.U.C. when he was allegedly compromised with a secret so dangerous to his freedom.

Wisconsin SCR 20:1.7 states:

> . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

The ABA comment [1] states:

> Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. . . .

The conflict in this case cannot be waived. The Assigned-GAL's loyalty and independent judgment with respect to his ability to represent the best interests of a child are tainted by the finding of probable cause to seize his computer for alleged child porn.

Assigned-GAL was appointed for D.U.C. for the appeal of this case, until he was quietly replaced in August, 2018. Neither the Court nor the State informed Mom-T.R.C.'s appellate counsel of the reason why Assigned-GAL was replaced on this case.

The mere appearance of a predilection to child pornography by the Assigned-GAL in this "very close to reunification" TPR case R132-84, where the Assigned-GAL advocates to remove a child from a biological parent to give her up for adoption, taints this case.

Regardless of the secret contained on the computer, the Assigned-GAL compromised his independent judgment by holding this issue secret and knowing that it could be discovered at any time. Any counsel withholding a secret so significant that the District Attorney's office has probable cause to get a search warrant to seize counsel's computer is vulnerable to blackmail and is compromised beyond repair regarding any significant legal decision of grave consequence for the minor ward.

The Assigned-GAL's compromised status is beyond repair because this case has the "TPR family death penalty" consequence of permanently ripping away a little girl from her biological mother, brothers, and grandmother for her entire childhood – all family members who dearly love this little girl, which is undisputed. In order to protect the public confidence in our judicial system, D.U.C. must be returned to Mom-T.R.C. and her family.

CONCLUSION

For all of the foregoing reasons, Petitioner Mom-T.R.C. respectfully requests that this Court grant this Petition or, in the alternative, provide a summary decision that reverses the underlying appellate decision.

Respectfully submitted,

ANDREW J. SHAW
Counsel of Record
MARION KOLLER SHAW
SHAW LAW OFFICES
6815 West Capitol Drive
Suite 115
Milwaukee, Wisconsin 53216
(414) 535-9626
shawlawoffices@gmail.com

Counsel for Petitioner
T.R.C.