COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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Nos. 99-1510
99-1511

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NO. 99-1510

IN THE INTEREST OF KEVIN P. M., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

THOMAS M.,

RESPONDENT-APPELLANT.

NO. 99-1511

IN THE INTEREST OF STEVEN M. M., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

THOMAS M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 DYKMAN, P.J.[1] This is an appeal from an extension order arising out of a CHIPS petition. Thomas M., the father of Kevin P.M. and Steven M.M. asserts that: (1) the conditions for the return of his children violate several of his constitutional rights; (2) the trial court erroneously exercised its discretion to extend the Dane County Department of Human Service's supervision of the children because the department failed to protect one of his children and the child's property while the child was in foster care; (3) the department did not serve a report on the parties; and (4) the failure to serve the parties denied him due process of law. We resolve all but two parts of these issues against Thomas M. and therefore affirm in part and reverse in part.

¶2 Thomas M. tells us that, in 1996, Kevin P.M. and Steven M.M. were adjudicated children in need of protection or services. Several extension orders were issued after the initial order, culminating with an order dated June 4, 1999, from which this appeal is taken. Thomas M. identifies four issues, which we will address serially.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

¶3 The following conditions in the extension order form the basis of Thomas M.'s first issue:

> b. The parents must not talk about adult issues during visits.
>
> c. The parents must not make promises about the future to the children or talk about where they will live.
>
> d. The parents must not make negative comments to the children about the Department, the foster parents or their involvement with juvenile court.
>
> e. The parents must not make any blaming statements to the children and they shall not talk about the government during visits.

¶4 Thomas M. asserts that these conditions abridge his freedom of speech, and are unconstitutionally vague because they are not defined. But the cases he cites concerning his freedom of speech are not helpful. While ***Cleveland Bd. of Educ. v. LaFleur***, 414 U.S. 632 (1974), ***Roe v. Wade***, 410 U.S. 113 (1973), ***Griswold v. Connecticut***, 381 U.S. 479 (1965) and ***Skinner v. Oklahoma ex rel. Williamson***, 316 U.S. 535 (1942), are significant cases in constitutional jurisprudence, they are of little assistance in determining whether a trial court may constitutionally prevent a non-custodial father from making certain promises, negative comments or blaming statements during visitation with his children. ***Skinner*** was an equal protection case. ***Skinner***, 316 U.S. at 541. ***Griswold*** recognized a right of privacy in marital sexual relations. ***Griswold***, 381 U.S. at 485-86. ***LaFleur*** holds that public school maternity leave rules which needlessly, arbitrarily or capriciously impinge on a teacher's marriage and family life violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. ***LaFleur***, 414 U.S. at 639-40. ***Roe*** held that where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest. ***Roe***, 410 U.S. at 155. Dane County does not

take issue with the constitutional concepts behind these cases, nor do we. But none of the cases cited hold that the state cannot infringe upon a constitutionally protected right under any circumstances or that constitutional rights are absolute. Indeed, a reading of these cases shows that balancing state interests against constitutional rights is a cornerstone of our constitutional jurisprudence.[2]

¶5 Thomas M. has cited no case which discusses the balance between First Amendment free speech rights and state interests in a family law setting. ***Organization For A Better Austin v. Keefe,*** 402 U.S. 415, 419 (1971), tells us that if government intends a prior restraint on expression, it carries a "heavy burden of showing justification for the imposition of such a restraint." Thomas M. assumes that this burden has not been met. We conclude that it has.

¶6 The evidence shows that Thomas M. harbors an extreme view of government. He testified that he cannot trust any government, or any employee of any government because they get "uppity." The court had access to a social worker's report noting that Thomas M. has been diagnosed as anti-social, sociopathic passive-aggressive. He admits to drinking on a daily basis, but denies that this is a problem. He has a long history of AODA abuse. For a period of one-and-one-half years, he and his wife were heavily using crack and drinking. They also admitted to dealing drugs for three years. Thomas M. showed up for a visit with his children extremely intoxicated, and drank through two meetings with a social worker. When he, his wife and his children were in Illinois, the children

[2] It is possible that ***Lange v. Lange***, 175 Wis.2d 373, 502 N.W.2d 143 (Ct. App. 1993), provides an answer to Thomas M.'s assertions. A full reading of all four opinions in that case could form the basis to conclude that if a divorce statute permits a trial court's order, there is no First Amendment violation when a trial court uses the statute to restrict First Amendment rights. We have chosen to inquire into the constitutional question here without relying upon ***Lange***.

were in foster care for seven months due to extreme neglect, AODA abuse by the parents, and a filthy and unsafe house. Teachers in Wisconsin recalled that they made reports to the Department of Human Services regarding physical abuse, emotional abuse, and neglect. Thomas M. is not motivated to make a permanent change, even for his own children. He was verbally aggressive and abusive to a social worker. According to the report, he was incarcerated from July to December of 1998 for a probation violation. Thomas M. describes himself as a sovereign American citizen, a sovereign citizen of the planet earth.

¶7 The trial court noted Thomas M.'s response to the proceedings and stated: "You should hear yourselves. This is not about Steven, it's not about Kevin and it's not about Erin—this is about anger at each other. Pitting yourselves one against the other. That's what this is about. This sounds terrible. That's what I'm hearing."

¶8 Except for a part of the trial court's order, Dane County has met the heavy burden of showing a justification for the restraint placed upon Thomas M.'s freedom of expression. The social worker's report noted that Steven M.M. "really seems to have serious emotional disturbances." He is eligible for special education because of emotional disabilities. Kevin P.M. is disturbed and aggressive toward his siblings. Both children show angry and aggressive behaviors.

¶9 Much of the hearing involved Thomas M.'s assertions that Dane County was improperly keeping him from his children and his desire to have them returned to him "with no conditions whatsoever." Making promises to his children about future events or talking to them about where they will live when the future was, at best, in a state of flux would be confusing and harmful to the

children. Making negative comments about the Department of Human Services, the foster parents and the juvenile court would inevitably make it more difficult to change the behavior of disturbed and aggressive children. The same is true as to blaming statements. Even a cold record shows that Thomas M. refuses to consider that his actions are a substantial factor in his children's problems and behavior. Children most often learn what they are taught, and Thomas M.'s negative, anti-social and aggressive stance are hardly likely to teach his children to be positive members of any community.

¶10 Thus, nearly all of the trial court's visitation restrictions are justified by the circumstances of this case. It is the trial court's requirement that Thomas M. not talk about the government during his visits with his children that is not supported. After prohibiting Thomas M. from talking about government during visits, the court noted: "And I guess I would be careful about that, and emphasize there are areas of government they can clearly talk about. I think the point is that we're trying to make this visit such that they're positive for the kids and they don't go away with a whole bunch of negative feelings."

¶11 The difficulty with this provision is more akin to the vagueness issue we will next discuss. The problem, as the trial court recognized, is that there would be no justification for prohibiting a discussion of the history of the First World War or the Vietnam War, even though some persons have negative views about those conflicts. Though there is a justification for restraining the anarchistic rhetoric Thomas M. is wont to use, the trial court's prohibition was overly broad and did not give Thomas M. the necessary guidance as to what was and what was not permitted. We realize that it is difficult to define the proper limits of discussion, and that Thomas M. is likely to attempt to subvert a limited order even at the expense of his children. But the prohibition as it now stands cannot be

justified by the facts of this case. The trial court on remand should enter an order tailored to the facts of this case.

¶12 Next, Thomas M. asserts that the trial court's restrictions on his speech are unconstitutionally vague. He cites ***Coates v. City of Cincinnati***, 402 U.S. 611, 614 (1971), for its conclusion that an ordinance which prohibited three or more people from assembling on a sidewalk and conducting themselves in a manner annoying to persons passing by was unconstitutionally vague. The ***Coates*** test for vagueness was whether people of common intelligence must necessarily guess at the meaning of the ordinance. ***Id.*** The Court noted that conduct which annoys some may not annoy others, and concluded that no standard of conduct was set out by the statute. *See* ***id.***

¶13 The terms to which Thomas M. objects are "adult issues," "blaming statements," "negative comments" and "promises." "Blaming statements" is a term commonly understood by most persons. "Blame" is fault finding or the placing of responsibility. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 229 (1993). These concepts are known to persons of ordinary sensibility. "Negative comments" is another commonly used and understood term. Disrespect and criticism are concepts akin to "negative behavior." A "promise" is defined as "a declaration that one will do or refrain from doing something specified." ***Id.*** at 1815. No-one, including Thomas M. will have to guess at the meaning of these words. The trial court's restrictions regarding "blaming statements," "negative comments" and "promises" in its order are not unconstitutionally vague.

¶14 However, we agree with Thomas M. that the court's restriction on discussing "adult issues" was unconstitutionally vague. We are unsure what the

court meant by "adult issues" and conclude that people of common intelligence would have to guess at its meaning. On remand, the trial court should enter an order describing the prohibited "adult issues" with sufficient certainty.

¶15 Thomas M. next argues that the trial court erroneously exercised its discretion to extend a CHIPS petition because the Department of Human Services failed to protect his children from a known risk of physical and sexual assault and the destruction of his child's property.

¶16 First, we do not accept Thomas M.'s assertion that five incidents he identifies show that the foster home where Steven M.M. was staying was unsafe. The trial court concluded that steps were being taken to deal with the incidents and that the population of the foster home was a particularly difficult group of people. Thomas M. concludes:

> The extension of the Chips petition in the case at bar is a clearly erroneous exercise of the trial court's discretion. The failure of the court to take seriously these incidents as well as the Department's breach of duty is an even greater abuse of discretion. The [appellant] therefore renews his request to overturn the trial court's order to extend.

¶17 But, except for a description of his view as to what happened and the severity of the incident, that is all that Thomas M. provides. He is asking us to conclude that a trial court may not extend a CHIPS order if the subject of the order has been the victim of trauma or theft. But he cites no authority for his assertion. Nearly twenty years ago, we noted that appellate argument without legal authority specifically supporting a proposition was inadequate and does not comply with § 809.19(1)(e), STATS. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). We concluded that in the future, we would refuse to

consider such an argument. *See* ***id.*** at 546, 292 N.W.2d at 378. We have consistently followed that rule, and we see no reason to depart from it now.

¶18 Thomas M. combines his last two related issues. He asserts that the Department failed to serve its report on him and that this violates both § 801.14(1), STATS., and the Due Process Clause of the United States and Wisconsin Constitutions. Section 801.14(1) provides:

> Every order required by its terms to be served, every pleading unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, undertaking, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in s. 801.11.

¶19 Though Thomas M. asserts that the report is a "paper," and that the department was therefore required to serve it on him, the statute does not require that "papers" be served. The statute pertains to "[E]very paper relating to discovery required to be served upon a party unless the court otherwise orders…." Thus, the paper must relate to discovery, it must be required to be served upon a party, and the court must not have ordered otherwise. Thomas M.'s brief does not discuss any of these three requirements. He offers no authority suggesting that a social worker's report relates to discovery and he does not explain why a social worker's report is required to be served upon a party.[3]

[3] Thomas M. cites the Fifth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution as requiring that he be served with a copy of the social worker's report. We will address that assertion later in this opinion.

¶20 Thomas M. admits that the juvenile court has ordered that social workers' reports be filed with the Juvenile Court Office or the judge's office no later than forty-eight hours prior to the time of the hearing. ***Shaffer***, 96 Wis.2d at 545-46, 292 N.W.2d at 378, requires more than an assertion that something is true—it requires argument to be supported by authority. Other than quoting § 801.14(1) and (2), STATS., and asserting "the social worker's report is a 'paper' within the meaning of the statute," Thomas M. cites nothing in support of his assertions. Though he asserts that reports are difficult to obtain, he says nothing about when the report pertaining to his family was filed. Pursuant to ***Shaffer***, we do not address Thomas M.'s argument. We do note, however, that the Juvenile Court Policy on Court Reports appears to be a rule that a court can "otherwise order[ ]" under § 801.14(1). And a social worker's report has nothing in common with the other documents listed in the statute: "written notice, appearance, demand, offer of judgment [or] undertaking." It is not a "similar paper."

¶21 After citing the Fifth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution, Thomas M. contends, "No reasonable argument can be made that the process outlined above constitutes due process under either the State or U.S. Constitutions."

¶22 Apparently the "process" to which Thomas M. refers is the procedure of requiring a social worker to file his or her report with the Juvenile Court Office or the judge's office. But we are not told of either the facts or the law which make this so. When was the report available? Where was it filed? When did Thomas M. attempt to get it? Was he successful? Could he have obtained the report earlier? What information did he need after he received the report? Even if the record supplied these facts, we would then be required to develop Thomas M.'s case for him by supplying authority supporting his position,

assuming that such authority exists. We will not develop an appellant's argument. *See* ***State v. West***, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct. App. 1993), *aff'd*, 185 Wis.2d 68, 517 N.W.2d 482 (1994). Nor can we serve as both advocate and judge. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). We decline to consider Thomas M.'s due process argument. *See* ***Shaffer***, 96 Wis.2d at 545-46, 292 N.W.2d at 378.

¶23 For the reasons we have discussed, we affirm the circuit court's order in part and reverse it in part. We remand the cause for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.