Left in the Dark:
State v. A.G. & Burden of Proof in Involuntary TPR Dispositional Hearings

Despite many mentions in unpublished opinions and the recent lengthy journey of one case through the Wisconsin court system, crucial issues regarding the burden of proof, if any, at termination-of-parental-rights disposition hearings remain unresolved.

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Recently, in *State v. A.G.* (hereinafter *A.G. III*), the Wisconsin Supreme Court declined the opportunity to resolve a crucial issue in child welfare law: namely, what is the burden of proof at the dispositional phase of a termination of parental rights (TPR) proceeding.[1] In the process, the supreme court and the Wisconsin Court of Appeals created wholly unwarranted uncertainty and confusion as to a related issue: whether any burden of proof applies to the best-interests determination at disposition in a TPR proceeding. In both regards, the appellate courts inhibited the ability of circuit courts to fulfill their responsibilities to children, parents, and other people involved in those proceedings.

Procedural and Historical Context and the Development of the Problem

Wisconsin has a bifurcated process in involuntary TPR proceedings. In the grounds phase, the petitioner (which usually, although not universally, is the government) seeks to establish that one or more grounds exist to involuntarily terminate parental rights, mandating a finding of parental unfitness.[2] If unfitness is established, the case moves to the dispositional hearing, in which the court determines whether TPR does or does not serve the best interests of the child.[3] The dispositional statute specifies a child's best interest is the "prevailing factor" in TPR dispositional decisions.[4]

In *Santosky v. Kramer*,[5] the U.S. Supreme Court held that the fundamental liberty interest of a parent (and, notably, the interest of a child) in the familial relationship could only be involuntarily terminated if grounds for TPR and parental unfitness were proved to the level of certainty and by the quality of evidence embodied in the middle burden of proof — reasonable certainty by clear and convincing evidence. Wisconsin codified that requirement.[6]

The *Santosky* Court wrote in broadly encompassing terms: "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[7] However, the Court did not explicitly state whether that constitutionally mandated burden applied only in the grounds-unfitness phase or through the dispositional phase of the proceedings.[8] The Wisconsin Legislature also failed to explicitly address the issue by not delineating in a statute the burden of proof in the dispositional phase of the TPR proceedings.[9] All of this has led to the continuing confusion the *A.G. III* court failed to address.

I contributed to the ongoing uncertainty as to the first issue — which burden applies at disposition. Because I believed the *Santosky* Court had not explicitly resolved the issue, in a number of presentations at judicial education seminars, I instructed circuit court judges to advise parents and attorneys that the burden at disposition was the middle burden and to impose and make findings as to that burden in those hearings.[10] Given the interests at stake and the effect of invalidated TPR orders, better safe than sorry, right?

It is a common occurrence in involuntary TPR proceedings for respondent parents to plead no contest in the grounds phase while preserving their right to contest TPR at the dispositional hearing. In that instance, it is incumbent on the circuit court to conduct a colloquy with the parent to

ensure that the waiver of the grounds-phase trial rights is knowing, intelligent, and voluntary.[11]

Never lacking for innovative arguments in zealously advocating for their clients, lawyers with the State Public Defender's Office began seeking withdrawal of those no-contest pleas entered pursuant to colloquies, stating the government would be required at disposition to establish that TPR served the best interests of the child to a reasonable certainty by clear and convincing evidence.

In essence, the lawyers argued that circuit court judges were telling respondent parents at the no-contest plea that the parents had a better chance of prevailing at disposition than they actually did. That is so because the heightened burden did not apply and the plea was therefore not knowing, intelligent, and voluntary.[12] The primary premise of their argument was the absence of a specified burden in the dispositional statute.

A.G. in the Circuit Court and Court of Appeals

A.G.'s convoluted and protracted appeal process began after he entered a no-contest plea in the grounds phase before the circuit court and lost at the disposition phase. A.G. then appealed and claimed that the judge advised him that the clear and convincing burden applied at the best-interests determination.[13] A.G. moved to withdraw his no-contest plea as not constituting a knowing, voluntary, and intelligent plea as required by statute and controlling case law.[14] The specific motion in *A.G.* had two bases for that claim: 1) the court had not sufficiently advised A.G. of "potential dispositions" (granting or dismissing the petition) as required by *Oneida County Department of Social Services. v. Therese S. (In re Termination of Parental Rights to Jasmine B.)*;[15] and 2) by referencing a heightened burden of proof that did not apply, the court had not adequately explained that the best interests of the child was the prevailing factor at disposition as is also required by *Therese S*.[16]

A.G. I. The circuit court denied the motion without a hearing, concluding A.G. had failed to make a prima facie showing that the plea colloquy was deficient and therefore A.G. had no right to a hearing pursuant to *Therese S.* and *State v. Brown*.[17] In a one-judge, unpublished opinion, the court of appeals reversed and remanded for an evidentiary hearing. Regarding the *Santosky* issue, noting the absence of a specified burden in the dispositional statute, Wis. Stat. section 48.426, the court concluded: "There is not a burden of proof placed on the State" on best interests at the dispositional phase. Because the court of appeals believed that A.G. had been advised that the state was required to meet the middle burden, the plea colloquy was deficient because A.G. was not adequately "informed of the statutory standard that applies at disposition."[18] In what some members of the Wisconsin Supreme Court would later view as a significant development, the state did not appeal *A.G. I*.

On remand and after a hearing on the motion,[19] the circuit court judge again denied the motion, concluding on the *Santosky* issue that there had been no prejudice because the court held the state to, and the state met, the middle burden on best interests. That is, the state met the burden that the court had advised A.G. would apply in the plea colloquy.

A.G. II. Largely ignoring the circuit court's "lack of prejudice" assessment, the court of appeals doubled down on its earlier "no burden of proof" holding and concluded that A.G. was "incorrectly advised at the plea hearing regarding the burden of proof."[20] It ordered remand with a mandate to allow A.G. to withdraw his no-contest plea as not knowingly, voluntarily, and intelligently entered. The state and the guardian ad litem (GAL) appealed.

A.G. in the Supreme Court: No Harm, No Foul, No Answer

It is difficult to discern the views of the justices from the fractured, 2-2-2 decision of the Wisconsin Supreme Court. All three opinions give significant space to disagreements as to which record was (or perhaps, more specifically, should be) before the court – only the no-contest plea hearing colloquy or the entirety of the circuit court record. There was further sparring and disagreement as to the law-of-the-case rule – whether the state's failure to appeal *A.G. I* bound the supreme court to the conclusion the plea colloquy was defective. Lost in all of that was any clarity on the views of the individual justices about the crucial issues of the existence of a burden of proof and its application at disposition.

The lead opinion, authored by Justice Rebecca Grassl Bradley and joined by Chief Justice Ziegler, appeared to silently acquiesce in the summary conclusion of the court of appeals that it was error to have advised in the plea colloquy that the middle burden applied at disposition

Judge Christopher R. Foley, Marquette 1978, retired in 2023 after 38 years in Branch 1 of the Milwaukee County Circuit Court. He now serves as a mediator, arbitrator, and special master. Judge Foley received the 2022 Lifetime Jurist award from the State Bar of Wisconsin. He thanks Judge Joseph Wall for his substantive suggestions and assistance with formatting and citations. Photo: Andy Mannis. Access the digital article at www.wisbar.org/wl.

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because there is not an applicable burden as to best interests.[21]

That conclusion appears, however, to be exclusively premised on the law-of-the-case theory embraced by the dissent. That is, because the state did not appeal *A.G. I*, the court of appeals decision there – that the plea colloquy was defective for having advised that the middle burden applied when no burden exists – was the law of the case and therefore bound the supreme court. However, the lead-opinion justices noted that they only "assume[d]" A.G. met his obligation to show the no-contest plea colloquy was defective,[22] and they pointedly observed they "did not resolve the issue."[23]

The lead opinion, nevertheless, reversed the court of appeals on a theory of no prejudice and insubstantial defect, stating that the circuit court promised A.G. the state would be held to the middle burden, the state was held to that burden, and the state met that burden.[24] According to the opinion, because A.G. was not inhibited from calculating his chances of success at disposition, the no-contest plea was knowingly, voluntarily, and intelligently entered.[25]

Justice Hagedorn, joined by Justice Karofsky, concurred but opined that no error occurred in the burden-of-proof colloquy because, as noted above, A.G. was never explicitly told the middle burden applied to the best-interests dispositional determination – only that he "had all the same trial rights" at disposition that he had in the grounds phase.[26] In doing so, the concurrence questioned the proposition accepted by the dissent that the supreme court was somehow bound by the not-appealed conclusion of the court of appeals in *A.G. I* that no burden of proof applied at disposition.[27]

Justice Dallet's dissent, joined by Justice Ann Walsh Bradley, stated unequivocally that the issue of the existence of a burden of proof at the dispositional phase was not before the court.[28] While noting it considered the holding in *A.G. I* that no burden applied "debatable,"[29] the dissent asserted the not-appealed holding of *A.G. I* was the law of the case and established that the plea colloquy was defective and the plea invalid.[30]

Despite all the back and forth in *A.G. III*, it is clear that a majority of the supreme court did not adopt the conclusion of *A.G. I* and *A.G. II* that no burden of proof applied at disposition. This is fortunate because the *A.G. I* and *A.G. II* conclusion is directly contrary to what I view as existing and controlling precedent that cannot be overturned by an unpublished decision of the court of appeals.

The lead opinion in *A.G. III* offered: "We are unaware of any Wisconsin decision analyzing whether the evidence regarding best interests of the child must meet a particular burden."[31] Unbeknownst to the supreme court, the court of appeals, and, apparently, the parties, such precedent does exist and concludes there is a burden of proof in dispositional hearings.

Precedent on Burden of Proof Exists

In *S.D.S. v. Rock County Department of Social Services* (*In the Interest of*

T.M.S.),[32] the court of appeals, acknowledging that the child in need of protection or services (CHIPS) dispositional statute did not specify an applicable degree of proof, observed that CHIPS cases are civil proceedings, citing *C.N. v. Waukesha County Community Human Services Department (In the Interest of S.S.K.).*[33] It then stated that the ordinary burden of proof – reasonable certainty by the greater weight of the credible evidence – applied in civil proceedings for which no burden was specified except in instances not pertinent to child welfare proceedings.[34] "We conclude that the ordinary burden, the greater weight of the credible evidence, applies to CHIPS dispositional and extension hearings."[35]

Any suggestion that the precedent is distinguishable because the case addressed only CHIPS cases is, in my view, without merit, given that *S.D.S.*, *S.S.K.*, and, most prominently, the Wisconsin Supreme Court decision *Waukesha County Department of Social Services v. C.E.W. (In the Interest of C.E.W.),*[36] categorized TPR and CHIPS as civil proceedings.[37] The lowest-burden-of-proof rationale in civil proceedings recognized in *S.D.S.* unquestionably extends to TPR.

S.D.S. is a three-judge, published opinion of the court of appeals. It has "statewide precedential effect."[38] A one-judge, unpublished court of appeals opinion, as in both *A.G. I* and *A.G. II*, is not precedent or binding on any court of this state.[39] Only the supreme court has the power to overrule a published, precedential opinion of the court of appeals.[40] As noted above, *S.D.S* was not cited in *A.G. III* and, more important, at most only two justices – and more likely none – embraced the "no burden of proof" holding of *A.G. I* and *A.G. II*. Binding Wisconsin law establishes there is an applicable burden of proof in dispositional hearings, leaving only the original question: Does *Santosky* constitutionally mandate a burden higher than "ordinary"?

Some uncertainty remains as to that question, and it would have been highly preferable for the supreme court to have addressed and resolved it in *A.G. III*. I, however, have come to believe the middle burden is not mandated at disposition. Although the U.S. Supreme Court spoke in the broad terms noted above, the Santoskys attacked the constitutionality of the preponderance-of-the-evidence standard in the New York statute that governed the grounds-unfitness phase of TPR proceedings.[41] The *Santosky* Court's holding specifically referenced only the grounds-phase statute: "The logical conclusion of this balancing process is that the 'fair preponderance of the evidence' standard prescribed by Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment."[42]

In so concluding, the Court noted that constitutionally adequate proof by the state at the grounds phase establishes "the parents are unfit to raise their own children."[43] In the absence of such a showing, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents."[44] Further, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[45] Once unfitness is established, "the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge."[46]

Santosky's conclusion that the fundamental liberty interest of the parent was only adequately protected if unfitness was established by clear and convincing evidence was premised upon an assessment of the factors in the Court's decision in *Mathews v. Eldridge*.[47] That is, in the absence of parental unfitness, the risk of erroneous deprivation of the parent's fundamental liberty interest via the use of the lesser burden outweighed any claimed *parens patriae* interest.[48]

However, in my view, once unfitness is established, that balancing flips because the public interest in protecting children from harm and from harmful relationships substantially outweighs parental interests now significantly dissipated by established unfitness in fulfilling parental responsibilities. The child's interest in preservation of the familial bond is substantially dissipated for the same reasons. While others might disagree,[49] I do not believe that clear and convincing evidence is constitutionally mandated in determining best interests in TPR dispositional hearings.

Confusion Continues

The uncertainty and confusion from the line of *A.G.* decisions continues for judges, parents, litigators, and child welfare professionals. I understand that arguments and appeals are being pursued asserting that plea colloquies are improper for failure to advise of the applicable burden of proof, questions whether a burden of proof exists, and, if there is a burden of proof, what it might be.

In a recent unpublished opinion, the court of appeals again embraced the no-burden-of-proof holding.[50] In doing so, in my view, the court dramatically mischaracterized the justices' views in *A.G. III* – suggesting that four justices had embraced the no-burden-of-proof rationale.[51] In addition, having discovered for the first time the holding in *S.D.S.*, the court of appeals failed to follow what I view as binding precedent.[52]

Finally, as this article was being completed, the court of appeals, again in a one-judge opinion, concluded the lowest burden applied at disposition.[53] That decision makes no mention of *A.G. I* and *A.G. II* and the "no burden" holding. However, perhaps exacerbating the ongoing confusion, the court suggested that the lower burden does not fall exclusively on the state-petitioner but is a "shared" burden with the parent.[54] This conclusion is contrary to the legal principle that "in general, the party invoking the judicial process in its favor bears the burden of production and persuasion."[55] This principle was also noted by Justice Dallet when she observed that the failure of the state-petitioner to produce evidence as to best interests at the dispositional hearing would require dismissal of the TPR petition.[56]

Conclusion

It would be unfair to criticize the supreme court for failing to address and resolve an issue not properly before it – as some of the justices asserted with respect to the "*Santosky* issue." However, as noted by Justice Dallet, the law-of-the-case rule has exceptions, including when the application of the rule would result in manifest injustice. In my view, if A.G. was properly advised in the plea colloquy or if any defect was insubstantial, manifest injustice would result from withdrawal of his no-contest plea and the Wisconsin Supreme Court was free to address the issue.

The supreme court itself recognized the recurring *A.G.*-like appeals appearing on the dockets of appellate courts in Wisconsin.[57] The lack of clarity and consistency from the appellate courts is preventing circuit courts from fulfilling their responsibilities to parents, litigants, and, most important, children. It is beyond time for the Wisconsin Supreme Court to provide answers to these questions. **WL**

ENDNOTES

[1]I cite three *State v. A.G.* decisions. I refer to the Wisconsin Supreme Court's decision, *State v. A.G. (In re Termination of Parental Rights to A.G.)*, 2023 WI 61, 408 Wis. 2d 413, 992 N.W.2d 75, as *A.G. III.* I refer to the Wisconsin Court of Appeals' decision on the initial appeal after denial of A.G.'s motion to withdraw the no-contest plea without a hearing, *State v. A.G. (In re Termination of Parental Rights to A.G.)*, No. 2021AP1476, 2022 WL 453112 (Wis. Ct. App. Feb. 15, 2022) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), as *A.G. I.* I refer to the second Wisconsin Court of Appeals decision after remand and hearing on A.G.'s motion to withdraw the no-contest plea, *State v. A.G. (In re Termination of Parental Rights to A.G.)*, No. 2022AP652, 2022 WL 2674218 (Wis. Ct. App. July 12, 2022) (unpublished opinion not citable per Wis. Stat. § 809.23(3)), as *A.G. II*. *A.G. I* and *A.G. II* are one-judge, unpublished decisions.

[2]*See* Wis. Stat. §§ 48.415, 48.424(1), (4).

[3]*See* Wis. Stat. §§ 48.426, 48.427.

[4]*See* Wis. Stat. § 48.426(2).

[5]455 U.S. 745 (1982).

[6]*See* Wis. Stat. § 48.31(1).

[7]*Santosky*, 455 U.S. at 747-48.

[8]At the time of the *Santosky* decision, New York had the same bifurcated procedure in TPR cases as Wisconsin. *See Santosky*, 455 U.S. at 748.

[9]Wis. Stat. § 48.426.

[10]This second aspect is crucial; if during the no-contest plea the circuit court advised the parent that the state had to prove best interest by clear and convincing evidence, then at the dispositional hearing the circuit court could only enter a termination order after finding – on the record – that the state had met that standard.

[11]*See* Wis. Stat. § 48.422(7); *Kenosha Cnty. Dep't of Hum. Servs. v. Jodie W. (In re Termination of Parental Rts. to Max G.W.)*, 2006 WI 93, ¶ 24, 293 Wis. 2d 530, 716 N.W.2d 845 (citing *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986)).

[12]*See A.G. I*, 2022 WL 453112, ¶ 1.

[13]Justice Hagedorn later observed that A.G. was never so specifically advised, noting the circuit court judge only advised A.G. that he retained "all the same trial rights" in the dispositional phase as those he was surrendering by pleading no contest in the grounds phase. *A.G. III*, 2023 WI 61, ¶ 47, 408 Wis. 2d 413 (Hagedorn, J., concurring). A.G. had been earlier advised in the no-contest colloquy that the state had the burden of establishing grounds by clear and convincing evidence. The "defective" admonition as to the applicability of the middle burden as to best interests, if it be so, was implicit, not explicit.

[14]*See* Wis. Stat. § 48.422(7); *Jodie W.*, 2006 WI 93, 293 Wis. 2d 530.

[15]2008 WI App 159, ¶ 16, 314 Wis. 2d 493, 762 N.W.2d 122. While the court of appeals twice concluded there was merit in this claim of failure to explain alternative dispositions, the lead and concurring opinions of the Wisconsin Supreme Court all but summarily dismissed the argument. The lead opinion concluded that the admonition that the court would have to decide at disposition – "is it in the child's best interest to in fact terminate your parental rights" – by "negative implication" advised A.G. the court could also choose not to terminate his rights. *A.G. III*, 2023 WI 61, ¶ 27, 408 Wis. 2d 413. The concurring opinion concluded there was no "doubt" the circuit court had adequately advised of potential dispositions. *Id.* ¶ 44 (Hagedorn J. concurring). Because I address only the "*Santosky*" issue, I do not discuss this issue further.

[16]*Id.*

[17]2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906.

[18]*A.G. I,* 2022 WL 453112, ¶ 16 (citing *Therese S.,* 2008 WI App 159, ¶ 16, 314 Wis. 2d 493).

[19]A.G. failed to appear at this hearing. *See A.G. III,* 2023 WI 61, ¶ 42, 408 Wis. 2d 413 (Hagedorn J., concurring).

[20]*A.G. II*, 2022 WL 2674218, ¶ 23. The *A.G. I* and *A.G. II* courts concluded that because Wis. Stat. section 48.426 prescribes only a "prevailing factor" or standard of best interests but no specific burden of proof, there is no burden of proof at disposition. The burden of proof speaks to the quality of evidence and level of certitude warranting the conclusion the standard has (or has not) been met. *See Santosky*, 455 U.S. at 754-755.

[21]*A.G. III*, 2023 WI 61, ¶¶ 4, 21, 36, 37, 38, 408 Wis. 2d 413.

[22]*Id.* ¶ 21.

[23]*Id.* ¶ 33 n.6.

[24]*Id.* ¶¶ 37-38.

[25]*Id.* ¶ 36.

[26]*Id.* ¶¶ 46-47 (Hagedorn J., concurring).

[27]*Id.* ¶ 43 n.1 (Hagedorn J., concurring).

[28]*Id.* ¶ 59 n.4 (Dallet, J. dissenting).

[29]*Id.* ¶ 58 n.3 (Dallet, J. dissenting).

[30]*Id.* ¶ 59 (citing *State v. Jensen*, 2021 WI 27, ¶ 13, 396 Wis. 2d 196, 957 N.W.2d 244) (Dallet, J. dissenting).

[31]*Id.* ¶ 33.

[32]152 Wis. 2d 345, 448 N.W.2d 282 (1989).

[33]143 Wis. 2d 603, 611, 422 N.W.2d 450 (Ct. App. 1988), *overruled on other grounds by State v. A.S. (In Int. of M.D.(S).)*, 168 Wis. 2d 995, 485 N.W.2d 52 (1992).

[34]152 Wis. 2d 345, 356, 448 N.W.2d 282 (1989).

[35]*Id.* at 357.

[36]124 Wis. 2d 47, 368 N.W.2d 47 (1985).

[37]*See also M.W. v. Monroe Cnty. Dep't of Hum. Servs. (In re Termination of Parental Rts. to M.A.M.)*, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984) ("Although serious human rights are implicated in the termination of parental rights proceedings, the proceeding is civil in nature.").

[38]*See* Wis. Stat. § 752.41.

[39]*See* Wis. Stat. § 809.23(3).

[40]*Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997).

[41]*Santosky*, 455 U.S. at 751-52 (citing N.Y. Fam. Ct. Act § 622).

[42]*Id.* at 768.

[43]*Id.* at 760.

[44]*Id.* at 767 (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

[45]*Id.* at 760.

[46]*Id.* Wisconsin has long and consistently adhered to both the aura of protection afforded a fit parent's decision-making and the preeminent *parens patriae* interest of the state when unfitness is established. *See Barstad v. Frazier*, 118 Wis. 2d 549, 348 N.W.2d 479 (1982); *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402.

[47]424 U.S. 319 (1976).

[48]455 U.S. at 754.

[49]See Brian C. Hill, Comment, *The State's Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. Chi. Legal Forum 557, 576-84 and cases cited therein.

[50]*See State v. B.M. (In re Termination of Parental Rts. to F.E.)*, No. 2023AP1137, 2023 WL 7544853, ¶ 15 n.4 (Wis. Ct. App. Nov. 14, 2023) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (reversing because, although the circuit court "described the dispositional phase as 'best interest of the child standard,' such a statement does not clarify that the best interests standard does not put a burden on the State").

[51]*Id.* ¶ 20 n.6.

[52]*Id.* ("We decline to adopt this conclusion because the plain language of the statute requires that best interests of the child be the prevailing standard.").

[53]*See State v. H.C. (In re Termination of Parental Rts. to H.C.)*, No. 2023AP1950, 2024 WL 934221, ¶ 2, (Wis. Ct. App. March 5, 2024) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). In this case, the parent had argued that due process was violated, asserting that Wis. Stat. section 48.426 was "facially unconstitutional because it does not define a burden of proof for the State to meet at the disposition hearing for a proceeding to terminate parental rights." *Id.* ¶ 16. The court dismissed that challenge by finding that due process is satisfied when the state proves that best interest is established by a preponderance of the evidence, and then so finding. *Id.* ¶ 20.

[54]*Id.* ¶ 35.

[55]*See Richards v. First Union Secs.,* 2006 WI 55, ¶ 17, 290 Wis. 2d 620, 714 N.W.2d 913.

[56]*A.G. III*, 2023 WI 61, ¶ 58 n.3, 408 Wis. 2d 413 (Dallet, J., dissenting).

[57]*Id.* ¶ 15 n.5 (Bradley, R.G., J., lead opinion). **WL**