

FILED
02-10-2025
CIRCUIT COURT
DANE COUNTY, WI
2024CV001711

1 STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
2 - - - - - BRANCH 15

3 ALYSSA PUPHAL, ET AL,

4 Plaintiffs,

5 -vs-

Case No. 24-CV-1711

6 WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL,

7 Defendants.

8 - - - - -

9 PROCEEDINGS: Oral ruling

10 DATE: February 6, 2025

11 COURT: Circuit Court Branch 15
12 The Honorable Stephen Ehlke
Circuit Court Judge, Presiding

13 APPEARANCES: ALYSSA PUPHAL, Plaintiff, by
14 MACKENZIE GUTNER, GREGORY EVERTS,
DOMINIQUE FORTUNE, RYAN COX, Attorneys
15 at Law, by phone.
16 WISCONSIN DEPARTMENT OF CORRECTIONS,
17 Defendant, by TIFFANY WINTER, Assistant
Attorney General, by phone.

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21 REPORTER: Erin Rauber, RPR
22 Court Reporter

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1 P R O C E E D I N G S:

2 THE COURT: We'll go on the record in
3 the matter of Alyssa Puphal, et al versus
4 Wisconsin Department of Corrections, et al,
5 24-CV-1711. May I have the appearance or
6 appearances by telephone for the plaintiff,
7 Ms. Puphal and Ms. Curtin-Weber. Hello?

8 MS. GUTNER: Sorry, your Honor,
9 Mackenzie Gutner here from Quarles & Brady on
10 behalf of Ms. Puphal and Ms. Curtin-Weber. And
11 I'm also joined by my colleagues
12 Dominique Fortune, Greg Everts, and Ryan Cox from
13 the ACLU.

14 THE COURT: All right. And then on
15 behalf of Department of Corrections and
16 Mr. Jared Hoy, in his official capacity, again,
17 by phone.

18 MS. WINTER: Assistant Attorney General
19 Tiffany Winter.

20 THE COURT: For the record, I'm in my
21 courtroom. The courthouse is open. The
22 courtroom is open. Nobody is here except court
23 personnel, but we are in compliance with any open
24 courtroom proceeding requirements that arguably
25 apply here. If some member of the public wanted

1 to sit, they certainly could. No one is here but
2 court personnel. We're here on the petition for
3 a -- or a motion for a writ of mandamus,
4 provisional writ of mandamus. I've read through
5 carefully the submissions on both sides and am
6 prepared to issue a ruling. I don't think
7 there's anything else to add to the record from
8 what's been submitted, but I always give counsel
9 a chance if there's anything briefly. Anything
10 further on the plaintiff's behalf or will you
11 stand on your briefs?

12 MR. EVERTS: Your Honor, Greg Everts. I
13 got kicked off for some reason earlier but I'm
14 back on. Just for the record, no, the plaintiffs
15 do not have anything further to add.

16 THE COURT: Anything further from
17 defendants?

18 MS. WINTER: No, your Honor.

19 THE COURT: All right. As I said, I've
20 had a chance now to carefully review the
21 submissions in this matter. Briefing was well
22 done on both sides. My ruling is as follows:
23 Plaintiff Alyssa Puphal is incarcerated at the
24 Wisconsin Department of Corrections' Robert E.
25 Ellsworth Correctional Center. Plaintiff

1 Natasha Curtin-Weber is incarcerated at the
2 Wisconsin Department of Corrections Taycheedah
3 Correctional Institution. Defendant Wisconsin
4 Department of Correction is an administrative
5 agency of the State of Wisconsin, created by
6 statute. DOC is the state agency required by law
7 to maintain and govern the state correctional
8 institutions. Defendant Jared Hoy is secretary
9 of DOC, sued in this case in his official
10 capacity. As DOC secretary, Mr. Hoy is the
11 individual in charge at and in control of the
12 DOC.

13 Somebody needs to mute. I think it
14 might be Quarles' end that's coming through.

15 In this case, plaintiffs seek a writ of
16 mandamus compelling the defendants to administer
17 a mother-child program.

18 RECORDING: You've been muted. To
19 unmute yourself, press star, six.

20 THE COURT: I hope I'm not muted.

21 RECORDING: You are no longer muted.

22 THE COURT: I'll start over again. In
23 this case, plaintiffs seek a writ of mandamus
24 compelling the defendants to administer a
25 mother-child program to allow pregnant and

1 postpartum women who are incarcerated or on
2 supervised release to retain physical custody of
3 their infants and be held in the least
4 restrictive custody. The plaintiffs contend
5 defendants are statutorily required to administer
6 a mother-child program pursuant to Section
7 301.049 of the Wisconsin Statutes.

8 Defendants contend that they are in
9 compliance with Section 301.049 because the DOC
10 offers a mother-child program to women on
11 probation, extended supervision, or parole who
12 are pregnant or have a child under the age of
13 one. Defendants contend Section 301.049 does not
14 require that the program be offered to
15 incarcerated individuals. Defendants also
16 contend that even if the statute does require the
17 mother-child program be offered to incarcerated
18 individuals, these plaintiffs cannot show
19 substantial harm, as required for issuance of a
20 writ, because the DOC has broad discretion in
21 determining who is allowed to participate in the
22 program. DOC argues that since plaintiffs cannot
23 establish they would have been accepted into the
24 program, they cannot establish a substantial
25 harm, and therefore the writ should not be

1 issued. I address these arguments in turn.

2 The parties agree regarding the standard
3 to be applied when considering whether a writ
4 should issue. Mandamus may be used to compel a
5 public officer to perform a duty which he or she
6 is legally bound to perform. Mandamus is a
7 discretionary writ, and whether to grant or deny
8 a party's petition for it lies within the sound
9 discretion of the trial court. Mandamus is an
10 exceptional remedy only to be applied in
11 extraordinary cases where there is no other
12 adequate remedy.

13 A writ of mandamus may only issue if the
14 petitioner can prove all of the following:
15 First, the petitioner has a clear legal right to
16 the relief sought; second, the government entity
17 has a plain legal duty to perform; third, the
18 petitioner has proven they will suffer
19 substantial damages if the duty is not performed;
20 and four, the petitioner has no other adequate
21 remedy at law. In exercising discretion in
22 determining whether to issue the writ, a court
23 may consider the urgency of the situation, the
24 equities of the parties, the efficacy or futility
25 of the writ if issued, the public policy or

1 interests that may be involved and the question
2 whether, if issued, the writ will promote
3 substantial justice or on the contrary cause
4 injustice, hardship or oppression.

5 Wisconsin Statute Section 301.049(1)
6 provides that the DOC shall administer a
7 mother-young child program allowing females to
8 retain during participation of the program the
9 physical custody of their children. Both sides
10 agree that the DOC must administer a program and
11 both sides agree there is a program in place.
12 Both sides also agree that the DOC is required to
13 provide the services listed under Section
14 301.049(3) as part of the mother-child program.
15 Insofar as this case is concerned there is no
16 contention that the DOC is not providing the
17 services required under Section 301.049(3) as
18 part of its existing program.

19 The crux of the dispute in this case
20 involves the interpretation of Section
21 301.049(2)(a) which establishes who is eligible
22 for consideration for the program. That
23 subsection provides as follows: "The department
24 shall provide the program for females who are:
25 1, prisoners; or 2, on probation, extended

1 supervision or parole and who, if approved by the
2 department under paragraph (b), would participate
3 in the program as an alternative to revocation of
4 probation, extended supervision or parole.

5 Plaintiffs contend that the word "or,"
6 given the context of the statute, should be read
7 conjunctively, i.e. to include "and," noting that
8 Wisconsin case law often interprets the word "or"
9 to "broaden the coverage of the statute to reach
10 distinct, although potentially overlapping sets."
11 Plaintiffs further point to the Wisconsin Court
12 of Appeals statement that a "strict reading of
13 the word 'or' should not be undertaken where to
14 do so would render the language of the statute
15 dubious, especially since there has been great
16 laxity in the use of terms 'and' and 'or,' such
17 that the terms are interchangeable and one may be
18 substituted for the other and is consistent with
19 legislative intent."

20 DOC argues that the use of the word "or"
21 generally describes a disjunctive concept,
22 meaning that a category that is included in a
23 list of categories linked by the term "or" is one
24 alternative choice. DOC argues that the
25 legislature knowing the difference between "and"

1 and "or," and if it meant to use "and," it would
2 have done so. Both sides cite well-established
3 persuasive authority. However, ultimately, I am
4 convinced that the plaintiffs have the better
5 argument.

6 As noted at page 7 of plaintiff's reply
7 brief, "If one were to replace 'or' with 'and,'
8 Wisconsin Statute Section 301.049(2)(a) would
9 read: The department shall provide the program
10 for females who are prisoners; and on probation,
11 extended supervision or parole. Wisconsin
12 Statute Section 301.049(2)(a)(1). This presents
13 an impossibility. Females for which the
14 mother-child program shall be provided cannot
15 both be a prisoner and on probation. Thus, if
16 written the way DOC posits, the statute would be
17 nonsensical in that it would require a program
18 for which no one would be eligible, i.e., the
19 legislature could not have meaningfully used
20 "and" to indicate conjunctive intent."

21 Also reinforcing my conclusion that this
22 is the proper interpretation is the fact that the
23 legislature was presumably trying to help as many
24 infants and mothers as it could, regardless of
25 the mother 's status within DOC. Put

1 differently, given the use of the word "shall,"
2 why would the legislature have given DOC the
3 authority to choose one class of infants and
4 mothers, those on probation, extended supervision
5 or parole, over another set, those who are
6 incarcerated? Interpreting the statute as giving
7 the DOC discretion to choose between these groups
8 makes no sense given the purpose of the statute
9 is presumably to help as many people as possible.
10 Accordingly, for these reasons I conclude the
11 word "or" in Section 301.049(2)(a) includes both
12 prisoners and people on probation, extended
13 supervision or parole. In short, I agree with
14 plaintiff's interpretation of the statute.

15 The next issue is whether plaintiffs
16 have established they will suffer substantial
17 damages. Defendants contend plaintiffs have not
18 met this requirement because they have not proven
19 and cannot prove that they would be eligible for
20 and accepted into the program if the DOC offered
21 the program to incarcerated females. The DOC
22 argues that since the program has limited
23 openings, also because there are multiple
24 criteria for acceptance, and because acceptance
25 is at the discretion of the department,

1 plaintiffs cannot establish they would have been
2 admitted into the program.

3 I agree with DOC that plaintiffs cannot
4 establish they would have been admitted to the
5 program if it had been offered to incarcerated
6 individuals, but it doesn't follow that they
7 haven't suffered substantial damages. As
8 plaintiffs correctly note, citing *State ex rel*
9 *Department of Natural Resources v. Wisconsin*, a
10 Court of Appeals, District IV case, 2018 Wis 25
11 at paragraph 47. The court there says, "It is
12 nearly tautological to observe that losing a
13 statutorily granted right is a harm. Losing that
14 right with no means to recover it makes the harm
15 irreparable."

16 Applied here, the harm is the denial of
17 the statutory right to be considered for the
18 program. It's also obvious I think from this
19 that there is no other adequate remedy for these
20 plaintiffs and so they have satisfied all four of
21 the requirements for issuance of a writ.

22 In conclusion, I find the plaintiffs
23 have established a clear right to be included in
24 the class of persons who the DOC must consider
25 for participation in the mother-child program.

1 In exercising my discretion, I conclude issuance
2 of the writ promotes substantial justice and
3 furtheres the legislature's goal of including as
4 many mothers and children in the pool of
5 candidates considered for acceptance into the
6 program as possible. So justice suggests that
7 and I think requires that the writ be issued in
8 this case. Requires in the sense that to do
9 otherwise would not create an injustice. I
10 understand that there is a financial difficulty,
11 perhaps, from the DOC's point of view, but that's
12 an issue for the legislature, not this court.

13 So for all of the reasons I've
14 indicated, the writ shall issue. I know it was
15 termed as a provisional writ, but I don't see how
16 further proceedings would change anything about
17 this. Mr. Everts, do you agree with that? I
18 think maybe he's on mute.

19 MS. GUTNER: The plaintiffs agree with
20 that, your Honor.

21 THE COURT: You don't disagree.

22 MS. GUTNER: We don't disagree.

23 THE COURT: And I know the State doesn't
24 agree with me or the Department doesn't agree
25 with me, but do you agree this would be the end

1 of the proceedings?

2 MS. WINTER: Yes, your Honor.

3 THE COURT: The reason I ask is
4 obviously a written order should be produced.
5 The plaintiffs, since it's your motion, if you
6 would draft an order incorporating my reasoning
7 and granting the relief that you've been
8 requesting, run it by opposing counsel as to
9 form. The supreme court lately is insistent that
10 we put this in or is not a final order for
11 appeal. I think it is a final order for purposes
12 of any appeal so please include that in there.
13 Once it's reviewed by opposing counsel, I would
14 be happy to sign it for any purpose that anyone
15 needs it for, okay?

16 MS. GUTNER: Thank you, your Honor.

17 THE COURT: All right. Take care,
18 everyone.

19 (End of proceedings.)

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1 STATE OF WISCONSIN)
 ss.)
2 COUNTY OF DANE)

3 I, ERIN RAUBER, RPR, Official Court Reporter, Dane
4 County Circuit Court, hereby certify that I reported in
5 Stenographic shorthand the proceedings had before the Court on
6 this 6th day of February, 2025, and that the foregoing
7 transcript is a true and correct copy of the said Stenographic
8 notes thereof.

9 Dated this 10th day of February, 2025.

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ELECTRONICALLY SIGNED BY
ERIN S. RAUBER
OFFICIAL COURT REPORTER

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