COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2875 **Cir. Ct. No. 2006TP39**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOSEPH J.M., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

STACI M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Staci M. appeals from an order terminating her parental rights to her son, Joseph M. She argues: (1) that WIS. STAT. § 48.415(10)

(2005-06)[1] is facially unconstitutional; and (2) that it is unconstitutional as applied to her case. We affirm.[2]

¶2 Joseph was born March 16, 2006, in the hallway of a "crack house." When Joseph was born, he had cocaine in his system, as did his mother, Staci. Within a few days after Joseph's birth, Staci voluntarily entered drug rehabilitation and Joseph was placed in foster care. On April 24, 2006, Joseph was found to be in need of protection and services (CHIPS). On May 30, 2006, Rock County filed a petition to terminate Staci's parental rights under WIS. STAT. § 48.415(10), which provides that a person's parental rights may be terminated if the child has been adjudicated in need of protection and services and the parent's rights to another child have been involuntarily terminated within three years of the filing of the CHIPS petition. On July 31, 2006, the court granted summary judgment finding that the grounds for termination had been met under WIS. STAT. § 48.415(10) because Joseph had been adjudicated CHIPS and Staci's parental rights to another child, Jacob, had been terminated on March 17, 2006. At the dispositional hearing on September 11, 2006, the circuit court found that termination was in Joseph's best interest and terminated Staci's parental rights.

¶3 Staci challenges the constitutionality of WIS. STAT. § 48.415(10) on its face. She contends that the statute violates substantive due process by creating

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The court decided that this case should be decided by a three-judge panel. As a result of the delays inherent in converting a case from a one-judge case to a three-judge case, the court's decision was not released within thirty days of the date the reply brief was filed. *See* WIS. STAT. RULE 809.107(6)(e). Therefore, we extend the deadline for deciding the case until today's date. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995) (we may extend the time to issue a decision in a TPR case).

a mandatory presumption of unfitness whenever the statutory criteria have been met, without "an individualized finding of unfitness."

¶4 "The right to substantive due process addresses the content of what government may do to people under the guise of the law." *See* ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted). "It protects against governmental action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty." ***Id.*** (citations omitted). "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." ***Id.***

¶5 In evaluating a substantive due process challenge to a statute, "[t]he threshold inquiry … is whether … a fundamental liberty interest [is] at stake." ***Id.***, ¶20. The right to parent one's child implicates a fundamental liberty interest. ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶23, 271 Wis. 2d 51, 678 N.W.2d 831. Because a fundamental liberty interest is implicated, "any statute that impinges on [this] right must withstand strict scrutiny." ***Ponn P.***, 279 Wis. 2d 169, ¶20. "In order to withstand strict scrutiny, a statute must be narrowly tailored to meet a compelling state interest." ***Id.*** The compelling state interest served by WIS. STAT. § 48.415(10) "is to protect children from unfit parents." ***Ponn P.***, 279 Wis. 2d 169, ¶20. "Accordingly, the statutory scheme at issue must be narrowly tailored to advance the State's interest in protecting children from unfit parents." ***Id.***

¶6 In ***Ponn P.***, the supreme court rejected a substantive due process challenge to the validity of WIS. STAT. § 48.415(4), which provides that continued denial of periods of physical placement or visitation is grounds for termination of

parental rights. ***Ponn. P.***, 279 Wis. 2d 169, ¶32. The supreme court concluded that the statute is narrowly tailored to advance the State's compelling interest of protecting children against unfit parents because a finding that grounds for termination exist under § 48.415(4) can be made only after the parent has gone through a "statutory step-by-step process" where each successive step calls for findings that reflect on the parent's fitness. ***Ponn P.***, 279 Wis. 2d 169, ¶¶26, 32.

¶7 Based on the analysis employed by the supreme court in ***Ponn P.***, we reject Staci's substantive due process challenge. Here, too, there is a step-by-step process that must precede a finding that grounds for termination exist. First, the County must show that the child has been adjudicated CHIPS on one of three specific grounds: abandonment, abuse, or neglect that seriously endangers the physical health of the child. *See* WIS. STAT. § 48.415(10); *see also* WIS. STAT. § 48.13(2), (3) and (10). Each of these CHIPS grounds reflects on the person's fitness at their role as a parent. The County must also prove that the court has ordered the termination of parental rights with respect to another child of the parent within three years of the date of the filing of the CHIPS petition, which can occur only if a court has first found the parent unfit. WIS. STAT. § 48.415(10)(b). Contrary to Staci's argument that grounds for termination under § 48.415(10) can be found without an individualized finding of unfitness, we conclude that each of the predicate steps under § 48.415(10) require the court to make findings and determinations about the parent's ability and fitness to parent based on the parent's individual circumstances. As the supreme court noted in ***Ponn P.***, 279 Wis. 2d 169, ¶32, "[i]t is the cumulative effect of the determinations made at each of the previous steps" that results in a finding that a parent is unfit under the statute. Based on the supreme court's analysis in ***Ponn P.***, we reject Staci's facial substantive due process challenge.

¶8 Staci next argues that WIS. STAT. § 48.415(10) is unconstitutional as applied to her in this case. Staci contends that she is not lodging a prohibited collateral attack on the prior proceedings, *see* ***Oneida County DHS v. Nicole W.***, 2007 WI 30, ¶2, ___Wis. 2d___, 728 N.W.2d 652, but that "given the particular facts and circumstances of the prior TPR and CHIPS proceedings, their mere existence is not an adequate proxy for unfitness and therefore, without more, could not be used to terminate [her] parental rights." In particular, Staci points to the fact that the TPR petition was filed only one month after the CHIPS petition was entered, arguing that "she was never given a real opportunity to meet the conditions of return on the underlying CHIPS order." She also points out that the TPR order was entered against her by default and she was not personally served, but was served by newspaper publication.

¶9 We conclude that, as applied to Staci, WIS. STAT. § 48.415 does not run afoul of substantive due process safeguards. Regardless of the amount of time Staci had to work on the conditions of return under the CHIPS order, the fact remains that, after having already had her parental rights to another child terminated, the County had to once again intervene to protect a child under Staci's care because her conduct had placed the child in danger. The CHIPS adjudication was a direct result of Staci's decision to use drugs and not seek proper medical care, causing her child to be born in the hallway of a drug house with cocaine in his system and without any medical support. Similarly, Staci's conduct—her failure to inform the County of her whereabouts despite the fact that the County had legal charge of her child—was the reason that she was served by publication in the TPR case. Staci's failure to appear was the cause of the default judgment in the TPR case. In short, Staci's actions are the reason that she meets the criteria for

termination under § 48.415(10). The statute, as applied to Staci, comports with substantive due process guarantees.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.