

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP3121

Cir. Ct. No. 2006TP58

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO MALAKAI H.K., A PERSON
UNDER THE AGE OF 18:**

LEIGHA K.,

PETITIONER-RESPONDENT,

v.

JASON B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Reversed.*

¶1 SNYDER, P.J.¹ Jason B. appeals from an order terminating his parental rights to Malakai H.K. and from an order denying his motion to vacate the judgment. Jason contends that WIS. STAT. § 48.42(2m) denied him his constitutionally-protected right to procedural due process by denying him notice and standing in the termination of parental rights (TPR) proceedings against him. He also argues the court infringed on his right to substantive due process by terminating his liberty interest in parenting Malakai. He further contends that § 48.42(2m) is unconstitutional on its face because it denies biological fathers notice and standing to contest a TPR petition against them. Having reviewed the record and the arguments of the parties, we ascertain the dispositive issue to be whether the circuit court improperly employed § 48.42(2m) under the facts of this case. Because we conclude it did, we reverse the termination of Jason’s parental rights.

FACTS AND PROCEDURAL BACKGROUND

¶2 Malakai was born on April 28, 2005, to Leigha K. and Jason B. At the time Malakai was conceived (around August 2004), Jason was twenty-one years old and Leigha was fifteen years old. During Leigha’s pregnancy, Jason was incarcerated and stayed so until April 4, 2006. During this time, Leigha informed Jason of her pregnancy and her belief that the child was his. Jason and Leigha met in December 2004 to discuss future plans, and Jason told her that “if I was the father, I’d own up to my responsibilities and be a dad.”

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Jason testified that he and Leigha wrote two to three letters per week to each other between December 2004 and April 2006, although Leigha's mother, Monica P., insists that Jason and Leigha were not corresponding regularly. Leigha brought Malakai to visit Jason in jail about six weeks after Malakai was born. Jason requested and received a number of photographs of Malakai during his time in prison.

¶4 On November 21, 2005, Jason admitted to paternity and was adjudicated as Malakai's father. The court awarded joint custody to Jason and Leigha, gave Leigha primary placement of Malakai, and provided Jason with periods of visitation, which were to be supervised by Leigha at her discretion after Jason's release from prison. Jason was also ordered to pay child support in the amount of \$133 per month. Jason began making monthly child support payments approximately one month after his release from custody.²

¶5 On April 4, 2006, the day Jason was released, he visited Malakai at Leigha's home. He visited again on April 5, 6, and 7, and on April 11, 2006. A visitation schedule was established, allowing Jason to visit on Tuesday and Thursday evenings and every other weekend for two hours.³ This schedule continued until May 17, 2006, when Jason was detained and charged with having sexually assaulted Leigha in August 2004, contrary to WIS. STAT. § 948.02(2). The complaint alleged that Leigha and Jason engaged in consensual sexual intercourse, stating "no force was used"; however, under § 948.02(2), sexual

² By the time of the termination of his parental rights in September 2006, Jason was approximately \$770 in arrears on his support obligation.

³ No copy of this schedule is found in the record; it was apparently made by mutual agreement, but never memorialized in writing.

assault of a child, it is the age of the victim rather than consent that matters. The felony charge of sexual assault of a child was later amended and Jason was ultimately convicted of two counts of fourth-degree sexual assault under WIS. STAT. § 940.225(3m), a Class A misdemeanor.

¶6 Jason was released from incarceration on June 9, 2006, and was ordered to have no contact with Leigha. On June 22, 2006, a new visitation schedule was drawn up between Monica, who would now be supervising Jason's visits with Malakai, and Jason's probation agent. This schedule permitted Jason to visit on Thursdays and Fridays from 10:00 a.m. to 11:30 a.m., while Leigha was at work.

¶7 On September 15, 2006, Leigha filed a petition for the involuntary TPR against Jason under WIS. STAT. § 48.415(9)(a), which provides that grounds for termination exist where parenthood is the result of sexual assault. Relying on WIS. STAT. § 48.42(2m)(a), which states that notice to the father is not required where the child was conceived as a result of specific types of sexual assault, Leigha did not serve Jason with notice of the petition and hearing. Jason's parental rights were terminated at a hearing on September 29, 2006.

¶8 Jason first learned his rights had been terminated when he received a copy of the TPR dispositional order from Leigha's attorney. Jason appealed, seeking permission to file a postjudgment motion and for an evidentiary hearing on that motion. On December 21, 2006, we remanded the matter to the circuit court and instructed it to address Jason's motion.

¶9 At that evidentiary hearing, facts surrounding Jason's relationship with Malakai were introduced. The parties disagree as to the number of visitation days Jason missed during the period from April 18, 2006, when his visitation

schedule was set up, to May 17, 2006, when he was taken back into custody. In any case, it is undisputed that Jason made nine visits to Leigha's home to see Malakai during this period. Between June 23, 2006, when the new visitation schedule took effect, and September 29, 2006, when Jason's parental rights were terminated, Jason visited Malakai twenty times. Jason missed nine visits during this period: twice when Malakai was sick, twice when Jason was sick, once when Monica was at work and unable to supervise, once when Jason's car would not start, twice when Leigha's family went on vacation, and once on the day of the TPR proceeding, when he was told by Monica that she had been called into work.

¶10 The quality of Jason's visits with Malakai is also in dispute. Jason claims that he played with Malakai in the back yard of Leigha's house, chasing balls around the yard, climbing a jungle gym, and teaching him how to touch his head and nose. Jason testified that Malakai would smile and start "hitting the door and window" of Leigha's house as he arrived, and he taught Malakai to say "da-da" and "dad." Jason introduced pictures of himself holding Malakai, as well as pictures he took of Malakai on his cell phone. In addition, Jason's sister and one of Jason's friends testified that they had seen videos on Jason's cell phone of Jason playing and interacting with Malakai.

¶11 On the other hand, Monica testified that Jason did not "really" talk to Malakai, and that Jason spent much of his visiting time talking on his cell phone. Rather than chasing around the yard, Jason merely "followed [Malakai] around."

¶12 Other evidence indicates that Jason's family took an interest in building a relationship with Malakai also. Jason's mother visited Malakai in summer of 2005, but Monica denied her permission to visit again in summer of 2006. Leigha took Malakai to visit with Sarah, Jason's sister, in July 2005. The

visit lasted several hours. Monica denied Sarah's subsequent requests to visit Malakai. On April 6, 2006, Sarah and her daughter visited Malakai with Jason. During that visit, Leigha invited Sarah to Malakai's birthday party, which they attended on April 29.

¶13 At the close of the evidentiary hearing, the circuit court denied Jason's motion, reaffirmed the termination of his parental rights, and restated that WIS. STAT. § 48.415(9)(a) provided grounds for the termination. Specifically, the court: (1) stated that Jason was charged with felony sexual assault under WIS. STAT. § 948.02(2) at the time of the TPR; (2) observed that Jason subsequently pled to misdemeanor fourth degree sexual assault; (3) decided that Jason had nonetheless "acceded to the elements" of the felony offense; and (4) concluded that grounds for termination under § 48.415(9)(a) were met "even though now through all these events ... [Jason] has been found guilty of fourth degree sexual assault, which is not one of the provisions cited in the statute." Jason appeals.

DISCUSSION

¶14 Jason challenges the constitutionality of WIS. STAT. § 48.42(2m), both facially and as applied to his case. The dispositive issue, however, is whether the circuit court erred in applying WIS. STAT. §§ 48.42(2m) and 48.415(9)(a) to the facts of this case and, if so, whether that tainted Jason's TPR proceeding so as to deny him the "fundamentally fair procedures" to which he was entitled as a parent. See *Sheboygan Co. DHHS v. Julie A.B.*, 2002 WI 95, ¶22, 255 Wis. 2d 170, 648 N.W.2d 402 (concluding that any attempt by the state to terminate parental rights must involve fundamentally fair procedures). Application of a

statute to the facts of record presents a question of law subject to our de novo review. *State v. Penzkofer*, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). Whether a person has standing is a question of law as well. *Carla S. v. Frank B.*, 2001 WI App 97, ¶5, 242 Wis. 2d 605, 626 N.W.2d 330.

Application of WIS. STAT. § 48.42(2m) to the Facts of this Case

¶15 WISCONSIN STAT. § 48.42 sets out the procedure governing TPR proceedings. A petition, which states such facts as the child's name, date of birth, address, and the names of the child's parent or parents, must be filed. The petition must contain a statement of consent from the parent whose rights are to be terminated (if the TPR is voluntary), or a statement of the grounds for involuntary termination under WIS. STAT. § 48.415 and the facts and circumstances by which the petitioner intends to establish those grounds. Sec. 48.42(1).

¶16 Persons who must be given notice of the petition include the parents of the child, a person who has filed an unrevoked declaration of paternal interest under WIS. STAT. § 48.025 before the birth of the child or within fourteen days of its birth, a person or persons alleged to the court to be the father of the child, a person who has lived in a familial relationship with the child who may be the father, the guardian, guardian ad litem, and legal custodian of the child, the child (if the child is twelve years of age or older), as well as any foster parent, treatment foster parent, or other physical custodian of the child. WIS. STAT. §§ 48.42(2), (2g).

¶17 WISCONSIN STAT. § 48.42(2m) identifies those who are not entitled to notice and who may be denied standing in a TPR proceeding.⁴ Section 48.42(2m)(a) relieves the petitioner of the notice requirement in proceedings against fathers of children conceived as a result of six specific types of sexual assault: first-, second-, and third-degree sexual assault under WIS. STAT. § 940.225; first- and second-degree sexual assault of a child under WIS. STAT. § 948.02; repeated acts of sexual assault of the same child under WIS. STAT. § 948.025; or sexual assault of a child placed in substitute care under WIS. STAT. § 948.085. All of the enumerated offenses are felonies.

¶18 Whether a child was thus conceived may be proven in one of two ways: either the attestation of a physician to his or her belief that “a sexual assault *as specified in this paragraph* has occurred,” or if “the person who may be the father of the child has been convicted of sexual assault *as specified in this paragraph*.” WIS. STAT. § 48.42(2m)(a) (emphasis added). A person fitting the description in § 48.42(2m)(a) has no standing to appear and contest a TPR petition, to present evidence relevant to the disposition, or to recommend alternative dispositions.

¶19 While Jason was initially charged with a felony under WIS. STAT. § 948.02(2), this charge was later amended to two misdemeanor charges under WIS. STAT. § 940.225(3m). The misdemeanor conviction is insufficient to invoke WIS. STAT. § 48.42(2m) for purposes of notice and standing. By enumerating specific felony crimes and limiting application of the statute to those crimes

⁴ WISCONSIN STAT. § 48.42(2m)(b) concerns the fathers of nonmarital children, where paternity has not been established. Jason’s paternity was established at the adjudication hearing of November 21, 2005; therefore, § 48.42(2m)(b) does not apply.

“specified in this paragraph,” the legislature intended this provision to apply only to the perpetrators of certain sexual assaults (felony sexual assaults), and not to others (for example, misdemeanor fourth-degree sexual assault).

¶20 Because Jason was never convicted of any of the crimes specified in WIS. STAT. § 48.42(2m)(a), Leigha was not entitled to deprive him of notice of the TPR petition and the court erred when it denied Jason standing to contest the termination of his rights. To hold otherwise contravenes the express intent of the legislature to distinguish perpetrators of one category of crime from perpetrators of another.

Did the Misapplication of WIS. STAT. § 48.42(2m)(a) Taint the Proceedings to the Extent that the Proceedings were Fundamentally Unfair?

¶21 Once a TPR petition has been filed, a contested termination proceeding involves two steps. The first step is a fact-finding hearing to determine whether grounds for the termination of parental rights exist. *Julie A.B.*, 255 Wis. 2d 170, ¶24. During this step, the rights of the parent are paramount and the parent enjoys a full complement of procedural rights. *Id.* If, at the close of the fact-finding hearing, the court or jury determines that grounds for termination have been established, the court must find the parent unfit and the proceeding moves to the dispositional hearing. *Id.*, ¶¶26, 28. The focus then shifts to the best interests of the child in determining the appropriate disposition. *Id.*, ¶28. By the time Jason learned of the proceedings, both the grounds phase and the disposition hearing had been completed.

¶22 Termination of a parent’s rights means that, pursuant to a court order, “all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed.” WIS. STAT. § 48.40(2). Such

profound consequences have prompted the development of detailed statutory requirements. A parent's right to companionship, care, custody, and management of his or her children is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Lassiter v. DSS*, 452 U.S. 18, 27 (1981). Thus, termination proceedings require the state to "provide the parents with fundamentally fair procedures." *Julie A.B.*, 255 Wis. 2d 170, ¶22 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)).

¶23 Leigha argues that the postjudgment evidentiary hearing, where Jason had the opportunity to contest the termination and present evidence of his relationship with Malakai, cured any defect in the original proceedings. We disagree. At that evidentiary hearing, the circuit court stated Jason was "convicted of a felony where the victim of the felony offense is the mother of the child, and thus, the child is the product of the criminal act." Jason however, was convicted of a misdemeanor, a crime not included in WIS. STAT. § 48.42(2m)(a).

¶24 It is the court's insistence that Jason was a felon that concerns us. The court's ruling that Jason's parental rights must be terminated under WIS. STAT. § 48.415(9) regardless of the fact that he was never convicted of one of the specified offenses at the very least misapplies the statute and at worst completely disregards the deference and protection to which parental rights are entitled. It appears from the record that the erroneous application of WIS. STAT. § 48.42(2m), which allowed the termination to proceed without notice, influenced the court's finding that grounds for termination of Jason's parental rights existed under § 48.415(9), parenthood as a result of sexual assault.

¶25 The circuit court erroneously concluded that Jason was convicted of felony sexual assault. Furthermore, it relied on that conclusion to deny Jason the

opportunity to participate in the initial TRP proceedings, it repeated its opinion that Jason did not have standing to contest the termination at the postjudgment fact-finding hearing, and it subsequently found grounds for termination under WIS. STAT. § 48.415(9). For these reasons, we hold that Jason was not accorded fundamentally fair procedures in the termination of his parental rights.

CONCLUSION

¶26 By denying notice and standing to a father who was entitled to both, the circuit court misapplied WIS. STAT. §§ 48.42(2m) and 48.415(9)(a) to the facts of this case. We reverse the judgment terminating Jason’s parental rights and the order denying his motion to vacate the judgment.

By the Court.—Orders reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

