COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2008

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. 2007AP2400 **Cir. Ct. No. 2006TP60**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO IVANNIES L., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

IVAN L.-C.,

RESPONDENT-APPELLANT,

JACQUELINE J.,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

¶1 BRUNNER, J. Ivan L.-C. appeals an order terminating his parental rights.[1] Ivan argues the termination is not proper under WIS. STAT. § 48.415(10) because he was not a party to the underlying CHIPS[2] order. He also argues WIS. STAT. § 48.415(10) is facially unconstitutional and unconstitutional as applied to his case. We disagree and affirm the order.

BACKGROUND

¶2 On September 8, 2005, Ivan and Jacqueline J.'s parental rights to Ivanna L. and Maria L. were terminated. Then, on January 17, 2006, Jacqueline gave birth to Ivannies, who was born with cocaine in her system. Ivan and Jacqueline were not married at the time; in fact, Jacqueline was married to another man.

¶3 On January 19, 2006, the court held an emergency custody hearing at which time, the County filed a petition for protection or services. Jacqueline and Ivan both attended the hearing. Ivan requested an interpreter for the next hearing. However, Ivan did not attend the next hearing. On February 22, the court held an adjudication hearing. Neither parent attended. The court held a dispositional hearing on April 3. Ivan was not present because he was in custody. Jacqueline was present and agreed to the entry of the dispositional report and the proposed conditions. The order stated, "Upon adjudication, Ivan [] shall" and then listed ten conditions for return of Ivannies to Ivan.

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

[2] CHIPS is an acronym for child in need of protection or services. *See* WIS. STAT. § 48.415(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The County filed a petition for termination of parental rights on August 17, 2006 listing Jacqueline, the legal father – Jacqueline's husband, and Ivan was listed as the alleged father. As grounds, the County listed WIS. STAT. § 48.415(1), 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 October 20, Jacqueline and Ivan appeared in court. The court took testimony regarding Ivannies' paternity and found the evidence overcame the marital presumption. The court therefore adjudicated Ivan the father. On May 23, 2007, the court granted summary judgment because Ivan's and Jacqueline's parental rights to their older children had been terminated in September 2005. At the dispositional hearing, the court determined it was in Ivannies best interest to have the parental rights of Ivan and Jacqueline terminated.

DISCUSSION

¶5 Ivan first argues WIS. STAT. § 48.415(10) is ambiguous because it does not specify whether the parent subject to termination must be bound by the underlying CHIPS order. Ivan argues the statute should be interpreted to require that the parent must be subject to the CHIPS order before their rights may be terminated. We must therefore interpret what the County must prove in order to meet the requirements of § 48.415(10).

¶6 Construction of a statute and its application to the facts found by the trial court presents a question of law we review without deference. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. We begin with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. That language is

given its common, ordinary, and accepted meaning. ***Id.*** We interpret language in the context in which it is used, in relation to the language of surrounding or closely related statutes, and in a way that avoids absurd results. ***Id.***, ¶46. A statute is ambiguous when it is "capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47. We do not consult extrinsic sources such as legislative history unless the statutory language is ambiguous. ***Id.***, ¶46.

¶7 Under WIS. STAT. § 48.415(10), the court may find grounds to terminate parental rights due to prior involuntary termination of parental rights to a different child if the County proves:

> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13(2), (3) or (10) [and]
>
> (b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) … a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

¶8 We see nothing ambiguous about the statute. The plain language of the statute only requires that the child has been adjudged in need of protection or services under WIS. STAT. § 48.13(2), (3) or (10); and that within three years prior to that adjudication a court has terminated the parent's rights to another child under one of the grounds listed in WIS. STAT. § 48.415. We note that § 48.415 provides a list of grounds for *involuntary* termination of parental rights; thus, a parent's rights to his or her child can only be terminated under § 48.415(10) if the rights to a prior child were involuntarily terminated. By its plain language, the statute does not require that the parent be bound by the underlying CHIPS order.

¶9 Ivan next argues WIS. STAT. § 48.415(10) is facially unconstitutional because it does not require a finding of unfitness. Whether the statute is constitutional is a question of law we review without deference. *See* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. "We begin with the presumption that the statute is constitutional and resolve any doubt in upholding its constitutionality." ***Id.***

¶10 The right to parent one's child implicates a fundamental liberty interest. ***Id.***, ¶20. Therefore, the statute must be narrowly tailored to meet a compelling state interest. *See* ***id.***, ¶17. The compelling state interest served by terminating a parent's rights under this statute is to protect children from unfit parents. *See* ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344.

¶11 The supreme court rejected an argument similar to Ivan's in ***Ponn P.*** There, a parent challenged WIS. STAT. § 48.415(4), which provides that continued denial of periods of physical placement or visitation is grounds for termination of parental rights. ***Id.***, ¶32. The court concluded the statute is narrowly tailored because a finding that grounds for termination exist under § 48.415(4) can only be made 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. ***Id.***, ¶¶26, 32.

¶12 Here too, termination can only happen after a "step-by-step" process. First, the County must show that the child has been adjudicated as a child in need of protection or services due to abandonment, abuse, or neglect that seriously endangers the child's physical health. *See* WIS. STAT. § 48.415(10); *see also* WIS. STAT. § 48.13(2), (3), and (10). Each of these grounds reflects on the parent's

fitness. Additionally, the County must prove that the court has ordered the involuntary termination of parental rights with respect to another child 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). Thus, the person's parenting skills have been shown lacking within a short time of the current proceeding. As noted in ***Ponn P.***, it "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. ***Id.***, ¶32. A parent cannot be found unfit under this statute unless the child is currently in need of protection or services the child's health, safety, or welfare, and the parent has had their rights involuntarily terminated to another child within the previous three years. Thus, § 48.415(10) is narrowly tailored to advance the compelling interest in protecting children from unfit parents.

¶13 Ivan next argues the statute is unconstitutional as applied to him. Ivan must therefore establish beyond a reasonable doubt that the statute is unconstitutional as applied to the specific circumstances at hand. *See* ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶14 Ivan argues the statute is unconstitutional as applied because the prior terminations were "default proceedings which were entered without counsel; one and possibly both of the prior terminations were entered in violation of law…." Ivan therefore asks this court to look at the substance of the prior proceedings. As noted by the Wisconsin Supreme Court, "to require more evidence than a prior involuntary termination order to satisfy WIS. STAT. § 48.415(10) would be tantamount to permitting a collateral attack on the prior order." ***Oneida County DHS v. Nicole W.***, 2007 WI 30, ¶27, 299 Wis. 2d 637, 728 N.W.2d. 652. "A collateral attack on a judgment is 'an attempt to avoid,

evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" ***Id.*** (citations omitted).

¶15 Collateral attacks are generally barred. ***Id.***, ¶28. However, in criminal proceedings, collateral attacks are allowed when the defendant was denied the right to counsel. ***Id.***, ¶30. While the supreme court has not stated that a parent may collaterally attack a TPR proceeding for denial of the right to counsel, it has not precluded the possibility. *See* ***id.***, ¶¶31-35. In order to make a prima facie showing of a violation of the right to counsel, the defendant must "demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.***, ¶34 (citations omitted). In a TPR proceeding, the right to counsel only attaches when the parent appears. *See* WIS. STAT. § 48.23. Ivan argues that his failure to appear in the prior termination proceedings "may [have been] the product of state discouragement and the failure to warn in a language he can understand…." However, Ivan makes no claim that he was actually unaware of the hearings. Further, Ivan has provided no citation to authority to support the proposition that state "discouragement" can in any way give rise to a claim for denial of the right to counsel. Therefore, even if we were to conclude that a collateral attack is permitted for denial of the right to counsel in a TPR proceeding, Ivan has failed to make a prima facie showing that his right was violated.

¶16 Ivan also argues the statute is unconstitutional as applied because he was not made a party to the CHIPS order and therefore "had no opportunity to meet any conditions for return." As noted above, there is no requirement that the parent be given the opportunity to meet the CHIPS conditions. Rather, the fact

that the court found Ivannies in need of protection or services so soon after Ivan's rights to his other children were terminated speaks to his unfitness. The court began CHIPS proceedings for Ivanna in 2003. Ivan's rights to Ivanna and Maria were terminated in September 2005. Ivannies was born in January 2006. Ivan had three years from the beginning of the proceedings against him regarding his older child until the birth of Ivannies in which to take steps to ensure that he would be able to care for future children.

¶17 Finally, Ivan argues the statute is unconstitutional as applied because he had no ability to attend the CHIPS dispositional hearing because he was incarcerated and the court did not order him produced. Ivan ignores the fact that he was present at the initial emergency custody hearing and took no steps between that hearing in January and the dispositional hearing in March to be adjudicated as Ivannies' father and therefore make himself a party to the proceedings. Ivan has provided no reason for his failure to pursue adjudication. Ivan also made no request of the court, either informally or formally by a habeas corpus motion, to appear at the CHIPS hearing. Ivan's own failures directly caused the termination of his parental rights. The statute is not unconstitutional as applied.

By the Court.—Order affirmed.

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