COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 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 Nos. 2008AP282
2008AP283
2008AP284

Cir. Ct. Nos. 2005TP64
2005TP65
2005TP66

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

NO. 2008AP282

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

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E.,

RESPONDENT-APPELLANT.

NO. 2008AP283

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

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E.,

RESPONDENT-APPELLANT.

NO. 2008AP284

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

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, P.J.[1] In this consolidated appeal, Phillip J.E. appeals termination of parental rights (TPR) orders under WIS. STAT. § 48.415(10) to his three children, Daniel J.E, Michelle L.E. and Sera M.E. The grounds for the TPR orders were established, in part, by prior adjudications that his children were

[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.

in need of protection or services (CHIPS) under WIS. STAT. § 48.13(10). Phillip contends that the Waupaca County Department of Health and Human Services (the Department) should be estopped from obtaining terminations under WIS. STAT. § 48.415(10) because it breached a plea agreement with him regarding the CHIPS adjudications by initiating TPR proceedings. Phillip also contends that application of § 48.415(10) in this case violates his right to substantive due process. We disagree and therefore affirm.

Background

¶2 Much of the background pertinent to this appeal was set forth in ***Waupaca County Department of Health and Human Services v. Phillip J.E. and Tracy J.E.***, Nos. 2007AP2926, 2007AP2927, 2007AP2928, unpublished slip op. (WI App November 1, 2007). As relevant here, we explained:

> The three children that are the subject of this appeal are triplets born to Phillip and Tracy [Phillip's wife] on June 13, 2005. Within days of the triplets' birth, the Waupaca County Department of Health and Human Services petitioned to have the children adjudicated CHIPS and for an order for temporary physical custody. The petitions alleged that the court had jurisdiction over the children under WIS. STAT. § 48.13(10) and (10m). As relevant here, that statute provides as follows:
>
> > The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
> >
> > ....
> >
> > (10) Whose parent ... neglects, refuses or is unable ... to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child;

> (10m) Whose parent ... is at substantial risk of neglecting, refusing or being unable ... to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent ... has neglected, refused or been unable ... to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home....

The allegations in the CHIPS petitions included the following:

> • Phillip and Tracy had a "long-standing history" with the Department, including contacts with the Department dating back to 1994.
>
> • In the intervening years, Phillip and Tracy had four different children removed from their home and, in all four cases, their parental rights to the children were ultimately terminated.
>
> • In each case, it was alleged that Phillip and Tracy had been unable to meet the conditions of return, and in each case there was evidence that Phillip and Tracy were unable to maintain a household in a safe, habitable, and sanitary condition.
>
> • The most recent termination of parental rights occurred on February 15, 2005, only four months before the triplets were born. At that time, the Department "had [again] been attempting to work with the parents to try and provide them with the necessary skills to provide basic care and shelter for the children. Yet again, the parents were unable to do so, and their house remained in an extremely unsanitary condition."
>
> • Upon admission to the hospital to give birth to the triplets, Tracy's personal hygiene was so poor that hospital staff had to request that she bathe, offering as a pretext that everyone was required to submit to this procedure.

> • There were indications that Tracy was not cooperating with the triplets' prenatal care in an attempt to avoid contacts with the Department.
>
> • The Department had received a report that, in the winter and up to a few months before the petitions were filed, Phillip and Tracy were living in a tent and using a small electric heater.
>
> • Although Phillip and Tracy had secured an apartment, their "situation in that apartment [was] unclear," and they had refused to allow the Department in to the apartment to check its condition.
>
> • Phillip and Tracy had "constantly and consistently maintained their housing in a state of total disarray and uninhabitability. In many instances ... [it was] not only unsafe, but ... totally unsanitary."
>
> • Phillip and Tracy had shown themselves to be "completely incapable of providing for even the simplest care for their children" despite the fact that the Department had spent "many years and significant resources attempting to impart ... the basic ability to care for their children." Phillip and Tracy had the benefit of home health aids, parent aids, and various social workers who had worked with them "intensively" to show them how to care for their children. This included significant hands-on training, which Phillip and Tracy were unable to grasp.

The circuit court appointed counsel for Phillip and Tracy, and they initially entered denials to the petitions. Approximately one week before the date scheduled for trial, however, Phillip and Tracy appeared at a pretrial conference and informed the court, through their attorney, that the parties had reached an agreement. More specifically, their attorney explained as follows:

> [T]here would be an admission on the part of the parents that protective services are appropriate, that the county would be asking for one year of protective services, that as of now the children would not be placed at the home but would remain placed in foster care.

> The department would continue to monitor the home ... and the anticipation is that over time, the [parents] will be able to [ ] either prove themselves or not to the satisfaction of the department; and that they understand there are some issues and do not dispute the validity of the inquiry and just feel that if given some time and some assistance, they're going to be able to meet or exceed the expectations of the department....

The Department indicated that it had the same understanding, adding that: "Essentially they will not be contesting the petition or admitting, however you want to phrase it." The parents' attorney clarified that Phillip and Tracy had decided not to contest the allegations in the petitions.

In conducting the plea colloquy, the circuit court paused to ask if the parties had discussed whether the CHIPS finding would be based on both grounds alleged in the petitions or on only one of the grounds. The Department indicated that the parties had not discussed that, but that the Department would "prefer" a finding based on WIS. STAT. § 48.13(10). The parents' attorney did not object. The court proceeded to conduct the plea colloquy based on § 48.13(10), and found the children in need of protection or services.

The circuit court subsequently entered a written CHIPS dispositional order for each child effective September 27, 2005, including conditions for return. The orders showed that the children were found in need of protection or services under both WIS. STAT. § 48.13(10) and (10m).

A little over six months later, the Department petitioned for the termination of Phillip's and Tracy's parental rights to the triplets. As one of the grounds for termination, the Department alleged prior involuntary termination of parental rights to another child under WIS. STAT. § 48.415(10). The requirements for that ground are as follows:

> (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).

> (b) That, within 3 years prior to the date the court adjudged the child who is the subject of the petition 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.
>
> WIS. STAT. § 48.415(10). Thus, based on the September 2005 CHIPS orders and the February 2005 termination of Phillip's and Tracy's parental rights to another child, the Department appeared to possess indisputable grounds under § 48.415(10) for seeking termination of Phillip's and Tracy' parental rights to the triplets.
>
> Phillip and Tracy moved to withdraw their CHIPS pleas and to vacate or revise the CHIPS orders. They argued, among other things, that their pleas were not knowing, intelligent, and voluntary because they were not fully informed of the consequences of entering a CHIPS plea based on WIS. STAT. § 48.13(10).
>
> After conducting a ***Machner***-type hearing, the circuit court denied the parents' motions but amended the CHIPS orders to clarify that there was only one ground for the orders, WIS. STAT. § 48.13(10). The court reasoned that the amendment was necessary because, during the plea colloquy, the court had proceeded only under § 48.13(10).

Phillip J.E. and Tracy J.E., Nos. 2007AP2926, 2007AP2927, 2007AP2928, unpublished slip op., ¶¶2-10.

¶3 On appeal, Phillip and Tracy renewed their request to withdraw their CHIPS pleas. They contended that they received ineffective assistance of counsel in the CHIPS proceedings that caused them to enter CHIPS pleas that were not knowing, intelligent and voluntary. Specifically, they asserted that their attorney failed to inform them of the consequences of a plea under WIS. STAT. § 48.13(10), namely that the Department could seek a termination of parental rights based on WIS. STAT. § 48.415(10) without having to prove that Phillip and Tracy failed to meet the conditions for return set forth in the CHIPS orders. Among other claims,

the parents also contended the CHIPS proceeding and the Department's subsequent effort to seek TPR orders under § 48.415(10) violated their right to due process and "fundamental fairness." We rejected these arguments.

¶4 In addressing the ineffective assistance claim, we concluded that, for Phillip and Tracy to make knowing, intelligent and voluntary pleas to the CHIPS petitions under WIS. STAT. § 48.13(10), they did not need to know that a consequence of the pleas was that the Department could seek a termination of parental rights based on WIS. STAT. § 48.415(10). We noted that this consequence was a collateral (as opposed to direct) consequence of the parents' plea, and that, in the criminal plea context, "knowledge of [collateral] consequences is not a prerequisite to entering a knowing and intelligent plea," citing ***State v. Santos***, 136 Wis. 2d 528, 532-33, 401 N.W.2d 856 (Ct. App. 1987). We thus concluded that the attorney's failure to inform Phillip and Tracy that the Department could seek a termination of parental rights based on § 48.415(10) did not constitute ineffective assistance.

¶5 We rejected Phillip's and Tracy's fairness arguments, and concluded that, to the extent that these arguments were directed at the fairness of the CHIPS proceeding, they boiled down to a contention that the Department breached a plea agreement. We assumed for the sake of argument that there was such an agreement, and that the Department had agreed to give Phillip and Tracy the opportunity to meet the conditions of return in the CHIPS orders, and concluded that the Department had met its obligation by giving the parents six months to do so. We explicitly declined to address any arguments that were directed at the fairness of the TPR proceedings, which we concluded were best raised in the

context of those proceedings. ***Phillip J.E. and Tracy J.E.***, Nos. 2007AP2926, 2007AP2927, 2007AP2928, unpublished slip op., ¶25.[2]

¶6 The circuit court proceeded on the TPR petitions while the appeal of the parents' attempt to withdraw their CHIPS pleas was pending before this court. On July 11, 2007, the circuit court granted the Department's motion for partial summary judgment as to grounds for termination pursuant to WIS. STAT. § 48.415(10), finding Phillip and Tracy to be unfit. In the disposition phase, a county social worker filed a report requesting termination of parental rights. The report states as follows:

> While the parents did enter into some services required under the [CHIPS] orders, little progress was made toward eliminating the cause that lead to the removal of the children from the parental home. In fact, the parents continued to demonstrate a marked inability to grasp even the most rudimentary parenting skills. Most importantly, the parents continued to demonstrate a total inability to maintain a household in a safe, habitable and sanitary condition. Over approximately the last two years, the Waupaca County Department of Health and Human Services conducted several home visits both scheduled and unscheduled to the three different residences inhabited by Philip and Tracy E[.] During every unscheduled home visit, the different residence(s) were found to be in such poor condition that the Department could not determine the home to be sanitary and safe for adults let alone three small infants….

¶7 The circuit court held a dispositional hearing on September 18-19, 2007. The county social worker testified that she recommended initiating

[2] Phillip's and Tracy's attorney filed a petition for review by facsimile on December 2, 2007. By order dated January 24, 2008, the supreme court dismissed the petition as untimely because the case did not meet the criteria for facsimile filing set forth in WIS. STAT. § 801.16, and the last day for filing a timely petition was December 3, 2007.

termination proceedings five to six months after the CHIPS orders were entered in September 2005 because the parents had

> made essentially no significant progress on their ability to maintain the home, demonstrate appropriate parenting skills. They certainly got themselves involved in some of the services that were recommended and were making some progress on those services, but those same basic things that had been present year after year after year with each child prior to these three were the same: No one was cleaning the house. And it wasn't just that it was dirty. It was that it was filthy and unsafe. Parenting skills were lacking. Those types of things, hadn't made any improvement at all.

The social worker also testified that Phillip had successfully completed AODA treatment and was attending AA meetings, and that Phillip had acted as the primary caretaker during the parents' scheduled visitations with the children.

¶8 At the conclusion of the dispositional hearing, the court found that it was in the children's best interest to terminate Phillip's and Tracy's parental rights. Phillip appeals.[3]

Discussion

¶9 Phillip contends that two doctrines of estoppel, equitable and judicial, require that the county be estopped from obtaining terminations of parental rights under WIS. STAT. § 48.415(10). Phillip also contends that

[3] Tracy is not a party to this appeal. She filed a separate notice of appeal on December 20, 2007. Her attorney filed a no-merit report on January 18, 2008, to which Tracy did not respond. On February 27, 2008, we issued an order affirming the circuit court's orders and relieving her attorney of any further representation in that matter. ***Waupaca County Dep't of Health and Human Servs. v. Phillip J.E.***, Nos. 2007AP2926-NM, 2007AP2927-NM, 2007AP2928-NM, unpublished order (WI App February 27, 2008).

§ 48.415(10), as applied to his case, violated his constitutional right to substantive due process. We address each of these arguments in turn.

A. Estoppel Arguments

¶10 We first examine whether the county should be estopped from obtaining terminations of parental rights under WIS. STAT. § 48.415(10) by application of two doctrines of estoppel, equitable and judicial. The question of whether on undisputed facts a particular case proves either of these estoppel doctrines is a question of law that we review de novo. *See* ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶21, 291 Wis. 2d 259, 715 N.W.2d 620 (equitable estoppel); ***Salveson v. Douglas County***, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182 (judicial estoppel).

¶11 Phillip's estoppel arguments center on his allegation that the Department breached a plea agreement. He contends that, in exchange for pleas of no contest to the CHIPS petitions, the Department agreed to provide him and Tracy one year to fulfill the conditions of return, and not to bring termination proceedings during this time period. He argues that once the Department secured this agreement, it laid the groundwork for a change of position by seeking the CHIPS orders under WIS. STAT. § 48.13(10). Because the Department, in Phillip's view, breached the plea agreement by initiating termination proceedings after only six months under the CHIPS orders, it should be equitably estopped from obtaining a TPR under WIS. STAT. § 48.415(10). Phillip also contends that the Department should be judicially estopped from obtaining a TPR under § 48.415(10) because, by filing the TPR petitions, the Department took the "clearly inconsistent" position that it was not obligated to provide protective services to Phillip and Tracy, "that their compliance with the CHIPS dispositional

order was irrelevant, and that unfitness could be proved solely on the basis of the CHIPS order and the prior orders terminating Phillip's parental rights." For the reasons set forth below, we disagree.

¶12 As we explained in ***Phillip J.E. and Tracy J.E.***, Nos. 2007AP2926, 2007AP2927, 2007AP2928, unpublished slip op., ¶26, Phillip and Tracy received the opportunity to remedy the unsanitary conditions in the home and to demonstrate their fitness to the Department. The Department did not file termination petitions immediately after the parents entered their CHIPS pleas. It is undisputed that, for six months before termination orders were sought, the Department continued to provide services to the parents and to monitor conditions in the home. According to the undisputed testimony of the parents' social worker, the termination request was made six months after the CHIPS orders took effect because the parents had "made essentially no significant progress on their ability to maintain the home, demonstrate appropriate parenting skills."

¶13 Moreover, the record does not support Phillip's claim that the Department pledged to give him and Tracy one year to fulfill the conditions of return, or to wait one year before seeking termination orders. At the ***Machner***-type hearing, when asked whether the Department promised not seek terminations within a certain period of time after the CHIPS orders, the parents' attorney for the CHIPS proceedings testified, "I don't think we had a particular period of time in mind [only] … a period of time … sufficient for the [parents] to display their capability." Phillip and Tracy were afforded six months to demonstrate their fitness, and we cannot conclude that such a period of time to accomplish this task was insufficient within the meaning of the agreement.

¶14 In sum, Phillip fails to prove the act of unfairness of which he complains, namely that the Department breached a plea agreement. For this reason, neither equitable estoppel nor judicial estoppel is appropriate in this case.[4]

B. Substantive Due Process Argument and ***Nicole W.***

¶15 We next examine whether the circuit court's application of WIS. STAT. § 48.415(10) to Phillip violated his right to substantive due process. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law[.]" *See also* Wis. Const. art. I, §§ 1 and 8. "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." ***Kenosha County Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶39, 293 Wis. 2d 530, 716 N.W.2d 845 (citation omitted). Any statute that adversely affects fundamental liberty interests is subject to strict scrutiny. ***Dane County Dep't of Human Servs. v. Ponn P.***, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. To survive strict scrutiny, a statute must be narrowly tailored to meet a compelling state interest. ***Id.*** Because Wisconsin courts have determined that a parent has a fundamental liberty interest

[4] As we recognized in our decision on Phillip's first appeal, once the Department determined that the parents' progress was unsatisfactory and decided to seek termination of parental rights, the Department used the CHIPS orders under WIS. STAT. § 48.13(10) to its advantage in the TPR proceedings. However, this action did not violate any promise made by the Department. Phillip makes much of the testimony at the ***Machner***-type hearing of the Department's attorney that he made a "strategic" decision in requesting that the court take the CHIPS pleas under § 48.13(10) instead of § 48.13(10m). We note again here that this testimony "does not establish that the Department intended to seek termination regardless whether Phillip and Tracy made acceptable progress in meeting the conditions of return." ***Waupaca County Dep't of Health and Human Servs. v. Phillip J.E. and Tracy J.E.***, Nos. 2007AP2926, 2007AP2927, 2007AP2928, unpublished slip op., ¶26 n.6 (WI App November 1, 2007).

in the custody and care of his or her children, *see, e.g.* ***Jodie W.***, 293 Wis. 2d 530, ¶41, and that protection of children from unfit parents is a compelling state interest, ***Ponn P.***, 279 Wis. 2d 169, ¶20, the grounds for termination set forth under WIS. STAT. § 48.415 and their application to a particular case are subject to strict scrutiny. ***Jodi W.***, 293 Wis. 2d 530, ¶41.

¶16 Phillip argues that substantive due process requires that, when a termination is sought under WIS. STAT. § 48.415(10), the underlying WIS. STAT. § 48.13(10) CHIPS order that serves as partial grounds for the termination must reflect a fair and accurate determination of parental fitness. At least to some extent, this argument rehashes arguments rejected above regarding the Department's alleged breach of a plea agreement. However, to the extent that it does not rest on already disposed of claims, we must conclude, based upon the supreme court's recent decision in ***Oneida County Dep't of Social Servs. v. Nicole W.***, 2007 WI 30, 299 Wis. 2d 637, 728 N.W.2d 652, that this argument is barred as a collateral attack upon the circuit court's prior CHIPS orders.[5]

[5] In their first appeal, Phillip and Tracy argued that the CHIPS petitions did not provide a sufficient factual basis for a finding under WIS. STAT. § 48.13(10). We declined to address this argument because Phillip and Tracy failed to respond to the guardian ad litem's assertion that they had waived this argument by failing to raise it within ten days of the plea hearing pursuant to WIS. STAT. § 48.297(2). Phillip does not directly reassert this argument here, but notes that Phillip's CHIPS attorney argued at the ***Machner***-type hearing that the parents would have prevailed had they contested the count under § 48.13(10) because no neglect had occurred because the triplets were taken from the parents at birth. We observe, however, that "neglect" is not the only basis for a CHIPS order under § 48.13(10). Such an order may also be based on a finding that the parent "is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." Sec. 48.13(10). We believe that the question of whether, in fact, the CHIPS petitions stated a basis for CHIPS orders under § 48.13(10) may arguably be relevant to the matter of whether a subsequent termination under WIS. STAT. § 48.415(10) would violate substantive due process. However, because we reject Phillip's substantive due process argument as a collateral attack on the CHIPS orders, we need not consider, for purposes of Phillip's due process argument, whether the CHIPS petitions actually stated a factual basis for the pleas.

¶17 "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.***, ¶27 (citations omitted). "[A] judgment is binding on the parties and may not be attacked in a collateral action unless it was procured by fraud." ***Id.***, ¶28 (citation omitted). Courts have recognized that a criminal defendant may collaterally attack a prior judgment within the context of a claim of ineffective assistance of counsel. ***Id.***, ¶30 (*citing* ***State v. Hahn***, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528).

¶18 In ***Nicole W.***, a mother subject to a termination order under WIS. STAT. § 48.415(10), challenged the Oneida County Social Services Department's use of a prior termination order to satisfy the requirement set forth in § 48.415(10)(b) that the parent's rights to another child had been terminated within the previous three years. Nicole W. argued that, because the termination order in the prior case did not disclose the statutory grounds for the termination, the Department could not establish that the prior termination was based on "one or more of the grounds specified in [§ 48.415]," as required by § 48.415(10).

¶19 The ***Nicole W.*** court first rejected this argument by concluding that WIS. STAT. § 48.415(10) did not require proof of the specific grounds upon which the prior termination order was obtained, and, regardless, omission of grounds in the termination order in the prior case was a "mere clerical error." ***Nicole W.***, 299 Wis. 2d 637, ¶¶19, 25. The ***Nicole W.*** court further concluded that the mother's argument also amounted to an impermissible collateral attack on the prior termination order. ***Id.***, ¶27. We read ***Nicole W.*** to hold that an attempt to examine a prior order that constitutes grounds for termination of parental rights under §

48.415(10) is barred as a collateral attack on the prior order, except where the order was obtained by fraud or when the defendant makes a prima facie showing that he or she was denied effective assistance of counsel in the prior proceeding.

¶20 Phillip attempts to distinguish ***Nicole W.*** by arguing that the underlying order in that case was a termination order that fulfilled a requirement of WIS. STAT. § 48.415(10) not at issue in this case, whereas the underlying order in this case is a CHIPS order that fulfilled the requirement of § 48.415(10) at issue here. Phillip suggests that because "significant earlier findings" were made in the CHIPS case—which, under ***Ponn P.***, 279 Wis. 2d 169, ¶20, permits us to examine the constitutionality of the entire statutory scheme, including the CHIPS statute—we may examine the underlying CHIPS order. However, we fail to see why a challenge to a prior a termination order would be a collateral attack under ***Nicole W.***, but a challenge to a CHIPS order would not be.

¶21 Phillip also argues that his challenge to the application of WIS. STAT. § 48.415(10) to him is not barred as a collateral attack because he was denied the effective assistance of counsel in the CHIPS proceeding, and because the underlying CHIPS orders were obtained by fraud. We reject both of these arguments. We addressed and rejected in our decision on the first appeal Phillip's and Tracy's contention that their attorney rendered ineffective assistance in the CHIPS proceeding for failing to advise them that the Department could proceed with a termination under § 48.415(10). As for Phillip's argument that the CHIPS orders were obtained by fraud, we observe that this claim is based on arguments rejected above that the Department breached a plea agreement, and that the Department somehow deceived him and his wife and capitalized on this deception. We reiterate that the Department did not immediately initiate termination

proceedings under § 48.415(10) after securing the plea agreement, but instead gave the parents six months within which to demonstrate their fitness, a period of time consistent with the apparent terms of the plea agreement.

Conclusion

¶22 For the reasons explained above, we conclude that the Department is not estopped from obtaining a termination of Phillip's parental rights under WIS. STAT. § 48.415(10), and that Phillip's substantive due process challenge to the circuit court's application of § 48.415(10) in this case is barred as a collateral attack on the underlying CHIPS orders. We therefore affirm.

By the Court.—Orders affirmed.

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