COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2004

Cornelia G. Clark
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. 03-2440, 03-2441, 03-2442, 03-2443, 03-2444, 03-2445, 03-2446

Cir. Ct. Nos. 02TP000107, 02TP000108, 02TP000109, 02TP000110, 02TP000111, 02TP000112, 02TP000113

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 03-2440

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2441

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2442

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2443

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2444

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2445

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

NO. 03-2446

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PONN P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Ponn P. appeals orders of the circuit court terminating his parental rights to his children, Diana, Channa, Rattanck, Dara, Rothana, Daer, and Ericka. Ponn contends the circuit court was without jurisdiction to terminate his parental rights because WIS. STAT. § 48.415(4), the statute under which the court acted, is a facially unconstitutional statute because it permits the government to sidestep its duty to prove parental unfitness. We reject Ponn's appeal because he has not met his burden of showing that the statutory scheme is unconstitutional.

¶2 On August 12, 2002, Dane County petitioned to terminate Ponn's parental rights to his seven children, pursuant to WIS. STAT. § 48.415(1), (2), and (6). On March 4, 2003, Dane County amended its petition to allege that grounds for termination existed under § 48.415(2) and (4). On June 2, 2003, Ponn entered a no contest plea and waiver to the termination petition. Ponn admitted the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

existence of the ground for termination listed in § 48.415(4) and, more specifically, admitted he had been denied visitation pursuant to an order under WIS. STAT. §§ 48.363 and 48.365, that at least one year had elapsed since the order denying visitation, and that the order had not been subsequently modified to permit visitation. The court accepted Ponn's no contest plea and subsequently held a contested dispositional hearing. On June 23, 2003, the circuit court entered seven orders terminating Ponn's parental rights to his seven children. Ponn appeals these orders.

¶3 Ponn asserts that in a termination of parental rights proceeding, the government is constitutionally required to show unfitness by clear and convincing evidence. Under WIS. STAT. § 48.415(4), proof of an order denying visitation or physical placement and proof that at least one year has elapsed without modification of the order allowing visitation or physical placement provides a showing of unfitness. That is, once one of the grounds for termination listed in § 48.415 has been established, the circuit court "shall," pursuant to WIS. STAT. § 48.424(4), find the parent "unfit." Ponn is silent on the operation of § 48.424(4) because his no contest plea rendered a finding of unfitness under § 48.424(4) by the circuit court unnecessary.[2] However, his constitutional argument applies equally to contested and uncontested findings based on the ground listed in § 48.415(4). Accordingly, we choose to address his argument in the context of a contested hearing and, therefore, incorporate references to § 48.424(4) in our discussion.

[2] WISCONSIN STAT. § 48.424(1) reads: "The purpose of the fact-finding hearing is to determine whether grounds exist for the termination of parental rights *in those cases where the termination was contested* at the hearing on the petition under s. 48.422." (Emphasis added.)

¶4 Ponn contends the statutory scheme is unconstitutional because this road to a finding of unfitness starts with WIS. STAT. § 48.355(3)(a), a statute authorizing denial of parental visitation based on the best interests of the child standard, not on parental fitness, and nowhere along this road does the government need to present "individualized proof of a parent's unfitness." Ponn argues that WIS. STAT. § 48.415(4) is unconstitutional on its face because it deprives all parents of substantive due process by permitting termination of parental rights based on a prior order denying visitation without regard to whether that prior decision involved a finding of unfitness. Thus, in Ponn's view, the statute is invalid in all of its applications because, when the statutory scheme is followed, the government satisfies the "unfitness" requirement without ever having to prove that the parent is unfit.

¶5 The County argues that we should not address Ponn's constitutional challenge to the statute because Ponn failed to provide notice to the Attorney General as required by WIS. STAT. § 806.04(11). However, although Ponn was slow to give notice, he has now done so, and the Attorney General has declined to participate at this stage. The County also argues waiver. The County's waiver argument would be correct if Ponn contended that the statute is unconstitutional as applied to him. However, Ponn challenges the facial constitutionality of the statute and, as he correctly points out, a facial challenge to the constitutionality of a statute is not subject to waiver. *See* ***State v. Trochinski***, 2002 WI 56, ¶34 n.15, 253 Wis. 2d 38, 644 N.W.2d 891.

¶6 Turning to the merits, the County argues that the core of Ponn's constitutional challenge—that it is unconstitutional to base a finding of unfitness on the presence of one of the grounds listed in WIS. STAT. § 48.415(4)—was

rejected in ***B.L.J. v. Polk County Department of Social Services***, 163 Wis. 2d 90, 470 N.W.2d 914 (1991). The County seemingly argues that ***B.L.J.*** is dispositive here because the ***B.L.J.*** court rejected the same constitutional challenge Ponn makes, explaining that a finding of unfitness, pursuant to §§ 48.415 and 48.424(4), does not require termination because the circuit court has the authority to reject the "statutory label of unfitness" by virtue of its authority to dismiss the petition, even when there is a finding of unfitness.[3]

¶7 Ponn, in turn, asserts that the language the County relies on from ***B.L.J.*** was withdrawn by the supreme court in ***Sheboygan County Department of Health and Human Services v. Julie A.B.***, 2002 WI 95, ¶¶34-36, 41, 255 Wis. 2d 170, 648 N.W.2d 402. We agree. The County's quote from ***B.L.J.*** ("One cannot imagine a more definitive rejection of a statutory label of unfitness than dismissal of a termination petition.") is plainly part of the language withdrawn by the court in ***Sheboygan County*** because it is part of the ***B.L.J.*** reasoning that there are "degrees of 'unfitness' that have legal significance." *See* ***Sheboygan County***, 255 Wis. 2d 170, ¶¶35-41. The lesson of ***Sheboygan County*** is that, once a finding of unfitness is made pursuant to the statute and is supported by sufficient

[3] We fail to understand much of the County's responsive argument on the merits of Ponn's constitutional challenge. A heading in its brief speaks of "rational basis." But that is not the test here. The well-settled standard applied to termination of parental rights statutes is strict scrutiny, which brings with it the requirement that the statute be narrowly tailored to serve a compelling state interest. *See* ***Winnebago County Dep't of Soc. Servs. v. Darrell A.***, 194 Wis. 2d 627, 639, 534 N.W.2d 907 (Ct. App. 1995). Also, the County discusses burden of proof, but we are unable to discern how that discussion responds to Ponn's arguments. It is undisputed that the government is required to show a ground listed in WIS. STAT. § 48.415(4) by clear and convincing evidence. *See* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993) (citing WIS. STAT. §§ 48.424(2) and 48.31(1)). Ponn does not complain that a ground in § 48.415(4) was not shown by clear and convincing evidence. Rather, he complains that the statutory scheme does not require *any* showing of unfitness.

evidence, a petition may not be dismissed because of lack of unfitness or degrees of unfitness. ***Id.***, ¶¶36-38. Rather, the circuit court must turn its attention to the best interests of the child. ***Id***. The court explained: "Once a basis for termination has been found by the jury and confirmed with a finding of unfitness by the court, the court must move to the second-step, the dispositional hearing, in which the prevailing factor—the polestar—is the best interests of the child." ***Id.***, ¶37.[4]

¶8 Still, Ponn's appeal must be rejected because he has not met his burden of showing that the statutory scheme is unconstitutional. We agree with Ponn's assertion that WIS. STAT. § 48.415(4) must be subjected to strict scrutiny because it interferes with a fundamental right. *See* ***Winnebago County Dep't of Soc. Servs. v. Darrell A.***, 194 Wis. 2d 627, 639, 534 N.W.2d 907 (Ct. App. 1995) (strict scrutiny is required in proceedings to terminate parental rights and State must show that termination is narrowly tailored to serve compelling state interest). Thus, the issue is whether WIS. STAT. § 48.424(4), read in conjunction with § 48.415(4), is narrowly tailored to serve a compelling state interest.

¶9 Ponn's discussion in his brief ignores an obvious fact: the statutory scheme reflects a legislative determination that satisfaction of WIS. STAT. § 48.415(4) *constitutes* a sufficient showing of unfitness. Ponn seemingly

[4] The distinction the ***Sheboygan County*** court draws between the unfitness finding and the circuit court's consideration of the best interests of the child may be more a procedural issue than a substantive issue. That is, we think it apparent that there is often a direct relationship between the best interests of a child and the degree or type of the parent's unfitness. We do not read ***Sheboygan County*** as prohibiting a court from discussing the degree or type of a parent's unfitness when that topic is relevant to determining the best interests of the child. Nonetheless, we readily acknowledge that the ***Sheboygan County*** court has made clear that once unfitness is found by the circuit court pursuant to WIS. STAT. § 48.424(4), the court must direct its focus on the best interests of the child standard.

assumes that the legislative scheme bypasses any meaningful determination of unfitness. Put in the context of his no contest plea and waiver, he assumes that his concession of satisfaction of § 48.415(4) does constitute a legislative determination that sufficient grounds for a finding of unfitness exist. Thus, Ponn fails to address whether this legislative determination is sufficiently narrowly tailored to meet constitutional standards. Because Ponn fails to address this topic, we decline to develop it for him and resolve it.

¶10 We note that Ponn would have faced an uphill battle even if he had attempted to fully develop his argument because of the reasonableness of the legislative assumption built into WIS. STAT. §§ 48.415(4) and 48.424(4). The legislature could have determined that, in the vast majority of cases, a showing of a denial of visitation or placement under § 48.415(4) reflects that the parent is unfit. Ponn would have needed to deal with the strong presumption of constitutionality, *see* ***State v. Thiel***, 188 Wis. 2d 695, 706, 524 N.W.2d 641 (1994), and his burden to demonstrate unconstitutionality beyond a reasonable doubt, *see* ***Winnebago County***, 194 Wis. 2d at 637.

¶11 We repeat our observation that Ponn does not complain that the statute is unconstitutional as applied to him. That is, he does not contend that under the particular facts in his case, the legislative assumption built into WIS. STAT. §§ 48.415(4) and 48.424(4) does not apply to him. Since this would have been raised for the first time on appeal, it would have been subject to the waiver rule. But there may be another reason for the omission of this argument. Ponn was convicted of felony child abuse on May 10, 2002, pursuant to a plea agreement involving reduced charging. He was given a prison sentence. Evidence adduced at the dispositional hearing shows that the reason Ponn was denied

visitation and physical placement for over two years was precisely because of his abuse of his children and his unfitness as a parent. A social worker testified that "[t]his case would fall at probably the highest level of abuse and neglect that I've ever … come across in my job." While it is true that Ponn denied allegations of child abuse, it is also true that the circuit court found that testimony not credible. Thus, the substantial evidence in the record of unfitness is such that an as-applied challenge would likely fail directly or fail because of harmless error.

By the Court.—Orders affirmed.

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