COURT OF APPEALS DECISION DATED AND FILED

March 23, 2009

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. 2008AP2330

Cir. Ct. No. 2008TP5

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

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

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

NICOLE W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Nicole W.'s parental rights were terminated under WIS. STAT. § 48.415(10). This statute permits termination if (1) a parent's child is found to be in need of protection or services due to abandonment, abuse, or neglect, and (2) the parent's rights were previously involuntarily terminated to another child within the prior three years. Nicole argues the statute is unconstitutional on its face and as applied to her. We disagree.

BACKGROUND

¶2 The Vilas County Social Services Department took Nicole's daughter, Tatiana A.W., into custody immediately after she was born and placed her into foster care. Four months later, the circuit court found Tatiana to be a child in need of protection or services (CHIPS) under WIS. STAT. § 48.13(10). This statute applies when a child is in need of protection or services because the child's parent "refuses or 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 [life] of the child[.]" ***Id.*** The CHIPS order continued Tatiana's placement in foster care because Nicole "has demonstrated an inability to care for a child in her own home and has had her parental rights to her other four children terminated. The record is overwhelming in evidence that she exhibits poor judgment in caring for herself as well as her children[.]"

¶3 Two years later, the Oneida County Department of Social Services[2] filed a petition to terminate Nicole's parental rights to Tatiana. The Department

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Venue was transferred from Vilas County to Oneida County.

alleged four statutory grounds supporting the petition, including WIS. STAT. § 48.415(10)—prior involuntary termination of parental rights. This ground requires:

> (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) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, 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).

¶4 The court concluded there were no material facts in dispute because (a) Tatiana had been found to be in need of protection or services under WIS. STAT. § 48.13(10), and (b) Nicole's parental rights to another child had been terminated within three years of the CHIPS order. The court therefore granted partial summary judgment in favor of the Department. It then terminated Nicole's parental rights.

¶5 Nicole appealed. With our permission, she filed a motion for postdisposition relief, and argued the order terminating her parental rights should be reversed because WIS. STAT. § 48.415(10) was unconstitutional on its face and as applied to her. The circuit court disagreed, and denied the motion. She now appeals the order denying that motion.

DISCUSSION

¶6 This appeal raises two issues: (1) whether WIS. STAT. § 48.415(10) is constitutional on its face; and (2) whether it is constitutional as applied to Nicole. The constitutionality of a statute presents a question of law that we review independently. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶14, 279 Wis. 2d 169, 694 N.W.2d 344. A party challenging a statute's constitutionality bears a heavy burden to overcome the presumption in favor of its constitutionality, and must therefore demonstrate it is unconstitutional beyond a reasonable doubt. ***Id.***, ¶¶16, 18.

1. Whether WIS. STAT. § 48.415(10) is unconstitutional on its face

¶7 When a statute impinges on a fundamental liberty interest, the statute must be narrowly tailored to a compelling state interest. ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶25, 271 Wis. 2d 51, 678 N.W.2d 831. Our case law has established that parents who have a substantial relationship with their children have a fundamental liberty interest in parenting them. ***Id.***, ¶23. However, the state also has a "compelling interest in the continuing welfare of its children." ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 639, 534 N.W.2d 907 (Ct. App. 1995). Therefore, to withstand a constitutional challenge, WIS. STAT. § 48.415(10) "must be narrowly tailored to advance the State's interest in protecting children from unfit parents." ***Ponn P.***, 279 Wis. 2d 169, ¶20.

¶8 Nicole argues WIS. STAT. § 48.415(10) is not narrowly tailored to the state's interest because it uses prior parental unfitness as a proxy for current unfitness. She therefore contends the statute is unconstitutional on its face. We disagree.

¶9 Our supreme court recently rejected an argument similar to Nicole's in ***Ponn P***. There, Ponn P. argued the statute providing that continued denial of physical placement or visitation is grounds for termination unconstitutionally permitted courts to terminate parental rights without specifically finding the parent unfit. ***Ponn P.***, 279 Wis. 2d 169, ¶15.

¶10 The supreme court disagreed, concluding that the statutory "step-by-step process" was "sufficient to show that [the statute] is narrowly tailored to advance the State's compelling interest of protecting children against unfit parents…." ***Id.***, ¶26. It noted that under this statute, the child must first be found in need of protection or services and placed outside the home. The court must then find that physical placement or visitation would be harmful and issue an order denying placement and visitation. ***Id.***, ¶25. Only after the order has remained in effect for a year can a parent's rights be terminated. The court described this process as having a "funneling" effect. The series of steps "acts as a funnel, making smaller and smaller the group of parents whose relationships with their children are affected at each step, until only a very small number of parents would be affected by [the statute]." ***Id.***, ¶32.

¶11 A similar process narrowly tailors WIS. STAT. § 48.415(10) to the state's interest here. First, the Department must show the child has been found to be in need of protection or services on one of three specific grounds—(1) abandonment, (2) abuse, or (3) neglect that seriously endangers the child's physical health—each of which bears directly on the parent's fitness. This ensures that § 48.415(10) can only be triggered by the most egregious situations requiring the child's protection.

¶12 Second, the parent must have had his or her parental rights to another child involuntarily terminated within three years of the CHIPS order. This prior involuntary termination could only have occurred if a court or jury first found the parent unfit, and the court subsequently concluded the evidence warranted terminating parental rights. *See* WIS. STAT. § 48.427(2). Thus, WIS. STAT. § 48.415(10) ensures courts will have made specific findings reflecting the parent's fitness over a short span of time before the parent's rights can be terminated.

¶13 Further, even if a court or jury finds grounds exist for terminating parental rights under WIS. STAT. § 48.415(10), the court still has discretion to dismiss the petition if it finds the evidence does not warrant termination. WIS. STAT. § 48.427(2). We conclude this statutory scheme is sufficiently narrowly tailored to the state's interest in protecting children from unfit parents.

2. Whether WIS. STAT. § 48.415(10) is unconstitutional as applied

¶14 We also conclude the statute is not unconstitutional as applied to Nicole. Nicole relies on our supreme court's decision in ***Kelli B.*** to argue that WIS. STAT. § 48.415(10) is unconstitutional as applied to her because it created an irrebuttable presumption she was unfit to parent Tatiana. In ***Kelli B.***, the court held a statute providing that incestuous parenthood is grounds for termination of parental rights was unconstitutional as applied because it "renders people like Kelli per se unfit solely by virtue of their status as victims [of incest]." ***Kelli B.***, 271 Wis. 2d 51, ¶26. Nicole argues that just as incestuous parenthood did not automatically render Kelli unfit, neither does Nicole's prior termination automatically render her currently unfit.

¶15 The facts here are nothing like those in ***Kelli B***. Nicole's unfitness to parent Tatiana is not due to her status as a victim. Rather, it derives from her own history of consistently failing to meet the standards required by Wisconsin law to adequately parent her children. Nicole's parental rights were terminated based on her inability to parent Tatiana, not on per se unfitness. WISCONSIN STAT. § 48.415(10) is therefore constitutional as applied to Nicole.

By the Court.—Order affirmed.

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