COURT OF APPEALS DECISION DATED AND FILED

October 14, 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 Nos. 2009AP1472
2009AP1473
2009AP1474

Cir. Ct. Nos. 2008TP32
2008TP33
2008TP34

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2009AP1472

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

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LYNN W.,

RESPONDENT-APPELLANT,

RONALD W.,

RESPONDENT.

NO. 2009AP1473

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

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LYNN W.,

RESPONDENT-APPELLANT,

RONALD W.,

RESPONDENT.

NO. 2009AP1474

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

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

LYNN W.,

RESPONDENT-APPELLANT,

RONALD W.,

RESPONDENT.

APPEALS from orders of the circuit court for Marathon County: THOMAS CANE, Judge. *Affirmed.*

¶1 BRUNNER, J.[1] Lynn W. appeals from judgments terminating her parental rights to her three minor children under WIS. STAT. § 48.415(4). She asserts that the conditions of return in the underlying no-contact order violated her substantive due process right to parent her children because her cognitive disability prevented her from satisfying the conditions. We conclude that § 48.415(4) as applied to Lynn is narrowly tailored to achieve the State's compelling interest in protecting children from unfit parents and affirm the orders.

BACKGROUND

¶2 This appeal arises out of petitions by the Marathon County Department of Social Services (Social Services) to terminate Lynn W.'s parental rights to Cameron W., Jasmine W., and Rebecca W., her three minor children. As

[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.

Notwithstanding WIS. STAT. RULE 809.107(6)(e), we may extend the time to issue a decision in a TPR case. We therefore extend the deadline for deciding these cases until October 14, 2009. This extension was necessary to permit us to give these appeals the careful consideration the litigants deserve. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995).

grounds for termination, the petitions alleged continuing denial of periods of physical placement or visitation under WIS. STAT. § 48.415(4).[2]

¶3 Social Services initiated a preliminary investigation after receiving reports that the children were frequently left out in the cold without proper clothing. The investigating social worker observed signs of substantial neglect and became concerned about the children's nutrition and supervision. On March 9, 2006, Social Services removed the children from the family home. Social Services later learned that Lynn was largely responsible for raising the children. Their father, Ronald W., resided with a girlfriend at the time of removal and maintained minimal contact with the children.

¶4 After the children were removed, Carrie Krueger, a Social Services employee, conducted about forty-eight supervised visits between the parents and the children. The visits were designed to teach Lynn parenting skills while ensuring the children's safety. Social Services was aware of Lynn's cognitive disability, and Krueger modified the supervised visits to accommodate Lynn. These modifications included demonstrations of appropriate behavior and "lots of repetition." Still, the visits were "chaotic." Dr. Steven Benson, a clinical psychologist who previously evaluated Ronald and Lynn, recommended that

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[2] WISCONSIN STAT. § 48.415(4) establishes continuing denial of periods of physical placement or visitation as a ground for terminating parental rights. Termination under this ground requires proof establishing two elements: "(a) [t]hat the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2)[,]" and "(b) [t]hat at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation."

supervised visitation cease because the visits were too traumatic for the children. The circuit court entered a no-contact order on October 26, 2006.

¶5 In early 2007, the children were found to be in need of protection or services (CHIPS).[3] The court found the parents unable to provide care for the children under WIS. STAT. § 48.13(10).[4] The court denied Lynn and Ronald visitation rights and placed the children in a foster home. The parents were warned that continuing denial of periods of physical placement or visitation would provide a ground for termination of parental rights.[5] The order also required Ronald and Lynn to satisfy individual conditions for re-establishing contact with the children. The order provided that Social Services would periodically reassess the visitation plan "as the parents are able to demonstrate their ability to meet the conditions outlined for them."

¶6 The CHIPS order identified several conditions of return applicable to Lynn. The first condition required her to demonstrate the ability and desire to parent the children effectively during her participation in a Parenting Education Program. Another condition required her to maintain a stable residence for six months and provide adequate necessities for the children. A third condition required her to cooperate with Social Services by meeting with her social worker as scheduled, giving the worker access to her home, releasing information as

[3] Lynn's dispositional hearing was held on March 21, 2007. Ronald's hearing was held on May 8, 2007.

[4] WISCONSIN STAT. § 48.13(10) grants the court exclusive jurisdiction over a child in need of protection or services "[w]hose parent … neglects, 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 physical health of the child[.]"

[5] *See* WIS. STAT. § 48.356(2).

requested and notifying Social Services of changes to her address or phone number.

¶7 The final condition in the order required Lynn to attend and "actively engage in" individual counseling sessions to address numerous emotional and parenting issues. The counseling requirement was intended to help her address emotional issues, including low self-esteem and aggressive behavior:

> [Lynn] will also learn to identify and express emotion, and know [how] that relates to parenting and relationships, address issues of low self-esteem, and learn to develop a more positive view of her self[-]worth. … Lynn will also need to work on issues of anger, aggressive behaviors, and dangerous acts, demonstrating the understanding of her actions, and demonstrating the ability to control those actions.

The counseling requirement was also designed to help her learn and understand appropriate parental behavior:

> This will also include identifying appropriate hygiene needs and demonstrating appropriate hygiene on a daily basis. Lynn shall also discuss with her therapist whatever assignment and agenda she has received from the Parent Aide, give concrete examples of how that particular subject would … be incorporated if the children were in her home. … Lynn will also address the issues of providing nurture to her children, demonstrated by identifying nurturing behaviors and expressing nurturing behaviors towards others. She will be able to describe concrete situations, and give examples of appropriate gestures of nurture, specifically as to how it relates to the children. She will learn to identify how to comfort and soothe others in need, and describe how that would be incorporated into her home with her own children.

¶8 Social Services devoted considerable resources to assist Lynn in satisfying the conditions outlined in the CHIPS order. Social Services reviewed Dr. Benson's evaluation and recommendations with Lynn to help her understand the improvements she was expected to demonstrate. The agency set up individual

counseling sessions for Lynn and conducted phone conferences with her and her therapist to convey expectations and gauge progress. Lynn was referred to the Community Support Program for employment training and assistance with daily life tasks like housekeeping, cleaning, and shopping. Social Services maintained contact with Lynn's case manager at the Community Support Program and provided transportation to her appointments, and Krueger even attended an appointment with Lynn to make her feel more comfortable. Social Services also arranged individual parenting instruction sessions and hired a protective payee for Lynn to help her make timely payments and manage her money.

¶9 Social Services provided each of these services "with the notion in our minds that Lynn does have a cognitive disability, and we need to gear everything toward her understanding and her ability to learn." Social Services sought Dr. Benson's advice regarding approaches he thought would be effective, and implemented these recommendations in separate meetings with Lynn.[6] Krueger and other Social Services employees also received specific training on handling parents with cognitive disabilities. Krueger frequently used methods Social Services considered more appropriate for parents with cognitive disabilities, including speaking with a basic vocabulary, role modeling, demonstration, and repetition. She also used charts, pictures and examples when communicating with Lynn. Each of Lynn's therapists was advised of her special needs and limitations.

¶10 Despite these efforts, Social Services concluded that Lynn's progress did not warrant a reevaluation from Dr. Benson to determine whether visitation

[6] These tactics included "being very concrete, using role modeling, setting small goals and building up from there once those goals were accomplished, and [lots] of hands-on demonstrating."

could resume. For about six months after entry of the CHIPS order, Social Services had infrequent contact with Lynn and was unaware of her location.[7] Although Lynn would call and schedule parenting appointments during this period, she would not show up for them. Meanwhile, Ronald attended fifteen appointments. Lynn refused to participate in the Community Support Program.

¶11 Lynn also failed to make any meaningful progress toward her therapy goals. Although she attended the individual counseling sessions, Social Services concluded she did not "want to deal with the issues the therapist[s] wanted her to deal with." Lynn's improvement was also hindered by her frequent therapist substitutions; in all, Lynn saw four different counselors. While Lynn's therapists believed she was capable of making progress, no therapist believed Lynn made sufficient progress to warrant reevaluation.

¶12 Social Services filed petitions to terminate Lynn's and Ronald's parental rights to their three children on September 15, 2008. On December 3, 2008, Social Services filed motions and supporting affidavits for summary judgment on the ground for termination under WIS. STAT. § 48.415(4). Lynn's attorney opposed the motion, asserting that § 48.415(4) was unconstitutional as applied to her. The court granted Social Services' summary judgment motion with respect to Ronald at a hearing on January 20, 2009.

¶13 At the January 20 hearing, Lynn's attorney argued that the use of WIS. STAT. § 48.415(4) to terminate Lynn's parental rights was unconstitutional

[7] Although Lynn was under a court order to remain at her parents' residence after she was criminally charged for burning down her house, she left in the middle of the night after a short time and without informing anyone of her whereabouts. Social Services later learned that she was living with Ronald during the time she was missing.

unless Social Services could prove it made reasonable efforts to accommodate Lynn's cognitive disabilities. Although Lynn conceded that she was bound for over a year by an unmodified dispositional order terminating contact with her children, her attorney claimed her disability prevented her from comprehending and meeting the conditions contained in the CHIPS order. The court concluded a fact-finding hearing was necessary to ascertain the extent of Social Services' accommodation and denied summary judgment with respect to Lynn.

¶14 At the fact hearing, the court heard testimony from Krueger and another Social Services employee, Susan Glodoski. Glodoski testified that Dr. Benson's evaluation revealed Lynn had an IQ of 66 and suffered from mild mental retardation. Glodoski acknowledged that Lynn's cognitive disability was "the major obstacle that we've been dealing with in trying to complete the recommendations and to help Lynn to learn and understand what she needed to, as far as being a parent." Although Glodoski testified that counseling would not necessarily correct Lynn's mental disabilities, she noted that a person with an IQ of 66 is considered educable. Glodoski and Krueger detailed Social Services' efforts to reunite Lynn with her children and noted Lynn's failure to progress despite their attempts.

¶15 The circuit court concluded the conditions in the CHIPS order were obtainable and that Social Services made reasonable efforts to help Lynn comply with them. In the court's view, Lynn "declined or simply did not or would not successfully complete what the department was asking in meeting her parenting needs or skills." The court determined that grounds existed for the termination of

parental rights and, at a separate dispositional hearing, found that termination of parental rights was in the children's best interests.[8]

DISCUSSION

¶16 Lynn's sole argument is that application of the ground in WIS. STAT. § 48.415(4) to terminate her parental rights violated her constitutional right to substantive due process. This issue is a question of law subject to independent appellate review. ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We presume that § 48.415(4) is constitutional and resolve any doubt in favor of upholding its constitutionality. ***Id.*** To the extent this appeal requires us to interpret the statute, we will avoid any interpretation that creates a constitutional infirmity. *See* ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845. In resolving the question presented, the circuit court made findings of fact. These findings will be sustained unless they are so clearly erroneous as to go "against the great weight and clear preponderance of the evidence." ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶39, 768 N.W.2d 615 (citation omitted).

¶17 Substantive due process rights flow from the Fourteenth Amendment of the United States Constitution and from article I, sections 1 and 8, of the Wisconsin Constitution. ***Jodie W.***, 293 Wis. 2d 530, ¶39. This form of due process protects individuals from government actions that are arbitrary or wrong without regard to the fairness of the procedures used to implement them. ***Kelli B.***, 271 Wis. 2d 51, ¶19. Substantive due process demands that a statute interfering

[8] *See* WIS. STAT. § 48.426.

with a fundamental liberty interest be narrowly tailored to advance a compelling state interest justifying the interference. ***Jodie W.***, 293 Wis. 2d 530, ¶39.

¶18 A parent's fundamental right to care for and maintain custody of his or her own child is well-recognized. *See* ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972); ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 686, 500 N.W.2d 649 (1993). A parent establishes this fundamental liberty interest by living with, and holding custody of, the child. ***Kelli B.***, 271 Wis. 2d 51, ¶24. Social Services does not dispute that Lynn has established a fundamental interest in parenting her children, and therefore we must subject the application of WIS. STAT. § 48.415(4) to strict scrutiny review.

¶19 WISCONSIN STAT. § 48.415(4) is one of twelve grounds for termination of parental rights. The state's concern for the welfare of children with unfit parents animates these grounds and serves as the state's compelling interest. ***Jodie W.***, 293 Wis. 2d 530, ¶41. There is also a temporal component to the state's interest "that promotes children's welfare through stability and permanency in their lives." ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶32, 279 Wis. 2d 169, 694 N.W.2d 344. The sole issue in this case is, therefore, whether the statute as applied to Lynn is narrowly tailored to achieve the State's compelling interest in protecting Cameron, Jasmine, and Rebecca.

¶20 Our supreme court has already sustained the constitutionality of WIS. STAT. § 48.415(4) against a facial attack, concluding that the statutory process underlying the ground for termination set forth in WIS. STAT. § 48.415 was narrowly tailored. ***Ponn P.***, 279 Wis. 2d 169, ¶32. In that case, the petitioner asserted the subsection violated his substantive due process right because it did not require the individualized determination of unfitness mandated by ***Stanley***.

Ponn P., 279 Wis. 2d 169, ¶22. The court held that "the cumulative effect of the determinations made at each [step in the termination process] causes the finding made under § 48.415(4) to amount to unfitness." ***Id.***, ¶32.

¶21 Lynn correctly points out that the supreme court left open the possibility of a successful as-applied challenge to WIS. STAT. § 48.415(4). *See* ***id.***, ¶25. The petitioner in ***Ponn P.*** argued that the statute was constitutionally infirm unless it was modified to require a court to make a finding regarding the reasons a parent failed to have a no-contact order modified during the year or more it had been in effect. ***Id.*** The court concluded that Ponn P. waived his right to challenge the validity of the no-contact order because he pled no contest to the petition to terminate his parental rights. ***Id.*** Lynn now squarely presents us with a proper as-applied challenge to the constitutionality of § 48.415(4).

¶22 According to Lynn, termination of her parental rights was a foregone conclusion. She asserts that her disability prevented her from satisfying the conditions established in the CHIPS order and, as a result, Social Services knew the order would not be modified within the one-year time frame under WIS. STAT. § 48.415(4). In short, Lynn claims that she was denied substantive due process because her unfitness determination hinged upon improvements that she could never make.

¶23 If Lynn was truly prevented from reuniting with her children by impossible conditions of return, her argument may have merit. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶51 (WIS. STAT. § 48.415(2) unconstitutional where parent is incarcerated and the sole ground for termination of parental rights is that the child continues to require protection and services due to the incarceration). In ***Jodie W.***, the supreme court held that the circuit court erred by finding Jodie an unfit parent

without regard to her actual parental activities. ***Id.***, ¶52. Indeed, the court could find "no evidence that the conditions of return were created or modified for Jodie specifically." ***Id.***

¶24 The circuit court in this case recognized the potential constitutional issue and held a hearing at which it heard evidence on Lynn's ability to comply with the conditions listed in the CHIPS order. The court found the conditions "obtainable," but determined that Lynn was simply unwilling to satisfy them. It concluded that Social Services made every conceivable effort to help Lynn comply with the conditions listed in the CHIPS order. It also found that Social Services accounted for Lynn's limitations and disabilities when making these efforts. The court went so far as to note that it "[did not] know what else the department could have done in this case." Although isolated portions of testimony at the hearing support Lynn's view, the court's decision is consistent with the totality of the evidence presented. Essentially, Lynn asks us to overturn the circuit court's findings of fact, but those findings are not clearly erroneous and we cannot do so.

¶25 Moreover, the conditions of return were tailored to address Social Services' concerns regarding Lynn's interaction with her children. Lynn primarily attacks the conditions requiring her to demonstrate appropriate parental behavior

and progress in individual therapy sessions.[9] We conclude that specific facts in the record support each condition.

¶26 The record is replete with circumstances justifying Lynn's required participation in the Parenting Education Program. Glodoski testified that Lynn would not play with her children and never learned how to give praise. She also noted Lynn's inability to empathize with her children, citing as one example an occasion in which Lynn scolded her son for crying after he injured his arm. Social Services also recognized nutritional deficiencies; for example, at the time of removal, Lynn's two older children were still consuming liquids through bottles even though they should have been eating solid foods by that point. Glodoski also identified several specific instances in which Lynn failed to account for her children's safety. Social Services' need to see an improvement in Lynn's personal hygiene was motivated by the fact that Lynn, Ronald and the children often appeared unkempt and in need of bathing and clean clothing. These circumstances justify both the education program and the portion of the counseling condition requiring Lynn to demonstrate appropriate parental behavior. Neither condition is manifestly unjust, arbitrary, or oppressive; both were designed to remedy specific instances of neglect.

¶27 Facts specific to Lynn also support the remaining requirements of the counseling condition. The portion requiring Lynn to address her self-esteem

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[9] Lynn does not claim that the conditions mandating cooperation with Social Services and maintenance of a stable residence are fraught with similar impossibility. We therefore decline to consider whether the circuit court was mindful of Lynn's particular circumstances when establishing these conditions of return. But we note that these are apparently common conditions, *see* ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶7, 293 Wis. 2d 530, 716 N.W.2d 845, and are usually justified by agency needs permeating most child welfare cases (e.g., the agency's need to maintain contact with the parents to monitor compliance).

and relationship issues reflects the duress Lynn's marital relationship placed upon her and the fact that she became suicidal at times. Lynn's abusive behavior toward Ronald and his child by another marriage justified the requirement that she demonstrate control over aggressive behaviors and dangerous actions. This requirement was also the result of an incident that led to an arson charge in which Lynn became very angry with Ronald and started his clothes on fire. As the fire spread and the house burned, Lynn ran outside without calling 911. She also did not inform a family with a newborn baby in the apartment below her. These very serious incidents demanded attention, and the conditions established by the CHIPS order were designed to address them.

¶28 In sum, we are satisfied that the ground for termination under WIS. STAT. § 48.415(4) as applied to Lynn is narrowly tailored to achieve the State's compelling interest in protecting children from unfit parents. The circuit court's determination that Social Services established obtainable conditions and made every reasonable effort to aid Lynn's reunion with her children is not clearly erroneous. Further, the challenged conditions of return were designed to address specific problems with Lynn's care for her children. Thus, we conclude that the statute is not unconstitutional as applied.

By the Court.—Orders affirmed.

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