

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 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. 2009AP2383

Cir. Ct. No. 2008TP13

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO KEIRRAH O.,
A PERSON UNDER THE AGE OF 18:**

KIA M. E.,

PETITIONER-RESPONDENT,

v.

JEROME E. O.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County:
EDWARD F. ZAPPEN, JR., Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ Jerome O. appeals an order terminating his parental rights to his daughter Keirrah under WIS. STAT. § 48.415(4). He contends that the sole ground for terminating his rights under the statute was that he was incarcerated, and therefore, under applicable Wisconsin case law, his substantive due process rights were violated. We agree and conclude that § 48.415(4), as applied to Jerome, is not narrowly tailored to achieve the State's compelling interest in protecting children from unfit parents. We therefore reverse.²

BACKGROUND

¶2 Jerome and Kia have a daughter named Keirrah, born on September 8, 2003. The parties agree that Jerome cared for his daughter financially, emotionally, and physically during Kia's pregnancy and after Keirrah's birth.

¶3 Kia, Jerome, and Keirrah lived with Jerome's mother Phyllis for approximately eighteen months until Kia moved out of the home. Jerome and Phyllis lived with and took care of the child until Jerome was incarcerated later that year. He was convicted of two felonies, substantial battery and false imprisonment. The court sentenced him to two consecutive prison terms of two

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

² Jerome argued in his brief-in-chief that the court erred when it granted Kia's motion for summary judgment because Kia failed to establish that Jerome had received statutorily required termination of parental rights. In his reply brief, Jerome concedes that warnings are not required in a termination following a family court order. *Kimberly S.S. v. Sebastian X.L.*, 2005 WI App 83, ¶1, 281 Wis. 2d 261, 697 N.W. 2d 476 (holding that a petitioner in a termination of parental rights proceeding need not prove that a family court order included warnings provided in WIS. STAT. § 48.356).

and one-half years of initial confinement and two years of extended supervision. Jerome committed these crimes before Keirrah was conceived.

¶4 The family court commissioner awarded Kia sole custody and primary placement of their daughter the same month that Jerome was incarcerated. The court also allowed Keirrah to move to Texas and live with Kia's parents. A year later Kia moved for an order amending the paternity judgment awarding her sole legal custody and primary physical placement. At a modification hearing, the court granted Kia's motion and effectively denied Jerome any physical placement. The court also issued a written order following the hearing.

¶5 More than one year later, Kia filed a Petition for Termination of Parental Rights seeking to terminate Jerome's parental rights. Kia alleged grounds existed under WIS. STAT. § 48.415(4).³ Specifically, her petition alleged that Jerome was denied physical placement and visitation of Kia and that more than one year had elapsed since the order denying him physical placement and visitation had been issued, and that the court had not modified the order. She

³ WISCONSIN STAT. § 48.415(4) states:

CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:

(a) That 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, 938.365 containing the notice required by s. 48.356(2) or 938.356(2).

(b) That 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.

subsequently moved for partial summary judgment on the grounds alleged in her petition. The court granted the motion and terminated Jerome's parental rights to Keirrah. Additional facts are provided as necessary in the discussion section.

DISCUSSION

¶6 We review de novo a grant of summary judgment, employing the same methodology as the circuit court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when no material facts are in dispute and the party is entitled to judgment as a matter of law. *Id.*

¶7 This case requires us to interpret and reconcile a circuit court's oral pronouncement with its written order. We interpret orders as we do other written instruments. See *Jacobson v. Jacobson*, 177 Wis. 2d 539, 546, 502 N.W.2d 869 (Ct. App. 1993) (interpreting a written judgment). An unambiguous written judgment is not subject to construction. *Cashin v. Cashin*, 2004 WI App 92, ¶10, 273 Wis. 2d 754, 681 N.W.2d 255. A written judgment that is clear controls over an ambiguous oral pronouncement. *Id.*, ¶22 (citing *Jackson v. Gray*, 212 Wis. 2d 436, 443-44, 569 N.W.2d 467 (Ct. App. 1997)). Whether an order is ambiguous is a question of law, which we review de novo. *Cashin*, 273 Wis. 2d 754, ¶12. An order is ambiguous when the language of the oral pronouncement or the written instrument is subject to two or more reasonable interpretations. *Schultz v. Schultz*, 194 Wis. 2d 799, 805-06, 535 N.W.2d 116 (Ct. App. 1995) (stating the rule in the context of a written judgment). To determine ambiguity, we consider the entire oral pronouncement and the written judgment as a whole; in the context of other parts of the order; and not in isolation.

¶8 In general, we afford deference to a circuit court’s interpretation of its own prior ambiguous order. *Id.* at 808. However, here, we are reviewing a circuit court’s interpretation of another circuit court’s order. Under this scenario, we are in the same position as the circuit court in interpreting the previous order of another court; therefore, we review the previous order de novo.

¶9 Jerome challenges the grounds phase of the termination of parental rights proceedings.⁴ Primarily, Jerome argues that under *Jodie W.*, the court’s finding of grounds for termination under WIS. STAT. § 48.415(4) violated his substantive due process rights because the sole reason for the family court’s order denying him physical placement was his incarceration. *See Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶50, 293 Wis. 2d 530, 716 N.W.2d 845.

¶10 The interpretation and application of constitutional and statutory provisions present questions of law, which we review independent of the circuit court. *Jodie W.*, 293 Wis. 2d 530, ¶19. We presume a statute is constitutional and resolve any doubt in favor of upholding its constitutionality. *Id.*, ¶20.

¶11 The right to substantive due process is grounded in the Fourteenth Amendment of the United States Constitution and in article 1, sections 1 and 8 of the Wisconsin Constitution. *Id.*, ¶39. “The right to substantive due process addresses the content of what government may do to people under the guise of the

⁴ There are two phases in an action to terminate parental rights. *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶10 n.10, 306 Wis. 2d 128, 716 N.W.2d 845. First, the court determines whether grounds exist to terminate the parent’s rights. *Id.* In this phase, “the parent’s rights are paramount.” *Id.* (quoting *Sheboygan County D.H.H.S. v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402). If the court finds grounds for termination, the parent is determined to be unfit. *Id.* The court then proceeds to the dispositional phase where it determines whether it is in the child’s best interest to terminate parental rights. *Id.*

law. It protects against governmental action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (citations omitted). Any statute that burdens a fundamental liberty interest, such as a parent’s right to the care and custody of his or her child, is subject to strict scrutiny review. *Jodie W.*, 293 Wis. 2d 530, ¶21. Such a review asks whether the statute is “narrowly tailored to advance a compelling interest that justifies interference with fundamental liberty interests.” *Id.*, ¶39. Here, we must determine whether the State’s action to terminate Jerome’s parental rights under WIS. STAT. § 48.415(4), as applied to him, is narrowly tailored to meet the State’s compelling interest of protecting Keirrah from an unfit parent. *Id.*, ¶41.

¶12 In *Jodie W.*, our supreme court addressed whether a finding of unfitness pursuant to the failure to meet the conditions of return in a continuing need of protection and services (CHIPS) order violated the parent’s right to substantive due process under WIS. STAT. § 48.415(2)(a), where the fact of the parent’s incarceration was the sole reason for the determination of unfitness. *Id.*, ¶40. Although the statutory grounds for termination in the present case is not the failure to meet the conditions of return in a CHIPS order pursuant to WIS. STAT. § 48.415(2)(a), but is rather denial of periods of physical placement under WIS. STAT. § 48.415(4), *Jodie W.* presented the same constitutional issue in a similar circumstance: Whether a finding of unfitness impermissibly burdens the substantive due process rights of an incarcerated parent where the parent is unable to change the underlying circumstances used as a basis for the termination—here, the period of denial of physical placement. We therefore consider whether the finding of unfitness in this case violated Jerome’s right to substantive due process under the framework established in *Jodie W.*

¶13 In *Jodie W.*, the court held that “a parent’s incarceration is not itself a sufficient basis to terminate parental rights.” *Id.*, ¶50. Instead, the *Jodie W.* court stated that the substantive due process provisions of the Wisconsin and United States Constitutions preclude the state from terminating parental rights without “an individualized determination of unfitness.” *Id.*, ¶49. To make such a determination, the court must consider factors in addition to incarceration, which include the following: (1) “the parent’s relationship with the child and any other child both prior to and while the parent is incarcerated”; (2) “the nature of the crime committed by the parent”; (3) “the length and type of sentence imposed”; (4) “the parent’s level of cooperation with the responsible agency and the Department of Corrections”; and (5) “the best interests of the child.” *Id.* Applying this test to the termination order, the *Jodie W.* court reversed, concluding that the order was based solely on the parent’s incarceration without regard to her actual parenting activities. *Id.*, ¶¶51-52.

¶14 The dispute in the present case centers on whether the family court relied on any factors other than incarceration in deciding not to grant Jerome physical placement. Kia concedes that if the family court’s order denying physical placement rested solely on Jerome’s incarceration, it cannot constitutionally serve as grounds for termination.

¶15 Jerome contends that the court’s order was based solely on his incarceration status. Kia contends that the court’s order denying Jerome physical placement rested on several factors, including his incarceration status; the nature of the crime for which he was incarcerated and that both Kia and the victim of his crime had cognitive difficulties that rendered them vulnerable; and the age of their

daughter and the inappropriateness of telephone contact with her because of her age.⁵

¶16 To determine whether the court relied on factors other than incarceration in denying Jerome physical placement, we examine the court’s oral ruling at the modification hearing and its written order. Our review of the modification hearing transcript reveals that the only mention of physical placement came in the context of a discussion about child support:

With regard to child support, there [are] a number of factors to look at in these circumstances. The conviction on which [Jerome] is serving is substantial battery intending bodily harm and false imprisonment. This is the court that handled that case. The court does recall that it was a rather violent incident in which he struck a woman of – the victim who somewhat older woman in her 40’s as I recall, it would take a little bit, but also someone who was also someone who was also – her condition was also that she was mentally limited. She had certain deficits, as I recall, perhaps not unlike what was referenced here with Ms. Epping that this person was very trusting. I recall [Jerome] having made a statement at one point in that matter where basically sort of came across as if he wanted to see if he could get away with it.

So there are some very troubling aspects of that in the court’s recollection.

⁵ The parties debate whether the grounds for terminating Jerome’s parental rights were based on the denial of both physical placement *and* visitation. This issue is without substance. Under Wisconsin’s family law statutes, “visitation” is the same as physical placement. More correctly, the operable phrase for visitation is “periods of physical placement.” There is no doubt that the family court order denied Jerome all periods of physical placement, including any sort of visitation. We note, however, that the court found no problem allowing Jerome to maintain contact with his almost three-year-old daughter by mail and left open the possibility of Jerome having contact by phone once his daughter became old enough for the contact to be meaningful. The bigger issue is, as we discuss below, whether the family court prohibited Jerome from having physical placement based solely on his incarceration status or for other reasons related to his fitness to parent. If the fact of Jerome’s incarceration was the sole reason for denying him physical placement, then, even as Kia concedes, the court’s order cannot constitutionally serve as grounds for terminating his parental rights.

So I think all of that part of the reason for the visitation issues and the custody issues and *basically not setting periods of placement at this point in time* for [Jerome]. When the child is a little older and thinks it might be appropriate, he can pursue that. But this is not the time for that. The court points out these problems. The court points out those issues with regard to his case, because under applicable case law, when a person is in prison, there are certain factors to be considered what to do with child support and how to set that.

¶17 The above passage might reasonably be interpreted to say that the court was considering the violent nature of Jerome's crimes and the similarity between the victim and Kia and their daughter as part of its reasons for denying Jerome physical placement. However, after doing so the court said:

[t]he court points out those issues with regard to his case, because under applicable case law, when a person is in prison, there are certain factors to be considered what to do with child support and how to set that.

This statement, on the other hand, appears to suggest that the court was considering these other factors for purposes of setting child support only. Consequently, we conclude that the court's oral pronouncement regarding the reasons for denying Jerome physical placement is ambiguous.

¶18 We turn next to the family court's written order to ascertain its intent in denying Jerome physical placement.⁶ The order states as follows:

The court finds that a substantial change in circumstances has occurred since the entry of the last order regarding custody and placement of Keirrah. Specifically,

⁶ Kia argues that we should apply the rule that when a court's oral ruling and its written order conflict, the oral ruling controls. See *State v. Perry*, 136 Wis. 2d 92, 113, 401 N.W.2d 748 (1987) (an ambiguous oral sentence controls when it clearly contradicts a written judgment). However, this rule does not help Kia. This argument rests on her assertion, which we have rejected, that the court's oral ruling unambiguously shows that reasons other than Jerome's incarceration served as grounds for denying him physical placement.

the respondent, [Jerome] has received a substantial prison term.

....

A visitation schedule for the respondent, [Jerome], is denied at the present time, due to his criminal convictions and resulting incarceration ...

The written order clearly provides that the sole reason for denying Jerome physical placement was because he was incarcerated. Consequently, because the written order is clear and the family court's oral decision is ambiguous, the written order controls. *See Cashin*, 273 Wis. 2d 754, ¶22. From this, we conclude that Jerome's incarceration served as the sole reason for denying him physical placement.

¶19 Having concluded that the sole reason for denying Jerome periods of physical placement of his daughter was his incarceration, we conclude, applying the holding in *Jodie W.* to the undisputed facts in this case, that the circuit court's application of WIS. STAT. § 48.415(4) to Jerome violated his substantive due process rights. The record shows that the court reached this conclusion without regard for Jerome's parenting activities. Kia does not dispute that Jerome cared for his daughter financially, emotionally, and physically. She also does not dispute that Jerome took care of the child after Kia moved out. We observe that the court made no individualized determination of Jerome's fitness as a parent and that no factors other than Jerome's incarceration were considered when denying him periods of physical placement. These facts mirror the situation in *Jodie W.* Accordingly, we reverse the circuit court's order terminating Jerome's parental rights.

By the Court.—Order reversed.

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

