COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2010

A. John Voelker
Acting 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. 2010AP52
2010AP53
2010AP136
2010AP137

Cir. Ct. Nos. 2005TP396
2005TP398
2005TP396
2005TP398

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

APPEAL NO. 2010AP52

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LORRAINE J.,

RESPONDENT-APPELLANT.

APPEAL NO. 2010AP53

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LORRAINE J.,

RESPONDENT-APPELLANT.

APPEALS NO. 2010AP136

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHNNY J.,

RESPONDENT-APPELLANT.

APPEAL NO. 2010AP137

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHNNY J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM S. POCAN and KAREN E. CHRISTENSON, Judges.[1] *Affirmed.*[2]

¶1 BRENNAN, J.[3] In this consolidated appeal, Lorraine J. and Johnny J. challenge the trial court's July 9, 2009 orders terminating their parental rights to Tyanna J. and Taybianna J., and the trial court's orders denying their post-termination motions. Both Lorraine and Johnny raise due process challenges to the trial court's April 25, 2008 order denying them visitation with the girls, and each raises a number of other individual claims. We affirm the trial court.

[1] The Honorable Dennis R. Cimpl originally presided over the cases making up this appeal and entered the first termination of parental rights ("TPR") orders. However, Judge Cimpl later vacated the TPR orders and recused himself. The Honorable William S. Pocan was then assigned to the cases and presided over the subsequent jury trial on grounds and the dispositional hearing, and entered the July 2009 TPR orders from which the parties appeal. The Honorable Karen E. Christenson entered the orders denying the parties' post-termination motions.

[2] By prior order, we consolidated the instant appeals for dispositional but not briefing purposes. Pursuant to WIS. STAT. RULE 809.107(6)(e) (2007-08), this court is required to issue a decision resolving TPR appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) (2007-08) for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Here, Johnny J. filed his reply brief in Case Nos. 2010AP136 and 2010AP137, on October 15, 2010, and Lorraine J. filed her reply brief in Case Nos. 2010AP52 and 2010AP53, on October 20, 2010. On our own motion, we now extend the decisional deadline in these matters through the date of this decision. Our review was made immeasurably more difficult by the confusing numbering of the record at the circuit court level.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

BACKGROUND

¶2 Tyanna was born February 11, 2004, to both Lorraine and Johnny, joining her four older siblings at home. In September 2004, the Bureau of Milwaukee Child Welfare ("Bureau") removed all five children from Lorraine and Johnny's home. Tyanna was then seven months old and did not have a crib. The home was dirty and in disrepair. Johnny had unmet drug and alcohol issues and Lorraine had untreated mental health issues. In November 2004, the trial court found all five children to be in need of protection and services ("CHIPS") and entered an order setting forth conditions for their return to Lorraine's and Johnny's custody.

¶3 Lorraine and Johnny missed one-third to one-half of the visits with the children setup by the Bureau after the November 2004 CHIPS dispositional order, and the case manager who personally observed the visits described those they attended as "chaotic." Because the inconsistent visitation was traumatic for the children, the Bureau reduced the number of scheduled visits.

¶4 On May 29, 2005, Taybianna was born to Lorraine and Johnny while her five siblings were in the custody of the Bureau. On August 18, 2005, when she was eleven weeks old, the Bureau removed Taybianna from Lorraine and Johnny's home. At that time, Johnny was noncompliant with court-ordered alcohol and drug assessment ("AODA") monitoring and treatment and refused to provide urine samples, and Lorraine had missed many appointments with her therapist. Further, Johnny had not obtained a stable source of income; the family was supported largely on Lorraine's Supplemental Security Income ("SSI"); and

they had no electricity in their home. When placed in foster care, Taybianna had diaper rash, thrush, and her milk bottle was crusted with dirt.

¶5 In September 2005, the trial court entered a CHIPS dispositional order for Taybianna and set the same conditions for Taybianna's return to Lorraine and Johnny's home as it had set for the other five children.

¶6 On September 29, 2005, the State filed a termination of parental rights ("TPR") petition for Tyanna and her four older siblings, alleging two grounds for termination under WIS. STAT. § 48.415: (1) continuing-CHIPS, pursuant to § 48.415(2); and (2) failure-to-assume-parental-responsibility, pursuant to § 48.415(6).[4]

¶7 In October 2005, the State filed an amended TPR petition, adding Taybianna to the original petition for the four older siblings and Tyanna, but only on the failure-to-assume ground. In February 2006, when Taybianna had been outside the home for the requisite six months, *see* WIS. STAT. § 48.415(2), the State filed a motion requesting permission to amend the petition a second time to add a continuing-CHIPS ground for Taybianna. The trial court granted the motion.

¶8 In late spring of 2006, things began to improve: Lorraine completed a parenting course and began therapy; and the family became involved in a mental health advocacy program. The State dismissed the failure-to-assume ground as to all six children but proceeded to the grounds jury trial on the continuing-CHIPS

[4] The TPR petitions for two of the older children alleged a third ground for termination that is irrelevant on appeal.

ground, which was set to begin on July 31, 2006. However, on the second day of the grounds jury trial, August 1, 2006, Lorraine and Johnny were offered a plea agreement and a second chance to reunite with their children.

¶9 Lorraine and Johnny both agreed and entered no-contest pleas to the continuing-CHIPS grounds as to all six children. Pursuant to the parties' negotiations, the trial court withheld findings of unfitness regarding the continuing-CHIPS grounds until the dispositional hearing in six months, giving Lorraine and Johnny an opportunity to demonstrate their fitness and avoid TPR orders. A key part of the plea agreement was that Lorraine and Johnny participate in successful bi-weekly visits with the children.

¶10 During the adjourned time period, Lorraine and Johnny were supposed to complete the programs that had been required in the CHIPS dispositional orders, including: individual therapy and family counseling, a parenting program, a nurturing program, couples counseling, a parent assistance program, mental health counseling for Lorraine, and AODA treatment and urine screens for Johnny. A clinical therapist, assigned to assess the family after the August 2006 agreement, concluded that Lorraine and Johnny needed extensive parenting education. She recommended an in-home parenting coach, the creation of a parenting plan, and separate visitation for some of the children due to their special needs and Lorraine's and Johnny's limitations.

¶11 Although Lorraine and Johnny made progress complying with the conditions for return as they related to the older four children, they did not fare so well with regard to Tyanna and Taybianna. In January 2007, the older four children were returned to Lorraine's and Johnny's care, and in March 2007, the

TPR petition regarding the older four children was dismissed and the CHIPS dispositional order was extended as to those four. However, the TPR petition regarding Tyanna and Taybianna went forward.

¶12 Supervisors reported that Lorraine's and Johnny's visits with Tyanna and Taybianna continued to be "[v]ery chaotic." For example, the social workers testified that: sometimes Tyanna and Taybianna refused to get out of the van for visits; once Taybianna hit Lorraine in the face because Lorraine was trying to get her out of the van's car seat; Taybianna often came to the supervisor to be held during visits, ignoring Lorraine and Johnny; Tyanna would sometimes just lie on the floor and kick and cry inconsolably; Johnny often sat and tuned the children out during visits; and Lorraine and Johnny permitted the children to watch inappropriate movies such as "Bride of Chuckie." Finally, the foster parent and daycare reported that Tyanna was pulling out clumps of her hair, was having difficulty sleeping and eating, and was biting her toes until they bled.

¶13 Lorraine and Johnny stopped participating in the intensive mental health advocacy program. Moreover, Lorraine and Johnny seldom contacted Lisa Hill, Tyanna and Taybianna's therapist. Hill testified that Lorraine and Johnny only came to one face-to-face meeting together and once Lorraine came alone. They had only limited phone contact with her about the girls' progress.

¶14 On August 3, 2007, on the eve of the dispositional hearing, Lorraine consented to the termination of her parental rights to Tyanna and Taybianna based on her earlier plea to the continuing-CHIPS ground. The trial court delayed entry of the TPR orders against her until it could address Johnny's rights.

¶15 Unlike Lorraine, Johnny asserted his right to the dispositional hearing. At the conclusion of the hearing, on August 10, 2007, the trial court found that it was in Tyanna's and Taybianna's best interests that Lorraine's and Johnny's parental rights to both children be terminated. On August 13, 2007, the trial court entered TPR orders terminating both Lorraine's and Johnny's parental rights to the two children.[5]

¶16 After the court's written TPR orders were entered, the cases were transferred from the Bureau to Children's Service Society, an adoption agency. Accordingly, all Bureau services to Lorraine and Johnny ceased. On September 23, 2007, Tyanna and Taybianna had their farewell visit with Lorraine and Johnny.

¶17 Both Lorraine and Johnny pursued post-termination motions to vacate their no-contest pleas to the continuing-CHIPS grounds. On April 25, 2008, the trial court granted their motions and vacated: (1) Lorraine's and Johnny's no-contest pleas to the continuing-CHIPS grounds; (2) the trial court's subsequent unfitness findings; and (3) the August 13, 2007 TPR orders.[6] The trial court then recused itself, ordered the appointment of new attorneys, and set the

[5] Amended TPR orders were entered on September 20, 2007. Because the amendments are irrelevant to the parties' claims on appeal and because the parties refer to the August 13, 2007 orders as the final TPR orders, we too refer to the August 13, 2007 orders as the final TPR orders throughout this appeal.

[6] During the hearing, Lorraine's counsel asked the court whether it was vacating the August 13, 2007 and September 27, 2007 TPR orders. The trial court replied affirmatively. We presume, however, that counsel misspoke and was, in fact, referring to the September 20, 2007 TPR orders. The first orders, which the September 20, 2007 TPR orders amended, were entered on August 13, 2007, and we find no September 27, 2007 TPR orders in the record.

matter for a status hearing before a new judge. In answer to a question about visitation, raised by the GAL, the trial court stated it was not ordering visitation and was returning the case to the status it had on July 31, 2006, the first day of the jury trial on grounds, prior to when Lorraine and Johnny pled no-contest to the continuing-CHIPS grounds.

¶18 On the next court date, a status hearing, the new judge presided and both Lorraine's and Johnny's new attorneys appeared, but the case had not yet been reassigned from the adoption agency to the Bureau's caseworkers. Counsel for Lorraine orally asked the trial court to address visitation at the next court date in July.

¶19 At the next court date in July 2008, counsel for Johnny asked the newly assigned caseworker from the Bureau why the Bureau had not arranged for visitation. The GAL objected to visitation. On July 30, 2008, the State filed an amended TPR petition, for both Lorraine and Johnny as to both girls, adding the failure-to-assume-parental-responsibility grounds that had previously been dismissed as part of the plea agreement. Simultaneously, the State also filed a request for injunction prohibiting Lorraine and Johnny from visiting with either of the two girls. On July 31, 2008, Johnny filed a motion for visitation, and later, Lorraine orally joined the motion.

¶20 On September 19, 2008, the trial court held a hearing on the visitation motions. Only Hill, the children's therapist, testified. She testified that she believed that it was not in the children's best interests to have contact with Lorraine and Johnny. Thereafter, the trial court denied visitation.

¶21 A jury trial was held on both failure-to-assume-parental-responsibility and continuing-CHIPS grounds. On May 11, 2009, the jury found against Lorraine and Johnny on both grounds with respect to both children. The trial court entered unfitness findings against both parents based on the jury's verdicts. On July 9, 2009, after the dispositional hearing, the trial court entered orders terminating both Lorraine's and Johnny's parental rights to both children. Lorraine and Johnny both brought post-termination motions challenging the TPR orders on due process grounds, which the trial court denied. This appeal follows.

DISCUSSION

¶22 Both Lorraine and Johnny raise due process challenges to the trial court's final TPR orders, and although they each characterize their due process claims somewhat differently, they both essentially argue that, by depriving them of visitation with Tyanna and Taybianna, the State caused them to be unable to defend against the TPR petition, violating their substantive and procedural due process rights. Each, separately, also brings a number of individual claims. We deal first with Lorraine and Johnny's joint due process claims, then turn to those claims that Johnny brings on his own behalf, and then finally address those claims that Lorraine and Johnny each brings that are moot.

I. The Due Process Challenge

¶23 First, Johnny separately claims that his due process rights were violated when the August 2007 TPR orders were entered and visitation was terminated. Johnny argues that the visitation should have continued, pursuant to WIS. STAT. § 48.368, until his appeal was granted or denied. Lorraine does not join in that argument.

¶24 Next, Lorraine and Johnny jointly argue that the State had a due process obligation to *immediately* allow Lorraine and Johnny to visit with Tyanna and Taybianna when the August 2007 TPR orders were vacated in April 2008, because the trial court returned the case to the same procedural posture it was in at the time Lorraine and Johnny entered their no-contest pleas in August 2006 and in August 2006 visitation was in place.

¶25 Finally, Johnny alone argues his due process rights were violated in September 2008, when the trial court denied his visitation motion because the trial court purportedly applied the wrong law, namely, the best-interest-of-the-child standard. In the alternative, Johnny argues that if the best-interest-of-the-child standard is the applicable standard under WIS. STAT. ch. 48, then ch. 48 deprived him of due process.

¶26 We address each challenge in turn.

A. Standard of Review.

¶27 Whether the challenged State action violates the Fourteenth Amendment's due process protections presents a legal question which we review independently of the trial court. *See* ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. "Substantive due process has been traditionally afforded to fundamental liberty interests." ***Id.***, ¶19. Wisconsin has recognized a parent's fundamental liberty interest in parenting his or her child. *See* ***T.M.F. v. Children's Serv. Soc'y of Wisconsin***, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983). Nonetheless, Wisconsin law has recognized that a parent's rights may be terminated upon proof of parental unfitness by clear and convincing

evidence via fundamentally fair procedures. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶22-23, 271 Wis. 2d 1, 678 N.W.2d 856.

¶28 Substantive due process protects against state action that is "arbitrary, wrong or oppressive" and that either "'shocks the conscience … or interferes with rights implicit in the concept of ordered liberty.'" ***Dane Cnty. DHS v. P.P.***, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted; ellipses in ***P.P.***).

¶29 Procedural due process ensures "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ***Brown Cnty. v. Shannon R.***, 2005 WI 160, ¶64, 286 Wis. 2d 278, 706 N.W.2d 269 (citation omitted). Before a parent's "'weakened familial bonds'" are destroyed, the parent must be provided with "'fundamentally fair procedures,'" including "a hearing, and proof of parental unfitness by clear and convincing evidence." ***Steven V.***, 271 Wis. 2d 1, ¶23 (citations omitted).

¶30 A challenged statute is entitled to a presumption of constitutionality, ***P.P.***, 279 Wis. 2d 169, ¶16, and the burden is upon the challenger to show that the statute is unconstitutional beyond a reasonable doubt, ***id.***, ¶18. When reviewing a claim alleging a violation of substantive due process, we consider more than just the challenged statute, but also the whole underlying statutory scheme. *See* ***id.***, ¶22. First, we examine the statute to see if a fundamental interest is at stake. ***Id.***, ¶20. If so, we review the statute to determine whether it is narrowly tailored to advance a compelling state interest. ***Id.***, ¶24. A parent raising an "as-applied" rather than a facial constitutional challenge must show that the legislative presumption of constitutionality is void given the particular facts of his or her

case. *See* ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

B. Johnny's due process rights were not violated when visitation was terminated after entry of the August 2007 TPR orders.

¶31 Johnny's first argument, in which Lorraine does not join, is that his due process rights were violated starting in August 2007, when the trial court entered the first TPR orders and did not permit him to visit Tyanna and Taybianna while he challenged those orders.[7] He asserts that WIS. STAT. § 48.368 required that the visitation portion of the 2004 and 2005 CHIPS dispositional orders remain in effect even after the entry of the August 2007 TPR orders, entitling him to visitation. He bases this argument on the language of § 48.368, which provides: "If a petition for termination of parental rights is filed under … [WIS. STAT. §] 48.415 … the *dispositional … order … shall remain in effect until all proceedings related to the filing of the petition or an appeal are concluded.*" (Emphasis added.)

¶32 In response, the State and GAL argue that: (1) the entry of the August 2007 TPR orders severed all parental rights, including visitation pursuant to WIS. STAT. § 48.43; and (2) Johnny misreads WIS. STAT. § 46.368, which does not state that the CHIPS dispositional *visitation* orders continue, but simply preserves the trial court's jurisdiction. We agree with the State and GAL.

[7] Although Johnny does not specify whether he is attacking the trial court's denial on substantive or procedural grounds (or both), it would appear that his challenge is founded largely upon procedural due process grounds as he cites to ***Santosky v. Kramer***, 455 U.S. 745 (1982), for the proposition that the State "must provide the parents with fundamentally fair procedures." ***Id.*** at 754.

¶33 Johnny's due process challenge requires that we interpret portions of the Wisconsin Children's Code, WIS. STAT. ch. 48.

> we begin with the language of the statute and attribute to it the common, ordinary, and accepted meaning. We interpret the language in the context in which it is used and in a way that avoids absurd or unreasonable results. If, using this approach, the statute has a plain meaning, we apply that meaning to the facts.

Dawson v. Town of Jackson, 2010 WI App 24, ¶17, 323 Wis. 2d 477, 780 N.W.2d 222 (citations omitted).

¶34 To begin, WIS. STAT. § 48.368 does not say that visitation continues after a TPR order is entered. By saying that the CHIPS dispositional order continues "in effect" until the TPR appeal is concluded, the statute is clearly designed to continue the court's jurisdiction over the children to prevent them from being in legal limbo in the event of a TPR reversal.

¶35 And even more importantly, Johnny's analysis of WIS. STAT. § 48.368—that it provided him with visitation rights while his post-termination challenge to the TPR orders was pending—is contrary to WIS. STAT. § 48.43(2), which clearly and unambiguously states that "[a]n order terminating parental rights permanently *severs all legal rights* and duties between the parent whose parental rights are terminated and the child." (Emphasis added.) The statute plainly states that all rights are severed and does not provide an exception for visitation. Accordingly, we reject Johnny's interpretation of § 48.368 because it renders § 48.43(2) meaningless, creates a conflict in the statutes, and therefore leads to an absurd result. *See* ***Winnebago Cnty. DSS v. Darrell A.***, 194 Wis. 2d 627, 643, 534 N.W.2d 907 (Ct. App. 1995).

¶36 Other portions of WIS. STAT. ch. 48 also lead us to conclude that Johnny's interpretation of WIS. STAT. § 48.368 is inaccurate. *See* ***tat x*** ***a a t t f a t*** 2 I 8 27 2 8 2 (We construe statutes x w y l w l l l l ly l For instance, WIS. STAT. § 48.43(1)(a) requires that a TPR order name the agency that will be securing the child's adoption. From this it is clear that as soon as a TPR order is entered, a child is transitioned into adoption, consistent with ending all contact with the parent whose rights were terminated.

¶37 Similarly, WIS. STAT. § 48.43(2)(a) and (b) specifically states that the child's relationships with his or her siblings and relatives whose relationship with the child is derived through the terminated parent are not extinguished by a TPR order but rather by entry of an adoption order. By reverse inference, the terminated parent's relationship to the child is extinguished once the TPR order is entered. The plain language of § 48.43(2) and its context with the other provisions of WIS. STAT. ch. 48, make it clear that Johnny's visitation rights were severed upon the entry of the August 2007 TPR orders. And his success in getting those orders vacated is evidence that Johnny was given fundamentally fair procedures to restore his relationship with his children after the entry of the August 2007 TPR orders.

C. Lorraine and Johnny were not denied due process on April 25, 2008, when the trial court failed to immediately reinstate visitation after vacating the August 2007 TPR orders.

¶38 In their shared due process argument, Lorraine and Johnny argue that on April 25, 2008, when the trial court vacated the August 2007 TPR orders,

fundamental fairness required that the trial court should have *immediately* reinstated Lorraine's and Johnny's visitation with Tyanna and Taybianna, pursuant to the 2004 and 2005 CHIPS dispositional orders. Lorraine and Johnny both rely, in part, on the trial court's words:

> THE COURT: … *I have now put this case back to where it was at the grounds phase*, so whatever the State and the guardian ad litem want to do about visitation, they can address to Judge Pocan on May 27; but right now, there is no order with regard to visitation.

(Emphasis added.)

¶39 More specifically, Lorraine and Johnny argue that because the trial court returned the case to "the grounds phase," and did not *deny* visitation, they were entitled to the visitation in place at the beginning of the TPR grounds phase. Lorraine and Johnny argue that at the grounds phase, the CHIPS dispositional orders in effect entitled them to "reasonable visitation." Accordingly, they argue that the Bureau had two choices after the trial court vacated the August 2007 TPR orders: (1) to setup visitation, pursuant to the 2004 and 2005 CHIPS dispositional orders; or (2) to bring a WIS. STAT. § 48.363(1)(a) petition for an injunction prohibiting visitation.[8] Lorraine and Johnny cite ***Santosky v. Kramer***, 455 U.S. 745 (1982), in support of their argument.

¶40 With regard to both Lorraine's and Johnny's arguments that their due process rights were violated by not being *immediately* provided with visitation on April 25, 2008, the State and the GAL argue that: (1) nothing in WIS. STAT.

[8] We note that the State did file a motion seeking an injunction to prohibit visitation pursuant to WIS. STAT. § 48.42(1m) on July 30, 2008.

ch. 48 gives parents in these circumstances an absolute right to immediate visitation; (2) even if the visitation portion of the CHIPS dispositional orders was reactivated when the trial court vacated the August 2007 TPR orders, it did not require *immediate* visitation; (3) both parents had been given timely and fundamentally fair procedures, including a full visitation hearing on September 19, 2008; and (4) the record shows that the trial court's decision to not immediately provide visitation on April 25, 2008, was reasonable under the circumstances and not "arbitrary, wrong or oppressive." We agree with the State and the GAL.

1. WISCONSIN STAT. ch. 48 does not require immediate visitation.

¶41 To begin, while WIS. STAT. ch. 48 does not *directly* address visitation in this unique set of circumstances—namely, after the vacating of a TPR order—ch. 48 does give plenty of guidance. For instance, ch. 48 tells us that the best-interest-of-the-child standard is paramount in all ch. 48 proceedings, *see* WIS. STAT. § 48.01(1), and that the right of birth parents to visit is not absolute when a child is in State custody, *see* WIS. STAT. § 48.355(3). Section § 48.355(3) provides that the trial "court *may* set reasonable rules of parental visitation" after a hearing if the court finds that the best interests of the child would be furthered by visitation. (Emphasis added.) And even after visitation has been granted, WIS. STAT. § 48.42(1m)(c) permits the trial court to revoke visitation if revocation is in the child's best interest. Thus, we see that the best interest standard controls visitation determinations in both CHIPS and TPR proceedings.

¶42 Here, as a practical matter, on April 25, 2008, the trial court could not determine the best interest of the children. Seven months had gone by since the entry of the August 2007 TPR orders and years had passed since the entry of

the CHIPS dispositional orders. In other words, the court could not assume that visitation was still in Tyanna's and Taybianna's best interest; circumstances had changed.

¶43 At the time the trial court reversed the August 2007 TPR orders, Tyanna was four and Taybianna was not quite three. Tyanna had not lived with her parents since she was seven months old and Taybianna had not lived with her parents since she was eleven weeks old. The occasional supervised visits the girls experienced with Lorraine and Johnny throughout their lives were described by the supervisors as "chaotic" and "unsuccessful." And on September 23, 2007, the girls were led to believe they were meeting with Lorraine and Johnny for the final time. When the trial court vacated the August 2007 TPR orders, Tyanna and Taybianna were living in a stable foster home and were in the process of being adopted. Moreover, at the time the trial court vacated the TPR orders, the parties had not prepared to argue visitation and therefore the court was not in a position to determine what was in Tyanna's and Taybianna's best interest at that time.

2. The 2004 and 2005 CHIPS dispositional orders did not require *immediate* visitation on April 25, 2008.

¶44 When the trial court failed to immediately reinstate visitation on April 25, 2008, the 2004 and 2005 CHIPS dispositional orders had been non-functional for several months, since the entry of the August 2007 TPR orders. *See* WIS. STAT. § 48.43(2) (severing all parental rights upon entry of the TPR order). The trial court ruled on April 25, 2008, that the visitation orders within the CHIPS dispositional orders were no longer in effect, given the events that had transpired in the case. But even if we accept as true Lorraine's and Johnny's argument that the CHIPS dispositional orders should have been reinstated, the

orders did not require the Bureau to immediately setup visitation on April 25, 2008.

¶45 Tyanna's CHIPS dispositional order, dated November 22, 2004, did not *require* visitation with Lorraine and Johnny. Rather, it ordered that any visitation "must be approved by the Bureau and supervised by a Bureau approved designee" and that visitation could be "modified by the Bureau and the GAL." Taybianna's CHIPS dispositional order, dated September 19, 2005, was slightly, but not significantly, different. It did require that the Bureau "set up and follow a reasonable visitation plan," but it also gave the Bureau approval powers and permitted the Bureau and the GAL to modify visitation. Because all of the visitation provisions of WIS. STAT. ch. 48 require that the child's best interests be paramount, and because even under the 2004 and 2005 CHIPS dispositional orders the Bureau and the GAL had authority to modify and deny visitation until a full visitation hearing could be held, Lorraine's and Johnny's substantive due process rights were not denied.

3. Lorraine and Johnny were afforded fundamentally fair procedures.

¶46 Furthermore, it is undisputed that Lorraine and Johnny were entitled to a timely and meaningful hearing on visitation once the trial court reversed the August 2007 TPR orders. But procedural due process does not require that they be given *immediate* visitation under the circumstances here.

¶47 To begin, Lorraine and Johnny's reliance on ***Santosky*** for support of that proposition is misplaced. The Court's holding in ***Santosky*** addressed the State's burden of proof when attempting to terminate parental rights, concluding it

was clear and convincing evidence. ***Id.***, 455 U.S. at 747. The Court did not address visitation. In fact, the Court specifically stated that it did not reach the merits of the TPR petition. ***Id.*** at 770.

¶48 Procedural due process requires that both Lorraine and Johnny be provided with notice and an opportunity to be heard. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). They were provided with both. The record shows that leading up to April 25, 2008, both Lorraine and Johnny had enjoyed the full panoply of procedures set forth in WIS. STAT. ch. 48. Indeed, on April 25, 2008, they were successful in post-termination appeals. And on that day, even before they asked for a visitation hearing, the trial court stated that the new judge would preside over a full visitation hearing.

¶49 We also take note that neither Lorraine nor Johnny petitioned for visitation until July 31, 2008, several months after the trial court vacated the August 2007 TPR orders. On April 25, 2008, it was the GAL who asked about visitation, not counsel for Lorraine or Johnny. And the timing of the full visitation hearing was set at the convenience of Lorraine's and Johnny's attorneys. The trial court had offered earlier dates.

4. The trial court's decision not to immediately reinstate visitation was not "arbitrary, wrong or oppressive."

¶50 On April 25, 2008, when the trial court vacated the August 2007 TPR orders, both the State, and Lorraine and Johnny had good reason not to immediately argue for visitation. The passage of time since the entry of the August 2007 TPR orders had created the need for careful preparation before holding a visitation hearing. Determining the best interests of the children

required the input of the professionals in the children's and parents' lives. And the Bureau had to reassign social workers to ascertain Lorraine's and Johnny's compliance with the CHIPS dispositional orders and determine the children's present psychological status.

¶51 Moreover, there were procedural obstacles that prevented the trial court from immediately ordering visitation. For instance, the trial court recused itself, preventing it from ruling upon visitation on April 25, 2008, and requiring a new judge be assigned. And the lawyers that had successfully represented the parents on appeal had completed their appellate representation, and new trial level attorneys had to be appointed who needed time to prepare for a visitation hearing. These real and significant practical problems necessitated a short delay, in order to ensure that Lorraine and Johnny received a fair and thoughtful visitation hearing and that the girls' best interests were being met.

¶52 For all of the above practical reasons, and given the unique history of these cases, the trial court's decision on April 25, 2008, was reasonable and not "arbitrary, wrong or oppressive." *See* ***P.P.***, 279 Wis. 2d 169, ¶19. Accordingly we conclude that the State's failure to provide immediate visitation on April 25, 2008, did not violate Lorraine's and Johnny's due process rights.

D. Johnny's due process rights were not violated when the trial court denied Johnny's motion for visitation on September 19, 2008, because the trial court reasonably concluded that visitation was not in Tyanna's and Taybianna's best interest.

¶53 Johnny alone argues that the trial court denied him due process at the September 19, 2008 visitation hearing when it purportedly applied the incorrect legal standard, namely, the best-interest-of-the-child standard. Alternatively,

Johnny argues that if the best-interest-of-the-child standard *was* the standard required by WIS. STAT. ch. 48, then ch. 48 violates his due process rights. Finally, in a last ditch effort to save his claim, he contends that if the best-interest-of-the-child standard was required by statute and does not violate due process, we should judicially change the standard. In response, the State and GAL argue that: (1) ch. 48 required that the best-interest-of-the-child standard be applied at the hearing; and (2) raising the standard is not supported by law. Again, we agree with the State and the GAL.

¶54 First, we note that it has long been established that the best-interest-of-the-child standard is the paramount consideration under WIS. STAT. ch. 48. *See* WIS. STAT. § 48.01(1) ("In construing this chapter, the best interests of the child … shall always be of paramount consideration."); *see also* ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶21, 255 Wis. 2d 170, 648 N.W.2d 402 (recognizing that the best-interest-of-the-child standard governs ch. 48). Johnny cites to no authority for his argument that the best-interest-of-the-child standard was incorrect for "a hearing like that held in this case." In fact, he acknowledges that WIS. STAT. § 48.42(1m) requires the court to consider the best interest of the child during a visitation hearing, but goes on to contend, without support, that § 48.42(1m) somehow did not apply to the September 19, 2008 visitation hearing.

¶55 We will not respond to unsupported, undeveloped arguments. ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. That is especially true where, as here, the record clearly shows that the September 19, 2008 hearing was a motion hearing for visitation under WIS. STAT. § 48.42(1m).

¶56 We reject as well Johnny's argument that, if WIS. STAT. ch. 48 did require the court to apply the best-interest-of-the-child standard at the September 19, 2008 visitation hearing, the statute is unconstitutional on its face and as applied to him. He bases this argument on ***Julie A.B.***, in which the court noted that during the fact-finding hearing on whether there are grounds for termination "'the parent's rights are paramount.'" *See* ***id.***, 255 Wis. 2d 170, ¶24 (citation omitted). Johnny seizes on this language for support of his argument that the trial court did not properly apply the best-interest-of-the-child standard at the September 19, 2008 visitation hearing.

¶57 In short, the holding in ***Julie A.B.*** did not address the standard the court must consider when determining whether visitation is appropriate. WISCONSIN STAT. § 48.42(1m)(e)2. clearly states that after a TPR petition has been filed, when considering a visitation motion, the court must "determine[] by clear and convincing evidence that the visitation or contact would be in the best interest of the child." Further, after a CHIPS dispositional order has been entered, WIS. STAT. § 48.355(3) clearly states that the court may "set reasonable rules of parental visitation" if "the court finds that it would be in the best interest of the child." And most importantly, as we previously noted, and as noted by ***Julie A.B.***, when "'construing [WIS. STAT. ch. 48] the best interests of the child … shall always be of paramount consideration.'" *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶21 (citations omitted; ellipses in ***Julie A.B.***).

¶58 Johnny next argues that if the trial court properly considered the best-interest-of-the-child standard at the September 19, 2008 hearing we should change the standard to a higher one, namely, the "necessary to prevent

endangerment of child" standard. Johnny cites to family law modification-of-custody cases to support his argument.

¶59 Johnny's argument has no merit. First, Johnny cites no authority for his proposition that we can require the trial court to consider a standard other than the one set forth in WIS. STAT. ch. 48 when deciding visitation motions; accordingly, we need not even address it. *See* ***Kruczek***, 278 Wis. 2d 563, ¶32. And secondly, those custody cases relied upon by Johnny are governed by a statute inapplicable to visitation under ch. 48. *See* WIS. STAT. § 767.451.

E. Due Process Conclusion.

¶60 Lorraine and Johnny unquestionably have a constitutionally protected private liberty interest in their continued parental relationship with their children. *See* ***Shannon R.***, 286 Wis. 2d 278, ¶¶58-59. However, it is also true that "[t]he State has an urgent interest in a termination of parental rights proceeding to protect the welfare of the children." *See* ***id.***, ¶60. On review here, we balance the competing interests and risks of erroneous deprivation, *see* ***id.***, ¶57, to see whether the parents were given an "opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *see* ***id.***, ¶64 (citations omitted), and if the State act is "arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair," *see* ***P.P.***, 279 Wis. 2d 169, ¶19.

¶61 Lorraine and Johnny assume that they could have successfully defended against the TPR petitions if they had been permitted visitation with Tyanna and Taybianna on: (1) August 13, 2007, when the first TPR orders were entered; (2) April 25, 2008, after the trial court vacated the August 2007 TPR orders; or (3) September 19, 2008, when the trial court denied their motions for

visitation. However, they present no specific evidence of actions on their part that would have demonstrated fitness to parent or rebutted the grounds in the petition. And they ignore the many instances in the record that support the jury's verdicts that they both failed to assume parental responsibility and failed to comply with the conditions set forth in the CHIPS dispositional orders.

¶62 Lorraine's and Johnny's pre-August 2007 parenting and visitation failures led to the first TPR orders. And their post-August 2007 visitation denials were due to their earlier failures and their continued lack of effort to demonstrate their fitness. Neither contacted the children's therapist, schools, foster families, social workers or did any act that showed their interest in the children's development and needs. That, coupled with their historical failure to have successful visits with Tyanna and Taybianna, create a record supporting the trial court's denial of visitation and the ultimate TPR orders. Nothing in the record shows that the trial court's decision was "arbitrary, wrong or oppressive" and it certainly does not "'shock[] the conscience'" of this court. *See* ***id.***, 279 Wis. 2d 169, ¶19 (citation omitted). Accordingly, we conclude that neither Lorraine's nor Johnny's due process rights were violated.

II. Johnny's individual claims

¶63 Johnny, separately, also argues that: (1) the trial court abused its discretion when it denied his visitation motion, on September 19, 2008; (2) the trial court lost competence or jurisdiction when the State dismissed the failure-to-assume ground on July 31, 2006; (3) his trial counsel provided ineffective representation; and (4) the trial court abused its discretion in giving a jury

instruction that the Bureau had no duty to provide services after entry of the August 2007 TPR orders. We reject each claim in turn.

A. The trial court did not abuse its discretion when it denied Johnny's motion for visitation on September 19, 2008.

¶64 Johnny separately argues that the trial court abused its discretion when it denied Johnny's motion for visitation at the September 19, 2008 hearing because the record from the hearing fails to support the trial court's conclusion that visitation was not in the children's best interest. We review the trial court's exercise of discretion with deference to the trial court's findings of fact and credibility determinations *See* I T T 8 7(2 We conclude, after review, that the trial court's factual findings and credibility determinations are not clearly erroneous, are uncontroverted, and support the trial court's finding that visitation would not be in the best interest of the children.

¶65 The sole witness at the September 19, 2008 hearing, Hill, Tyanna and Taybianna's therapist, was called by the State. At the time, Hill had been Tyanna's individual therapist for the preceding two years and Taybianna's individual therapist for the preceding one year. Hill testified that she began working with the girls after Tyanna began exhibiting stress symptoms. In the beginning, she met weekly with Tyanna and every other week with Taybianna. Later, she met with each of the girls monthly.

¶66 Hill testified that, at that late date, visitation with Lorraine and Johnny would be traumatic for Tyanna and Taybianna because of the time that had passed since they had seen each other and past difficulties during visitation. She recounted that when Lorraine and Johnny had been permitted visitation with the

girls, the children had not done well. Moreover, Hill testified that both girls were in stable foster placements. Hill testified that to reintroduce visitation in September 2008, a year after the purported farewell visit, was not in the girls' best interests.

¶67 In support of her conclusion, Hill testified that any change in the girls' lives exacerbated their negative symptoms. And she believed that the likely effect of reinstituting visitation would result in short-term emotional damages and long-term emotional attachment problems for the girls. No party offered any evidence contradicting Hill's testimony. Accordingly, the trial court's reliance on her testimony was not an abuse of discretion.

B. The trial court did not lose competence or jurisdiction when the State dismissed the failure-to-assume ground on July 31, 2006.

¶68 Next, Johnny argues that the trial court lost competence to decide Taybianna's TPR petition on July 31, 2006, when the State voluntarily dismissed the failure-to-assume ground before trial. Central to Johnny's argument is the assumption that no other ground had been raised to terminate Lorraine's or Johnny's parental rights to Taybianna. That is simply not the case.

¶69 Johnny's argument ignores the clear evidence in the record, namely, the trial court's March 16, 2006 ruling accepting the State's amended TPR petition, a ruling Johnny did not object to at the time. In other words, the petitions to terminate Lorraine's and Johnny's parental rights to Taybianna had been amended to include the continuing-CHIPS ground four months before the State voluntarily dismissed the failure-to-assume ground. Johnny's argument that the amended petition was never filed because it was an attachment to the motion for

leave to file and was not later filed separately is without merit. The trial court's ruling clearly accepted the amended petition for filing. Consequently, the trial court did not lose competency to proceed over the petitions regarding Lorraine's and Johnny's parental rights to Taybianna.

C. Johnny's trial counsel did not provide ineffective assistance.

¶70 Johnny next argues that he received ineffective representation from trial counsel at the jury trial on grounds because his counsel: (1) failed to object to "unsubstantiated evidence" and other hearsay evidence; and (2) failed to object to the trial court's reliance on the best-interest-of-the-child standard.

¶71 In order to assert an ineffective assistance of counsel claim, Johnny must demonstrate that: (1) trial counsel's performance was deficient; and (2) trial counsel's deficient performance prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a successful ineffective assistance of counsel claim requires that Johnny show both deficiency and prejudice, we need not address both components of the inquiry if Johnny fails to make a sufficient showing on one. *See* ***id.*** at 697.

¶72 First, Johnny's argument that counsel erred in not objecting to unsubstantiated and other hearsay evidence during the jury trial on grounds is undeveloped. The evidence he refers to consists of reports made to the Bureau that: (1) Lorraine and Johnny neglected their other four children, but not Tyanna and Taybianna; (2) three of the older children had been engaged in inappropriate touching with each other; (3) Johnny hit one of the older children with a belt; and (4) one of the older children had a scratch on his chest. None of these reports involved Tyanna or Taybianna. However, while Johnny generally states that the

statements were "not relevant," "hearsay," and "unduly prejudicial," he fails to attempt any explanation of *how* this prejudiced him. More specifically, he fails to explain how the testimony affected the jury's conclusion that grounds existed on which to terminate his parental rights on both the failure-to-assume and the continuing-CHIPS grounds. We will not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶73 Second, we have already concluded above that the trial court properly considered the best-interest-of-the-child standard. Consequently, Johnny cannot demonstrate that his counsel was deficient for failing to object to the court's use of the standard.

D. The trial court did not abuse its discretion when it instructed the jury that the Bureau had no duty to provide services after the August 2007 TPR orders were entered.

¶74 Johnny next argues that the trial court abused its discretion when it gave a jury instruction to the effect that the Bureau had no duty to provide services to Lorraine and Johnny after August 2007 when the first TPR orders were entered, up to April 25, 2008, the date of the trial court's reversal of those orders. Johnny argues that no law supports the instruction, yet he cites no law to support his proposition that the instruction was incorrect. Additionally, Johnny does not claim the instruction prejudiced him. Johnny's argument is undeveloped and therefore we will not address it. *See* ***id.***, 171 Wis. 2d at 647.

III. Moot Issues

¶75 Finally, Johnny alone argues that the evidence was insufficient to support the jury's verdict on the failure-to-assume-parental-responsibility ground,

and Lorraine alone argues that WIS. STAT. § 48.415(6), the failure-to-assume statute, is unconstitutional, as applied to her, on due process grounds. We will not address either issue because both issues are moot. ***State ex. rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("Generally, moot issues will not be considered by an appellate court.").

¶76 The jury found two grounds on which to terminate Lorraine's and Johnny's parental rights to Tyanna and Taybianna: continuing-CHIPS, pursuant to WIS. STAT. § 48.415(2), and failure-to-assume, pursuant to WIS. STAT. § 48.415(6). Johnny's challenge to the sufficiency of the evidence on the failure-to-assume ground need not be addressed because, even if we accept his argument as true, the jury found his rights were properly severed based upon the continuing-CHIPS ground. Similarly, even if we accept as true Lorraine's "as-applied" challenge to the constitutionality of the failure-to-assume ground, her rights were also properly severed based upon the continuing-CHIPS ground.

By the Court.—Orders affirmed.

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