COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2011

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. 2011AP1168, 2011AP1169, 2011AP1170, 2011AP1171, 2011AP1243, 2011AP1244 2011AP1245, 2011AP1246, 2011AP1247

Cir. Ct. Nos. 2010TP48 2010TP49 2010TP50 2010TP51 2010TP52

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

NO. 2011AP1168

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EVELIN O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MINERVA L.,

RESPONDENT-APPELLANT.

NO. 2011AP1169

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ERICK O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MINERVA L.,

RESPONDENT-APPELLANT.

NO. 2011AP1170

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PORFIRIO O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MINERVA L.,

RESPONDENT-APPELLANT.

NO. 2011AP1171

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MARIA O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MINERVA L.,

RESPONDENT-APPELLANT.

NO. 2011AP1243

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PORFIRIO O.,

RESPONDENT-APPELLANT.

NO. 2011AP1244

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PORFIRIO O.,

RESPONDENT-APPELLANT.

NO. 2011AP1245

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PORFIRIO O.,

RESPONDENT-APPELLANT.

NO. 2011AP1246

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PORFIRIO O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PORFIRIO O.,

RESPONDENT-APPELLANT.

NO. 2011AP1247

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MARIA O.-L., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PORFIRIO O.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.[1]

¶1 VERGERONT, J. Minerva L. and Porfirio O. appeal the circuit court's orders terminating their parental rights to their children Evelin O.-L., Erick O.-L., Porfirio O.-L., and Maria O.-L. Porfirio also appeals the order terminating his rights to his daughter Ana O.-L.[2] The ground for termination at issue on this appeal is WIS. STAT. § 48.415(4), Continuing Denial of Periods of Physical Placement or Visitation. Both parents contend that the circuit court erred when it granted partial summary judgment in favor of the Dane County Department of Human Services. They assert that the circuit court applied the wrong legal standard in analyzing their constitutional arguments. We conclude the court applied the correct legal standard and properly granted partial summary judgment under § 48.415(4) in favor of the County. Accordingly, we affirm the orders terminating Minerva and Porfirio's parental rights to all five children.

[1] These cases were converted from one-judge appeals to three-judge appeals pursuant to WIS. STAT. § 809.41(3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Although Minerva and Porfirio appeal separate orders and raise slightly different arguments, because the appeals involve the same children and the same issues, we address them in one opinion. Pursuant to WIS. STAT. RULE 809.82(2), on our own motion, we extend the thirty-day deadline in RULE 809.107(6)(e) as to Minerva's appeal.

BACKGROUND

¶2 On May 14, 2010, the County filed petitions seeking to terminate the parental rights of Minerva and Porfirio (TPR petitions) to their five children. The petitions alleged WIS. STAT. § 48.415(4) as one ground. This subsection applies when a parent has been denied periods of physical placement or visitation under an order in certain types of actions, including actions adjudging children to be in need of protection and services [CHIPS], and at least one year has elapsed since the order was issued, without any modification that permits physical placement or visitation.[3] The petitions alleged that each of the children had been placed outside the parental home pursuant to CHIPS orders since April 30, 2009. Each CHIPS order made a finding that it was contrary to the child's welfare to remain in his or

[3] WISCONSIN STAT. § 48.415(4) provides:

> Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights.… Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> (4) 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 or 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.

her parents' home because both parents had been arrested for the abuse of Ana. Each CHIPS order contained the following provision:

> Pending further order of [the] court, all contact between Minerva and Porfirio[] and all of the children is denied. The court may reconsider the denial of contact upon the parent's demonstration that he/she:
>
> A. Acknowledges and take[s] responsibility for their abusive behavior.
>
> B. Has completed a psychological evaluation as ordered by the court.
>
> C. Demonstrates an understanding of how their behavior negatively affected the children.
>
> D. Demonstrates that contact is permitted by bail conditions and/or probation/parole pursuant to any order of the criminal court.
>
> E. Engages in psychotherapy to address issues including domestic violence, anger management and parenting and any other issues as identified by the therapist. Each parent's therapists must recommend that the parent is able to engage in appropriate contact with their children.
>
> F. Demonstrates that contact is recommended by each child's therapist and in each child's best interest.
>
> G. Porfirio shall engage in sex-offender assessment and treatment as recommended.

¶3 The TPR petitions alleged that the CHIPS orders had been unchanged for at least a year, thus fulfilling the requirements of WIS. STAT. § 48.415(4).

¶4 The TPR petitions also alleged grounds for termination of parental rights to all of the children pursuant to WIS. STAT. § 48.415(9m), Commission of a Serious Felony Against One of the Person's Children. In support of this ground, the petitions alleged that Minerva had pled no contest to six counts of felony child

abuse related to injuries sustained by her daughter, Ana, and Porfirio had been convicted after a jury trial of twenty-one counts of physical abuse of Ana. In addition, the petition to terminate Porfirio's parental rights to Ana alleged § 48.415(5)(a) as a ground. This subsection applies when a parent has physically or sexually abused the child who is the subject of the petition and the injury caused to the child has resulted in a felony conviction.

¶5 The County moved for partial summary judgment against both Minerva and Porfirio, arguing that there were no factual disputes on any of the alleged grounds for termination. The court denied the motion as to WIS. STAT. § 48.415(9m) and (5) because the convictions supporting those grounds were still on appeal. Those grounds are not before us.

¶6 With respect to WIS. STAT. § 48.415(4), the ground at issue on this appeal, Minerva and Porfirio each argued that it was impossible for them to satisfy the conditions in the CHIPS orders because they were incarcerated. Therefore, they claimed, terminating their parental rights on the basis of WIS. STAT. § 48.415(4) violated their rights to substantive due process.

¶7 The only factual material submitted by Minerva and Porfirio in support of their arguments was the deposition testimony of social worker Kate Gravel. In the portion attached to Minerva's response, the social worker testified that "[i]t was difficult to access those services in terms of psychological evaluations, participating in therapy, given the fact that [Minerva] was incarcerated." Minerva also points to a portion of the deposition attached to the County's reply brief, where the social worker testified: "At this time, those aren't — it's not possible for them to — my understanding is that Dane County, the

providers with whom Dane County contracts to do the evaluations aren't going to go to the prison."

¶8 In the portions of the deposition attached to Porfirio's response, the social worker testified that she met with him once and spoke with him on the phone once. She testified that "it was difficult for him to meet [several of the] conditions, because those opportunities weren't available to him while he was incarcerated." She also testified that, although psychological evaluations were available in the Dane County Jail, she did not pursue an evaluation because Porfirio "had not yet been convicted and was continuing to deny his behavior and we didn't think it would be beneficial to have a psychological evaluation if [Porfirio] could not openly participate in that evaluation."

¶9 Neither Minerva nor Porfirio submitted a personal affidavit indicating what steps, if any, each had taken to satisfy or attempt to satisfy the conditions in the CHIPS orders.

¶10 The circuit court concluded that there were no disputed facts as to whether the requirements of WIS. STAT. § 48.415(4) were satisfied, and the court granted partial summary judgment on this ground in favor of the County. The court concluded that both parents had failed to provide any factual support for their arguments that the conditions in the CHIPS orders were impossible for them to satisfy while incarcerated. It further concluded that § 48.415(4) is not unconstitutional on its face.

DISCUSSION

¶11 On appeal, Minerva and Porfirio both contend that the circuit court improperly analyzed their constitutional arguments as facial challenges to the constitutionality of WIS. STAT. § 48.415(4), rather than properly analyzing them as challenges to the statute's constitutionality as applied to them. If the proper standard is applied, they assert, the County is not entitled to partial summary judgment under § 48.415(4) because there are facts showing that it was impossible for them, due to their incarceration, to comply with or modify the terms of the CHIPS order denying them physical placement and visitation.

¶12 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Partial summary judgment is appropriate in a TPR case when there is no genuine issue as to any material fact regarding the asserted ground for unfitness under WIS. STAT. § 48.415, and, taking into account the heightened burden of proof required by due process, the moving party is entitled to judgment as a matter of law. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶6, 271 Wis. 2d 1, 678 N.W.2d 856. Once the moving party has established a prima facie case for summary judgment, the nonmoving party must, by affidavits or other statutorily specified means, set forth particular facts showing that there is a genuine issue of material fact. § 802.08(3). Competing reasonable inferences from undisputed facts may create issues of fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). We view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. ***Novell v. Migliaccio***, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 783 N.W.2d 897.

¶13 Determining whether WIS. STAT. § 48.415(4), as applied to Minerva and Porfirio, violates their constitutional right to substantive due process presents a question of law, which we review de novo. *See* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We presume that the statute is constitutional and resolve any doubt by upholding its constitutionality. ***Id.*** Because the termination of parental rights implicates a fundamental liberty interest, we analyze the statute's constitutionality under the strict scrutiny standard. ***Id.***, ¶17. To satisfy this standard, the statute, as applied to Minerva and Porfirio, must be "narrowly tailored to advance a compelling interest that justifies interference with" this fundamental liberty interest. ***Id.***

¶14 We first address the contention of Minerva and Porfirio that the circuit court erroneously construed their as-applied challenges as facial challenges to WIS. STAT. § 48.415(4). In making this assertion, the parents rely on the fact that the court extensively discussed a case addressing a facial challenge to the statute, ***Dane County DHS v. P.P.***, 2005 WI 32, ¶15, 279 Wis. 2d 169, 694 N.W.2d 344. ***Dane County DHS v. P.P.*** held that § 48.415(4) is not facially unconstitutional because the step-by-step process underlying it is narrowly tailored to advance the State's compelling interest in protecting children from unfit parents. ***Id.***, ¶¶20, 26, 32. The court enumerated the five steps that must occur

before the final determination under § 48.415(4) is made.[4] The court reasoned that each of these five steps involve an evaluation of a parent's fitness, and it is the cumulative effect of these previous determinations that "causes the finding made under § 48.415(4) to amount to unfitness." ***Id.***, ¶32. The court explicitly noted that its decision of facial constitutionality did not foreclose an as-applied substantive due process challenge to § 48.415(4). ***Id.***, ¶25.

¶15 While we agree that the circuit court addressed the facial constitutionality of the statute in its discussion of ***Dane County DHS v. P.P.***, we do not agree that the court failed to consider Minerva and Porfirio's as-applied challenges. The court specifically addressed their as-applied challenges in concluding that they had not presented any factual materials showing that it was impossible for them to meet the conditions for physical placement or visitation in the CHIPS orders because of their incarceration.

¶16 Although we conclude the court understood the parties were making as-applied constitutional challenges and considered their arguments, we also observe that, because our review of the propriety of partial summary judgment is de novo, we independently conduct an as-applied constitutional analysis.

[4] The five steps are: **"**(1) [T]here is an initial decision to hold a child in governmental custody; (2) if the child is held in custody, then there must be a factual determination that the child is in need of protection or services before the next step will be reached; (3) if a child is found in need of protection or services, then the decision about whether to place the child outside the parental home is made; (4) if the child is placed outside the home, only after finding that parent-child visitation or physical placement would be harmful to the child may a parent be denied visitation and physical placement; and (5) if an order denying visitation and physical placement is entered, it must contain conditions that when met will permit the parent to request a revision of the order to afford visitation or periods of physical placement." ***Dane County DHS v. P.P.***, 2005 WI 32, ¶26, 279 Wis. 2d 169, 694 N.W.2d 344.

¶17 The parents rely on ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, in arguing that WIS. STAT. § 48.415(4) is unconstitutional as applied to them because it was impossible, due to their incarceration, to meet the conditions in the CHIPS orders. ***Jodie W.*** involved a TPR proceeding under § 48.415(2)(a), which requires that the child has been placed outside the home under a CHIPS order, that the county agency has made reasonable efforts to provide the services ordered by the court, that the child has been outside the home for six months or longer, and that the parent has failed to meet the conditions established for the safe return of the child and there is a substantial likelihood the parent will not meet these conditions within the twelve-month period following the fact-finding hearing. The TPR petition in ***Jodie W.*** alleged that the mother had failed to meet one of the conditions—maintaining a suitable residence for her child—because she had been incarcerated, and she would not be able to meet this condition within the next twelve months because of her incarceration. ***Id.***, ¶8.

¶18 The court in ***Jodie W.*** held that the mother's substantive due process rights were violated because she was deemed unfit "solely by virtue of her status as an incarcerated person without regard for her actual parenting activities or the condition of her child." ***Id.***, ¶55. "[A] parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." ***Id.***, ¶49 (citation omitted). In arriving at this conclusion, the court took into account the fact that the mother did not have problems maintaining a home or any parental deficiencies before her incarceration, that she was incarcerated for nonviolent offenses (operating while intoxicated, fourth offense, and fleeing an officer), that her sentence was less than

four years, and that she had made significant progress toward meeting many of the other conditions for the return of her child. ***Id.***, ¶¶4, 53, 54.

¶19 We will assume without deciding that the rationale in ***Jodie W.*** applies to TPR proceedings under WIS. STAT. § 48.415(4), as well as under § 48.415(2). Thus, we will assume that there is a substantive due process violation if the *sole* reason a parent has been denied physical placement or visitation under a CHIPS order for at least a year is that it is impossible for the parent to meet a condition under that order *solely* because of incarceration. Given this assumption, in order to avoid partial summary judgment under § 48.415(4), Minerva and Porfirio each need to show, at a minimum, that there is a reasonable inference from the facts in the record that one or more conditions were impossible to meet solely because of incarceration and, as to those that were not impossible to meet for that reason, the parent met those conditions.[5] We conclude neither parent makes this showing.

¶20 With respect to the record concerning Minerva, she did not present any factual submission showing that she has satisfied the conditions that were within her control. Here particularly, there is no factual showing that she acknowledged and took responsibility for her abusive behavior or demonstrated an

[5] We say "at a minimum" because, under the reasoning in ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, the court takes into account all the relevant facts that bear on the individual parent's fitness, not simply the conditions of return. Thus, the ***Jodie W.*** court considered the reasons for incarceration, the length of incarceration, and the evidence of the parent's parenting prior to incarceration. *See* ***id.***, ¶¶53-54. There are obvious and significant distinctions between the facts in ***Jodie W.*** and the facts in the cases before us on these points. Whether it would violate the substantive due process rights of Minerva and Porfirio to terminate their parental rights even if they had met all the conditions in the CHIPS order except those it was impossible for them to meet, is an issue we need not address in this opinion.

understanding of how her behavior negatively affected her children. While this alone defeats her challenge, we also observe that the deposition testimony on which she relies does not create a genuine issue of material fact that any conditions were impossible for her to satisfy because of her incarceration. Viewed most favorably to Minerva, this testimony shows that it was difficult to access evaluation and therapy services while incarcerated and that evaluations were not done in prison through Dane County. There is no evidence in the record indicating that Minerva actually tried to obtain either of these services or that these services could not be obtained in the jail where she was incarcerated from the date of the entry of the CHIPS order until the TPR petitions were filed. It is not reasonable to infer from the social worker's testimony that it was impossible for Minerva to access those services during the year following the entry of the CHIPS order solely because she was incarcerated.

¶21 We conclude there is no genuine issue of material fact that Minerva did not satisfy all the conditions that were under her control. Thus, she has not made the requisite showing to withstand partial summary judgment based on her contention that her parental rights were terminated under WIS. STAT. § 48.415(4) solely because she was incarcerated.[6]

[6] Minerva also argues that the County failed to provide her with the "mental health services mandated by the court." To the extent Minerva contends the circuit court mandated that the County provide her with these services, she does not develop an argument on this point. We therefore do not address this argument.

(continued)

¶22 We now turn to Porfirio's arguments. He contends the circuit court erred in failing to consider factual assertions he made in his brief before that court. The circuit court declined to consider his assertions because they were not in an affidavit. This was not error but a proper application of summary judgment procedure. WISCONSIN STAT. § 802.08(2) and (3) provide that a party opposing a motion for summary judgment must submit affidavits "made on personal knowledge," as well as "pleadings, depositions, answers to interrogatories, and admissions on file" setting forth specific facts showing there is a genuine issue for trial. Arguments made in a brief do not fulfill this requirement.[7]

¶23 Like Minerva, Porfirio contends that it was impossible for him to satisfy the conditions in the CHIPS orders while he was incarcerated, but he has submitted no factual materials showing that he has satisfied the conditions within his control. The social worker's testimony as to him is more definite on the lack of availability of services for certain of the conditions. However, for the reasons we have already explained, even if there is a factual dispute regarding the impossibility of obtaining the services required to meet some of the conditions, he cannot show that his parental rights were terminated *solely* because of his

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In addition, Minerva appears to be of the view that, instead of relying on the factual submissions of the parties, the circuit court had an obligation to make factual inquiries into the availability of services for her in view of her incarceration. We disagree. Minerva was represented in the circuit court by counsel, and it was incumbent on her to present factual submissions under WIS. STAT. § 802.08(3) in opposition to the County's motion for partial summary judgment.

[7] In his brief on appeal Porfirio refers to his argument in the circuit court that the social worker made no effort to assist him. However, on appeal he does not develop an argument that WIS. STAT. § 48.415(4) is unconstitutional as applied to him because his social worker did not proactively work with him to satisfy the conditions in the CHIPS order. We therefore do not address this issue.

incarceration unless he can show that he has met all the conditions that were not impossible to fulfill because of his incarceration. He has not presented any factual submissions that create a dispute of fact as to whether he satisfied all of the conditions within his control.[8]

CONCLUSION

¶24 We conclude the circuit court properly granted partial summary judgment in favor of the County under WIS. STAT. § 48.415(4). Accordingly, we affirm the circuit court's orders.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[8] To the extent Porfirio is suggesting that it is a violation of his Fifth Amendment right against self-incrimination to require that he acknowledge his abusive behavior in order to meet a condition of the CHIPS order or in order to obtain a psychological evaluation (another condition of the CHIPS order), he does not present a developed argument on this point and we do not address it.