

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 16, 2014

Diane M. Fremgen
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. 2013AP1661

Cir. Ct. No. 2012TP249

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO WILL C.-R.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

LAWANDA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PEDRO COLON, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Lawanda R. appeals from an order of the circuit court terminating her parental rights (TPR) to Will C.-R. Lawanda argues that the circuit court's finding that she was unfit under WIS. STAT. § 48.415(2) on the sole basis that she failed to meet the conditions of return violated her substantive due process because she was unable to meet those conditions due to her cognitive limitations. I affirm for the reasons discussed below.

BACKGROUND

¶2 Lawanda is the biological mother of Will, who was born in March 2007. Will suffers from severe symptoms of autism and Lawanda suffers from serious cognitive limitations. Prior to March 2011, Lawanda and Will resided in Mississippi with Lawanda's mother; however, following the death of Lawanda's mother in March, Lawanda and Will moved to Wisconsin where they lived with Lawanda's aunt.

¶3 In July 2011, the Bureau of Milwaukee Child Welfare (BMCW) received a referral that Will was being physically abused by Lawanda's aunt and neglected by Lawanda. Will was removed from the home and placed in foster care. In August 2011, BMCW filed a petition for protection and services and the court found Will to be a child in need of protection and services (CHIPS), pursuant to WIS. STAT. § 48.415(2).

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. On the court's own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion by one day to January 16, 2014.

¶4 In October 2011, the circuit court entered a dispositional order. In its order, the court included a written explanation of the conditions that Lawanda would be required to meet in order for Will to be returned to her home. These conditions included meeting the following goals: (1) express an understanding of Will’s special needs and demonstrate an ability to provide for his treatment needs independently; (2) interact with Will appropriately during his visits and encourage Will to communicate; (3) communicate with Will’s educational providers on a regular basis; (4) schedule important medical appointments in recognition that Will has significant developmental delays; (5) manage the day to day responsibilities of her household; (6) understand her own cognitive and emotional limitations and participate in all recommended services; (7) appropriately supervise Will; and (8) encourage Will in positive ways to “talk, sing and to communicate in ways other than screaming.” The conditions also included the requirement that Lawanda demonstrate “the ability to have a safe, suitable and stable home.”

¶5 In October 2012, the State filed a petition to terminate Lawanda’s parental rights, pursuant to WIS. STAT. § 48.415(2), continuing CHIPS, and WIS. STAT. § 48.415(6), failure to assume parental responsibility. The State alleged that BMCW made reasonable efforts to provide to Lawanda services ordered by the court, that Lawanda failed to meet the conditions for a safe return of Will to her home, specifically noting that Lawanda failed to demonstrate an independent ability to care for or keep Will safe, and that there was a substantial likelihood that Lawanda would not meet the court-ordered conditions for safe return within the next nine months.

¶6 Lawanda contested the petition and the issue of whether grounds existed for termination of Lawanda’s parental rights was tried to the circuit court.

At trial, Mary Tuhy, case manager assigned to Lawanda and Will's case, testified that she put in place a specialized parenting assistant to help Lawanda with basic parenting needs, but that Lawanda had difficulty understanding basic concepts and failed to demonstrate an ability to care for Will on a basic level, including making sure she woke up with Will in the morning and got him dressed and fed. Tuhy testified that during visits, Lawanda had very limited interactions with Will and that Lawanda needed to be prompted to engage and play with Will. Tuhy testified that despite prompting, during visits Will mostly sat on a couch watching television.

¶7 Latrece Laack testified that she was assigned as the ongoing case manager for Lawanda. Laack testified that she provided parenting coaching to Lawanda, ensured a specialized parenting assistant continued to meet with Lawanda and referred Lawanda for adult services. Laack testified that she was uncertain how much Lawanda understood of Will's needs in light of Lawanda's own limited cognitive abilities. Laack testified that Lawanda had to be reminded to provide basic care for Will, such as changing his diapers, hugging or touching Will, and did not demonstrate an understanding of Will's more specific needs due to his autism. Laack also testified that Lawanda had difficulty caring for herself. Laack testified that she was unaware of a facility that would provide a full-time caregiver for both Lawanda and Will, and that her attempt to find another family member besides Lawanda's aunt to assist with the care of Lawanda and Will was unsuccessful.

¶8 Dr. Michelle Iyahah, a clinical psychologist, who completed an assessment of Lawanda's daily living skills, testified that Lawanda's IQ is 48, which is "extremely low." According to Iyahah, Lawanda is unlikely to reason effectively, and she has poor memory functioning, reads at only a kindergarten

level and has math skills at the first-grade level. Iyamah testified that her examination of Lawanda revealed that Lawanda functions at the level of a child less than ten years old. Iyamah testified that Lawanda is unable to function on her own and that to care for a child, she would need another caretaker to assist her 100% of the time.

¶9 Regina Branch, who provided specialized parenting services to Lawanda and has been trained in working with individuals with cognitive limitations, testified that she did not observe much physical interaction between Lawanda and Will. Branch testified that Lawanda's parenting skills did not improve during the two-year time period Branch worked with Lawanda and that Lawanda failed to retain information between visits, meaning she had to be continually reminded of the same things.

¶10 Jessica Edwards testified that she took over case management responsibility in December 2012. Edwards testified that during visits, Lawanda failed to demonstrate an ability to understand when and how to discipline Will, and that visits were chaotic.

¶11 Finally, Lawanda's aunt testified that Lawanda attended all prenatal appointments for Will, was able to bathe and feed him, and that she believed Lawanda could take the bus by herself, provided the routes were written down and she was instructed to give the paper to the bus driver. Lawanda's aunt acknowledged that Lawanda had difficulty doing things on her own, but did not think it would be difficult for her to care for Will, despite his needs. Lawanda's aunt also expressed her belief that in time, Will would act like a normal child and speak in plain language.

¶12 At the conclusion of the hearing, Lawanda’s counsel argued that the conditions placed on Lawanda for reunification with Will were conditions that were “impossible for [her] to meet” in light of Lawanda’s limitations and that other, more realistic conditions for someone with her needs, should have been put into place. The court ultimately declined to determine at that time whether grounds existed for termination.

¶13 In February 2012, the circuit court held a dispositional hearing. Without taking any additional testimony, the court found at the beginning of the hearing that grounds did not exist for a finding that Lawanda failed to assume parental responsibility, but that grounds did exist for finding that Will was a child in need of continuing protection and services. With respect to a finding of continuing CHIPS, the court found that there was clear and convincing evidence that Lawanda did not meet the conditions for return established by the court and that she would never be able to meet them. The court found that BMCW had provided services to Lawanda to the extent the community could do so, and that any referrals made were within the confines of what the community had to offer.

¶14 After the court made the determination that grounds existed for termination of Lawanda’s parental rights, the hearing proceeded into the dispositional phase. The court ultimately determined that it was in Will’s best interest to terminate Lawanda’s parental rights and in April 2012, an order terminating Lawanda’s parental rights was entered. Lawanda appeals.

DISCUSSION

¶15 Lawanda contends that the circuit court’s finding of unfitness violated her substantive due process rights.

¶16 Whether an individual's substantive due process rights have been violated by governmental action presents a question of law, subject to our independent appellate review. *Monroe County D.H.S. v. Kelli B.*, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. To establish a substantive due process claim, an individual must demonstrate that he or she has been deprived of a liberty or property interest that is constitutionally protected. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶46, 235 Wis. 2d 610, 612 N.W.2d 59. A parent has the fundamental right to the care and custody of his or her child, thus, the state may not terminate his or her right without an individualized determination that the parent is unfit. *Kenosha Cnty D.H.S. v. Jodie W.*, 2006 WI 93, ¶40, 293 Wis. 2d 530, 716 N.W.2d 845.

¶17 Lawanda argues that her substantive due process rights were violated because the circuit court determined her to be unfit under WIS. STAT. § 48.415(2) on the sole basis that she failed to meet the conditions of return established by the court, conditions she was unable to meet due to her cognitive limitations. Lawanda relies on *Jodie W.*, wherein the supreme court held that a mother's substantive due process rights were violated when the circuit court determined her to be unfit under § 48.415(2) on the sole basis that the mother, who was incarcerated, failed to meet the conditions of return, which were impossible for the mother to meet while incarcerated.² See *id.*, ¶47. Lawanda asserts that *Jodie W.* stands for the proposition that "return condition[s] that [are] impossible for a

² The conditions of return required the mother to maintain a suitable residence, cooperate with the Department of Children and Family Services, maintain regular contact with her child, actively participate in services, provide financially for her child, participate in specified counseling programs, and successfully complete any conditions of probation. *Kenosha Cnty. D.H.S. v. Jodie W.*, 2006 WI 93, ¶7, 293 Wis. 2d 530, 716 N.W.2d 845.

parent to meet [are] not narrowly tailored and therefore violate[] the parent’s right to substantive due process.” I read Lawanda’s brief as arguing that because the conditions of return established for her were impossible for her to meet in light of her cognitive limitations under *Jodie W.*, determining her to be unfit for failing to meet those conditions was a violation of her substantive due process rights.

¶18 Lawanda misinterprets *Jodie W.* In *Jodie W.*, the court “conclude[d] that a parent’s incarceration does not, in itself, demonstrate that the individual is an unfit parent ... [and] that 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. The court explained that a parent has a fundamental right to the care and custody of his or her child, “may not terminate this right without an individualized determination that the parent is unfit.” *Id.*, ¶40; see *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). The supreme court stated that WIS. STAT. § 48.415(2), “requires a finding by the circuit court that the relevant agency made reasonable efforts” to provide the parent with services ordered by the court, taking into consideration “the characteristics of the parent or child ... the level of cooperation of the parent ... and other relevant circumstances.” *Jodie W.*, 293 Wis. 2d 530, ¶¶43, 45 (quoted source omitted).

¶19 The supreme court noted that the circuit court in *Jodie W.*, found the mother to be unfit without regard to her actual parenting activities and without evidence that the conditions of return were created or modified specifically for the mother. *Id.*, ¶52. The court stated, however, that “a parent’s incarceration does not, in itself, demonstrate that the individual is an unfit parent,” and it concluded that “in cases where a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent’s incarceration, WIS. STAT. § 48.415(2) requires that the

court-ordered conditions of return are tailored to the particular needs of the parent and child.” *Id.*, ¶¶49, 51.

¶20 *Jodie W.* dealt with the limited situation of an incarcerated parent who was unable to meet the conditions of return solely because of her incarceration. Contrary to Lawanda’s suggestion, *Jodie W.* does not stand for the proposition that in all situations in which a parent is unable to meet conditions of return, a finding of unfitness on the basis that the parent failed to meet those conditions violates the parent’s substantive due process rights. Furthermore, I read the supreme court’s mandate in *Jodie W.*, that the conditions for return of the child be narrowly tailored as not being exclusively related to the ability of the parent to meet the conditions, but rather as also being based upon the requirements of what is necessary to adequately protect the child. Within that context, the conditions should reflect the individual ability of the parent, but only to the extent that the conditions can do so and still adequately protect the child.

¶21 Lawanda argues that the conditions of return and the circuit court’s evaluation of her failure to meet those conditions were not narrowly tailored to meet the court’s compelling interest in protecting Will from an unfit parent. However, Lawanda does not explain how or why the conditions were not narrowly tailored to her and Will’s situation, nor does she explain that there are any requirements which might be tailored to her particular cognitive limitations that would still adequately protect Will.

¶22 Lawanda has failed to establish that a finding of unfitness under WIS. STAT. § 48.415(2) violated her substantive due process rights. Accordingly, I affirm.

By the Court.—Order affirmed.

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

