COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 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 Nos. 2014AP45
2014AP46

Cir. Ct. Nos. 2012TP92
2012TP94

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LATASHA G.,

RESPONDENT-APPELLANT.

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LATASHA G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] In these consolidated appeals, Latasha G. appeals from orders of the circuit court terminating her parental rights to Ivyonna S. and Ceceilia S. The ground for termination at issue in these appeals is WIS. STAT. § 48.415(4), continuing denial of periods of physical placement. Latasha argues that the circuit court violated her right to substantive due process by finding that grounds existed to terminate her parental rights on that basis. I affirm for the reasons discussed below.

BACKGROUND

¶2 Latasha is the biological mother of Ivyonna, who was born in February 2002, and Ceceilia, who was born in November 2006. In February and May of 2011, the State filed criminal complaints against Latasha charging her with child abuse of Ivyonna and Ceceilia. As a condition of bail in the criminal cases, the circuit court ordered that Latasha not have either direct or indirect contact with Ivyonna or Ceceilia.

¶3 Ivyonna and Ceceilia were placed out of the home in February 2011. In August 2011, dispositional orders were entered determining Latasha and Ceceilia to be children in need of protection and services and continuing their out-of-home placement. The dispositional orders identified having regular and

[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.

successful visits with Ivyonna and Ceceilia as a condition of return, but contained the following limitation on Latasha's contact with the girls:

> Direct or indirect contact may occur after the no contact order is dismissed, when child(ren) are identified as mentally stable by their therapist, after Latasha begins individual counseling and parenting classes, and Latasha demonstrates positive changes in her behavior towards her child(ren).

¶4 In June 2011, January 2012 and June 2012, Latasha requested the circuit court in her criminal cases to modify her bail condition to permit contact with her minor children with the approval of the Dane County Department of Human Services (DCDHS). However, Latasha's requests were denied. In March 2012, Latasha was convicted of intentional child abuse of Ivyonna and was sentenced to four years' imprisonment and six years' extended supervision. The circuit court in the criminal proceedings also ordered that Latasha was to have no contact with her children without prior approval of her parole officer and the DCDHS. DCDHS did not approve any contact between Latasha and Ivyonna or Ceceilia anytime after February 17, 2011.

¶5 In November 2012, the County filed petitions seeking the involuntary termination of Latasha's parental rights of Ivyonna and Ceceilia. The petitions alleged WIS. STAT. § 48.415(4) as the ground for termination. Subsection (4)[2] applies when a parent has been denied periods of physical

[2] 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:
>
> ….

(continued)

placement or visitation under an order in certain types of actions and at least one year has elapsed since the order was issued, without any modification that permits physical placement or visitation. The petitions alleged that both children had been placed outside of the parental home pursuant to a CHIPS order since August 26, 2011.

¶6 The County moved for summary judgment on the petition to terminate Latasha's parental rights, arguing that more than one year had elapsed since the entry of the dispositional orders in August 2011, and that those orders had not been modified to permit Latasha periods of physical placement or visitation. Latasha conceded that the County had demonstrated sufficient undisputed facts to support its summary judgment motion, however, she moved to dismiss the termination petitions on the basis that the ground relied upon for termination was unconstitutionally applied to her because her visitation rights with Ivyonna and Ceceilia were restricted by conditions beyond her control.

¶7 The circuit court denied Latasha's motion to dismiss and granted the County's motion for summary judgment, finding Latasha to be an unfit parent to

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> (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:
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> (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.

Ivyonna and Ceceilia based on continuing denial of physical placement. The court concluded that of the four limitations specified in the dispositional orders on her right to visitation with the children, the first—that the no-contact orders in the criminal cases be dismissed—remained a bar to visitation. The court determined that because that limitation had not been lifted, the County had established there was no genuine issue of material fact as to the ground alleged for termination. The court further determined that granting summary judgment on that ground did not violate Latasha's substantive due process rights. Latasha appeals.

DISCUSSION

¶8 Latasha contends that termination of her parental rights on the basis of WIS. STAT. § 48.415(4), continuing denial of periods of physical placement and visitation, violated her substantive due process rights.[3]

¶9 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 Cnty. 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.

[3] Latasha concedes that there was no genuine issue of material fact that WIS. STAT. § 48.415(4) was established and states that "[s]ummary judgment would have been appropriate but for Latasha's constitutional right to substantive due process."

Kenosha Cnty. D.H.S. v. Jodie W., 2006 WI 93, ¶40, 293 Wis. 2d 530, 716 N.W.2d 845.

¶10 Relying on ***Jodie W.***, Latasha argues that her substantive due process rights were violated because she was determined to be unfit based on a condition that she claims was impossible for her to satisfy. The condition she claims was impossible for her to meet was placement or visitation with Ivyonna and Ceceilia. According to Latasha, placement or visitation with the girls was impossible due to the order in her criminal cases barring any contact with the girls.

¶11 In ***Jodie W.***, the supreme court held that a mother's substantive due process rights were violated when the circuit court determined her to be unfit under WIS. STAT. § 48.415(2), continuing need of protection and services, on the sole basis that the mother, who was incarcerated for charges unrelated to her child, failed to meet the conditions of return, which were impossible for the mother to meet while incarcerated.[4] *See* ***id.***, ¶47. The court concluded 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 (emphasis added). The court stated that this conclusion does "not render a parent's incarceration irrelevant" to the determination of whether a parent is unfit. ***Id.***, ¶50. The court explained that although incarceration alone is not a sufficient basis to terminate parental rights, a parent's incarceration may be considered among other factors relevant to the parent and child involved in the proceeding, including, for

[4] 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.

example, the nature of the crime committed by the parent and the type of sentence imposed. ***Id.***, ¶50.

¶12 I will assume without deciding that the rationale in ***Jodie W.***, which concerned a TPR proceeding under WIS. STAT. § 48.415(2), also applies to TPR proceedings under WIS. STAT. § 48.415(4). Thus, I 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 that condition under the order solely because of the parent's incarceration. *See, e.g.,* ***Dane Cnty. D.H.S. v. Minerva L.,*** No. 2011AP1168, et al., unpublished slip op. (WI App Aug. 11, 2011). In light of this assumption, Latasha needed to show that there is a reasonable inference from the facts in the record that she was unable to have physical placement or visitation solely because of the fact she was incarcerated. Latasha has not done so.

¶13 It is undisputed that in the criminal cases against Latasha, the circuit court imposed an order restricting her contact with Ivyonna and Ceceilia. However, the record does not support a reasonable inference that those conditions were imposed merely by virtue of Latasha's incarceration. Many parents are incarcerated but are still permitted contact with their children. Instead, the reasonable inference here is that the orders restricting Latasha's contact were imposed in light of Latasha's physical abuse of Ivyonna and Ceceilia, matters entirely within her own control, which led to the charges against her and her subsequent convictions. Latasha has thus failed to demonstrate a reasonable inference that she was not able to meet the conditions of the CHIPS order solely because of incarceration.

¶14 Latasha also argues that the circuit court erred in finding her to be unfit because the court did so based upon facts irrelevant to the ground alleged, i.e., continued denial of periods of physical placement or visitation. Latasha acknowledges that in ***Jodie W.***, 293 Wis. 2d 530, ¶50, the supreme court stated that with respect to termination of parental rights under WIS. STAT. § 48.415(2), factors other than just a parent's incarceration must be considered.[5] Nonetheless, it is clear from the court's decision that the court found that termination of Latasha's parental rights was appropriate because she had been denied physical placement or visitation since February 2011, which the court found was uncontested.

¶15 In conclusion, Latasha has failed to establish that the circuit court's finding of unfitness based upon WIS. STAT. § 48.415(4) violated her substantive due process rights. Accordingly, I affirm the orders of termination.

By the Court.—Orders affirmed.

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

[5] Latasha claims, however, that a proceeding under WIS. STAT. § 48.415(4) has "very different elements" and that the breadth of the relevant evidence in this type of proceeding is smaller than that in a § 48.415(2) proceeding. Latasha wants to have her cake and eat it too. She seeks to apply ***Jodie W.*** to these circumstances when it suits her, without explaining why the holding in that case applies to proceedings under § 48.415(4), but then seeks not to apply parts of that decision that do not suit her.