

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 8, 2007**

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. 2006AP2525  
2006AP2526  
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2006TP16  
2006TP17**

**IN COURT OF APPEALS  
DISTRICT IV**

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**No. 2006AP2525**

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

**ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**BONNIE B. A/K/A BONNIE L.,**

**RESPONDENT-APPELLANT.**

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**No. 2006AP2526**

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

**ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

V.

**BONNIE B. A/K/A BONNIE L.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Rock County: R. A. BATES, Judge. *Affirmed.*

¶1 DYKMAN, J.<sup>1</sup> Bonnie L.<sup>2</sup> appeals from orders terminating her parental rights to Crystal L. and Jeremiah L. Bonnie contends that the termination of her rights under WIS. STAT. § 48.415(2), based on her failure to meet the conditions of return imposed by the Department of Human Services, violated her substantive due process rights. We disagree, and conclude that Bonnie's parental rights were validly terminated because she failed to meet appropriately imposed conditions of return.<sup>3</sup> Accordingly, we affirm.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> We note that Bonnie is referred to both as Bonnie B. (her non-marital name) and Bonnie L. (her marital name). For clarity, we refer to her as Bonnie.

<sup>3</sup> Bonnie also argues that termination of her rights to Jeremiah L. based on WIS. STAT. § 48.415(6), on grounds that she never assumed parental responsibility for him, was not supported by sufficient evidence, because she did in fact carry him to term. Because we conclude that termination was supported by Bonnie's failure to meet the conditions of return, and that those conditions were validly imposed, we need not address this argument. *See* § 48.415 (listing alternative grounds for termination).

### ***Background***

¶2 In 1993, Bonnie L. was convicted of first-degree sexual assault of a child and two counts of incest, for sexual abuse of her minor son. Bonnie was sentenced to nine months in jail and ten years of probation. The rules of Bonnie's probation prohibited her from having any contact with children, including her own.

¶3 While on probation, Bonnie gave birth to two more children. Crystal L. was born in October 1995, and Jeremiah L. was born in October 1996. Because Bonnie's probation prohibited her from having contact with children, Bonnie relinquished care of Crystal when she was about four months old; Jeremiah was removed from Bonnie's care at birth. In September 2003, Crystal and Jeremiah were found to be children in need of protection or services (CHIPS). Later in September 2003, Bonnie was arrested for violating the terms of her probation. In March 2004, she was sentenced to twelve years in prison.

¶4 The Rock County Department of Human Services filed petitions to terminate Bonnie's rights to Crystal and Jeremiah in March 2006. The petitions alleged grounds for termination under WIS. STAT. § 48.415(2), because both children were in continuing need of protection or services, and § 48.415(6), because Bonnie had failed to assume parental responsibility as to Jeremiah.<sup>4</sup> A jury found grounds to terminate Bonnie's rights, because both children were in continuing need of protection or services and because Bonnie had failed to assume

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<sup>4</sup> Originally, the department alleged Bonnie failed to assume parental responsibility as to both children, but did not pursue that ground as to Crystal.

parental responsibility of Jeremiah. Bonnie's parental rights were terminated by orders dated July 7, 2006. Bonnie appeals from those orders.

### *Discussion*

¶5 Bonnie does not challenge the facial validity of WIS. STAT. § 48.415(2), but argues that it is unconstitutional as applied to her because it violated her substantive due process rights. “Substantive due process rights are rooted in the Fourteenth Amendment of the United States Constitution, and Article I, Sections 1 and 8 of the Wisconsin Constitution.” *Kenosha County Dep’t of Human Servs. v. Jodie W.*, 2006 WI 93, ¶39, \_Wis. 2d\_, 716 N.W.2d 845. Whether § 48.415(2), as applied, violated Bonnie’s constitutional right to substantive due process, is a question of constitutional law, which we review de novo. *Id.*, ¶22.

¶6 To determine whether WIS. STAT. § 48.415(2), as applied, violated Bonnie’s due process right, we must interpret and apply statutory and constitutional provisions, questions of law that we review de novo. *Id.*, ¶19. “The purpose of statutory interpretation is to determine what a statute means so that it may be given its full, proper, and intended effect.” *Id.*, ¶20. We presume statutes are constitutional, indulging every possible presumption to uphold the law. *Id.*

¶7 “The right to substantive due process addresses the content of what government may do to people under the guise of the law. It protects against governmental action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” *Dane County Dep’t of Human Servs. v. Ponn P.*, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (citations omitted). A statute that infringes on a fundamental liberty interest is subject to strict scrutiny review. *Id.*, ¶20. “In order to withstand strict scrutiny, a statute

must be narrowly tailored to meet a compelling state interest.” *Id.* A parent has a fundamental liberty interest in retaining parental rights, and the State has a compelling interest in protecting children from unfit parents. *Id.* The question in this case, then, is whether the application of WIS. STAT. § 48.415(2) to terminate Bonnie’s parental rights was sufficiently narrowly tailored to the facts presented.

¶8 Under WIS. STAT. § 48.415(2), grounds exist to terminate parental rights if (1) the child has been adjudged a child in need of protection or services and placed outside his or her home; (2) the agency responsible for the child has made a reasonable effort to provide the services ordered by the court; and (3) the child has been outside the home for at least six months and the parent has failed to meet the conditions for returning the child to the home, and there is a substantial likelihood that the parent will not meet those conditions within the next twelve months. “Reasonable effort” is defined as “an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child ..., the level of cooperation of the parent ... and other relevant circumstances of the case.” Section 48.415(2)(a)2.a.

¶9 Bonnie argues that the conditions imposed by the department for the return of her children were impossible for her to meet and therefore not narrowly tailored to her case. Bonnie’s conditions of return were:

1. The mother must no longer be restricted from having contact with the child based on her sexual abuse conviction by her probation officer.
2. The mother must demonstrate the ability to maintain a safe and stable living environment, suitable for children.
3. The mother must demonstrate the ability to meet the child’s physical, medical, educational, and emotional needs on a daily basis.

Bonnie argues that those conditions were impossible to meet because she is incarcerated, and thus are not sufficiently narrowly tailored to withstand strict scrutiny. Bonnie relies heavily on *Jodie W.*, 2006 WI 93, for the assertion that her conditions of return violated her substantive due process rights. Her reliance is misplaced.

¶10 In *Jodie W.*, the supreme court analyzed “whether the circuit court’s application of [WIS. STAT. § 48.415(2)] was constitutionally permissible when the court determined that Jodie was an unfit parent because she failed to meet conditions of return that were impossible for her to meet because she was incarcerated.” *Id.*, ¶47. The court concluded 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. Thus, termination of Jodie’s parental rights was unconstitutional because “the circuit court found Jodie an unfit parent without regard for her actual parenting activities. There [wa]s no evidence that the conditions of return were created or modified for Jodie specifically.” *Id.*, ¶52 (citation omitted).

¶11 Contrary to Bonnie’s assertions, *Jodie W.* does not hold that WIS. STAT. § 48.415(2) “is unconstitutional as applied if it is used to terminate parental rights to a child based solely on a continuing CHIPS ground with conditions that are impossible to meet because the parent is incarcerated.” Instead, *Jodie W.* holds 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.*, ¶51. The court further explained: “Our conclusions do not render a parent’s incarceration irrelevant. We simply conclude that a parent’s incarceration is not itself a sufficient basis to terminate parental rights.” *Id.*, ¶50.

¶12 *Jodie W.* is easily distinguished from the instant case. Jodie’s conditions of return were generic, requiring Jodie to:

- (1) obtain, maintain and manage a suitable residence;
- (2) cooperate with the Division of Children and Family Services;
- (3) maintain regular contact with [her son];
- (4) actively participate in services;
- (5) provide for the financial needs of [her son];
- (6) participate in a counseling program specifically designed to address issues of domestic violence; and
- (7) successfully complete any conditions of probation.

*Id.*, ¶7 (footnotes omitted). The conditions were obviously impossible for Jodie to meet while incarcerated, but there was no indication she could not have met the conditions if she were not incarcerated. *See id.*, ¶53. Jodie cared for her son for the first two years of his life, and had developed a substantial relationship with him. *Id.*, ¶53. Further, Jodie was incarcerated for nonviolent offenses and was not prohibited from contact with children. *See id.*, ¶¶4, 53.

¶13 In contrast, Bonnie’s conditions of return were specifically tailored to her situation as a parent incarcerated for the sexual abuse of her minor son. While her conditions were also impossible for her to meet, they were not impossible for her to meet based solely on her incarceration. Bonnie was prohibited from contact with her children far before her incarceration; she has not seen Crystal, who is now eleven, since she was four months old, and has never seen Jeremiah, who is now ten. The reason Bonnie cannot meet the conditions of return imposed by the department, narrowly tailored to protect Crystal and

Jeremiah from unfit parenting, is that she has been convicted of sexual abuse of a child and cannot have contact with any children, including her own.

¶14 When deciding whether to terminate the parental rights of an incarcerated parent, a court must consider “the nature of the crime, the sentence imposed, who the crime was committed upon, the parent’s conduct toward the child before and during incarceration, and the child’s specific needs.” *Id.*, ¶48 (citation omitted). Here, Bonnie has been sentenced to twelve years in prison for sexual abuse of her minor son. She has not seen or communicated with her children in over ten years. The children are in a foster family and are likely to be adopted. Considering the factors listed in *Jodie W.*, we conclude that termination of Bonnie’s parental rights for failure to meet the conditions of return imposed by the department did not violate her substantive due process rights. Accordingly, we affirm.

*By the Court.*—Orders affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.



