COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2007

David R. Schanker
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. 2006AP2603
2006AP2604
2006AP2787
2006AP2788

Cir. Ct. Nos. 2005TP376
2005TP377
2006TP3
2006TP4

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAWANA R.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAWANA R.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAWANA R.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LAWANA R.,

RESPONDENT-APPELLANT

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and MICHAEL G. MALMSTADT, Judges. *Affirmed*.

¶1 WEDEMEYER, J.[1] Lawana R. appeals from an order terminating her parental rights to Damone R., Latricia A., Joanne K., and Paul K.[2] Lawana claims WIS. STAT. § 48.415(10) (2005-06)[3] violates her constitutional rights to substantive due process on its face and as-applied. Lawana claims the statutory scheme of § 48.415(10) is unconstitutional because there is no cumulative "funnel" effect of findings as described in ***Dane County DHS v. P.P.***, 2005 WI 32, ¶32, 279 Wis. 2d 169, 694 N.W.2d 344. Lawana also claims the court's reliance on a prior involuntary termination of parental rights (TPR) ordered after a default judgment for non-appearance deprives her of the individualized determination of fitness required by ***Stanley v. Illinois***, 405 U.S. 645 (1972). Because § 48.415(10) is narrowly tailored to meet the State's compelling interest in protecting children from unfit parents, and because an attack on a prior default judgment is a collateral attack barred by ***Oneida County Dept. of Soc. Serv. v. Nicole W.***, 2007 WI 30, ¶27, ___ Wis. 2d ___, 728 N.W.2d 652, § 48.415(10) is not unconstitutional on its face or as-applied. Accordingly, this court affirms.

BACKGROUND

¶2 On November 28, 2004, Milwaukee Police responded to the residence of Lawana and her boyfriend, David K., due to reports from neighbors

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

[2] David K., Lawana's boyfriend, also appeals his termination of parental rights to Joanne K. and Paul K., albeit for different reasons. Lawana and David both appealed from the orders terminating parental rights and the record is shared. These cases, however, will be decided in separate appellate opinions.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

that Damone was heard screaming "It's too cold! It's too cold!" Upon arrival, the police found Damone standing naked and soaking wet in front of a fan. David stated that he was punishing Damone for taking candy from a cousin by making him take an ice bath and then forcing him to stand in front of the fan. Damone reported that punishment such as this was not unusual. That day, as a result of the reports of abuse and the fact that no food was found in the home,[4] Damone, Latricia, Joanne, and Paul were removed from the home. Probable cause for the removal was found on November 30, 2004, as required by WIS. STAT. § 48.21(1)(b).

¶3 On June 16, 2005, the Honorable Judge Carl Ashley, found the children to be Children In Need of Protection or Services (CHIPS).[5] Specifically, all children were deemed CHIPS due to neglect, WIS. STAT. § 48.13(10), and Joanne and Paul were also deemed CHIPS due to risk of neglect, § 48.13(10m). As children adjudicated CHIPS under § 48.13(10), the State then petitioned to have Lawana's parental rights terminated under WIS. STAT. § 48.415(10) due to a prior involuntary TPR within three years of the CHIPS order. The State filed petitions to terminate Lawana's parental rights to Damone and Latricia on September 9, 2005, and to Joanne and Paul on January 9, 2006.[6]

[4] At the time, Lawana and David were facing eviction. They had no plans to find subsequent housing or care for their children.

[5] The CHIPS order for Latricia was stayed until July 11, 2005 due to an issue with service on Hugh A., her adjudicated father. This difference in dates has no effect on the subsequent ruling.

[6] The four petitions proceeded in sets of two with Damone and Latricia in one group and Joanne and Paul in the other. All four cases were consolidated on appeal for the sake of judicial efficiency.

¶4 Motions for partial summary judgment were filed on December 30, 2005, for Damone and Latricia, and on April 3, 2006, for Joanne and Paul. The motions all included an order dated July 22, 2002, terminating Lawana's rights to Cedric R. and Lasander R. The order was made on grounds of abandonment, WIS. STAT. § 48.415(1)(a)2. and 3. (2001-02), failure to assume parental responsibility, WIS. STAT. § 48.415(6) (2001-02), and continuing CHIPS, WIS. STAT. § 48.415(2) (2001-02).[7] Lawana failed to appear at the July 22, 2002 hearing and was found in default. Despite the finding of default, the Honorable Christopher Foley held a hearing wherein clear and convincing evidence was presented as to Lawana's parental unfitness. At the conclusion of the hearing, the trial court made an individualized determination that Lawana was unfit to be a parent.

¶5 On January 12, 2006, the court granted the State's motion for partial summary judgment upon a finding that the July 22, 2002 TPR order and June 15, 2006 CHIPS order conclusively establish Lawana's unfitness as to Damone and Latricia due to her prior TPR and subsequent CHIPS order less than three years later due to neglect. The same findings—that Lawana is unfit due to her prior TPR and subsequent CHIPS within three years of the prior TPR based on neglect—were made with regard to the motion for partial summary judgment regarding Joanne and Paul on May 4, 2006.

¶6 Dispositional hearings were held on April 11, 2006, June 22, 2006, and July 6, 2006, to determine the best interests of Damone and Latricia. Lawana

[7] Cedric and Lasander were adjudicated to be CHIPS on November 3, 1993. As such, nine years elapsed between the CHIPS order and the TPR, affording Lawana substantial opportunity to meet the conditions for the return of Cedric and Lasander.

testified on her own behalf during the July 6, 2006 hearing. After recitation of the finding of Lawana's unfitness, the court took into consideration the factors set forth in WIS. STAT. § 48.426(3) in its decision, and ordered the termination of parental rights of Lawana to Damone and Latricia pursuant to WIS. STAT. § 48.427(3).

¶7 The dispositional hearing to determine the best interests of Joanne and Paul was held on August 10, 2006.[8] Lawana did not testify, and at the close of the hearing, the court ordered the termination of parental rights of Lawana to Joanne and Paul pursuant to WIS. STAT. § 48.427(3) after making findings as to the best interests of the children as required under WIS. STAT. § 48.426(3).

¶8 Lawana filed a notice to appeal the TPR orders. After this court granted Lawana's motion to consolidate and motion to remand the consolidated appeals, a hearing was held on Lawana's post-dispositional motion to vacate judgments terminating parental rights and motion for new trial on grounds.[9] The court denied Lawana's motions and found that WIS. STAT. § 48.415(10) was not

[8] The Honorable Michael Malmstadt sat for the Honorable Dennis R. Cimpl at this hearing. It should also be noted that Judge Malmstadt was a member of the Special Committee on Children In Need of Protection or Services, which was responsible for the reorganization of The Children's Code and the addition of Wis. Stat. § 48.415(10) as grounds for a termination of parental rights.

[9] The Honorable William S. Pocan sat at this hearing.

unconstitutional on its face and did not violate Lawana substantive due process rights as-applied.[10] It is from this decision which Lawana now appeals.

DISCUSSION

A. Facial Substantive Due Process Challenge

¶9 Lawana first argues that WIS. STAT. § 48.415(10)[11] violates the constitutional right to substantive due process on its face. She contends that the statutory scheme for § 48.415(10) does not have the cumulative "funnel" effect the Wisconsin Supreme Court described to uphold WIS. STAT § 48.415(4) in ***P.P.***, 279 Wis. 2d 169, ¶32. Rather, Lawana claims that a finding of unfitness

[10] The court also rejected Lawana's argument that trial counsel was ineffective for not insisting that Lawana testify prior to a finding of unfitness and for not raising constitutional challenges to WIS. STAT § 48.415(10). Lawana does not raise that argument before this court on appeal.

[11] WISCONSIN STAT. § 48.415(10) states:

> (10) PRIOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS TO ANOTHER CHILD. Prior involuntary termination of parental rights to another child, which shall be established by proving all of the following:
>
> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13 (2), (3) or (10); or that the child who is the subject of the petition was born after the filing of a petition under this subsection whose subject is a sibling of the child.
>
> (b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

through summary judgment lacks the individualized determination of fitness required by ***Stanley***.

¶10 When confronted with an argument regarding the constitutionality of a statute, such an issue is a question of law and is subject to *de novo* review. *See* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. Statutes are presumed constitutional, and any doubt as to the constitutionality of a statute is resolved in favor of upholding the statute. *See* ***id.***; ***P.P.***, 279 Wis. 2d 169, ¶¶16-17. "[G]iven a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality." ***P.P.***, 279 Wis. 2d 169, ¶17 (citation omitted). As such, it must be established beyond a reasonable doubt that the statute is unconstitutional and "that there are no possible applications or interpretations of the statute which would be constitutional." ***State v. Cole***, 2003 WI 112, ¶30, 264 Wis. 2d 520, 665 N.W.2d 328 (quoting ***State v. Wanta***, 224 Wis. 2d 679, 690, 592 N.W.2d 645 (Ct. App.1999)).

¶11 The constitutional right to substantive due process guards individuals from arbitrary, wrong or oppressive state acts even if fair procedures are used to execute the acts. ***Kelli B.***, 271 Wis. 2d 51, ¶19 (citation omitted); *see also* ***P.P.***, 279 Wis. 2d 169, ¶19. When a fundamental liberty interest is at stake, a statute that imposes on that interest must withstand strict scrutiny—that is, the statute must be narrowly tailored to advance a state's compelling interest. ***Kelli B.***, 271 Wis. 2d 51, ¶¶23-25. Case law has established that parents who have a substantial relationship with their children have a fundamental liberty interest in parenting. ***Id.*** ¶23; ***Stanley***, 405 U.S. at 651. It is also well established that the State has a compelling interest in the protection of children from unfit parents; such is the purpose of The Children's Code. *See* WIS. STAT. § 48.01. The State

does not argue a fundamental liberty interest is not at stake here. Therefore, WIS. STAT § 48.415(10) "must be narrowly tailored to advance the State's interest in protecting children from unfit parents." *See* ***P.P.***, 279 Wis. 2d 169, ¶20; ***Kelli B.***, 271 Wis. 2d 51, ¶¶23-25.

¶12 The crux of Lawanda's facial argument is that a finding of parental unfitness under the statutory scheme of WIS. STAT. § 48.415(10) is possible without the "significant earlier findings" the court in ***P.P.*** stated create a "cumulative effect" when it upheld WIS. STAT § 48.415(4). ***P.P.***, 279 Wis. 2d 169, ¶¶26-32. Because there are no findings of fitness when summary judgment is granted, this argument supposes, § 48.415(10) violates the individualized determination of fitness requirement of ***Stanley***. This court disagrees with Lawana and agrees with the circuit court that "the situation [here] is very similar to the one addressed in [***P.P.***]. [I]t's a logical extension of the decision in that case."

¶13 In ***P.P.***, the court listed a step-by-step process of findings regarding parental fitness that must be made prior to a finding of unfitness under WIS. STAT § 48.415(4):

> (1) there 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.

P.P., 279 Wis. 2d 169, ¶26. According to the court, the processes "act as a funnel, making smaller and smaller the group of parents whose relationships with their children are affected at each step, until only a very small number of parents would be affected." ***Id.***, ¶32. The same is true for WIS. STAT. § 48.415(10); all of the above procedures must be complied with in TPR proceedings under § 48.415(10). Thus, because there is a constitutionally permissible application of the statute, the statute is facially valid. *See* ***Cole***, 2003 WI 112, ¶30.

¶14 Additionally, unlike ***Kelli B.***, where the Wisconsin Supreme Court stated "[t]he fact of incestuous parenthood does not, in itself, demonstrate that victims like Kelli are unfit parents," 271 Wis. 2d 51, ¶26, Lawana was determined to be an unfit parent in 2002. Chapter 48 contains no requirement that the parent whose rights are at stake be "currently" unfit; the statutes only require a finding of unfitness.[12] Therefore, it can be inferred that the legislature created a presumption of unfitness under WIS. STAT. § 48.415(10) to protect children from unfit parents who have already had their rights to one or more children terminated.[13] In the

[12] While the WIS. STAT Ch. 48 does not explicitly use the word current, the use of a three-year look-back period in WIS. STAT § 48.415(10) implies that a parent's unfitness will be presumed for those three years. After the three-year period has elapsed, parents will once again be presumed fit.

[13] WISCONSIN STAT § 48.415(10) was drafted based on the approach of the Minnesota statutes whereby parents who have prior TPRs are presumed unfit. *See* MINN. STAT § 260C.301(1)(b)(4) (2005). The Special Committee on Children In Need of Protection or Services wanted to address the issue that parents who have a previous history of abuse are more likely to repeat that history on subsequent children. Wisconsin Legislative Council, Volume VI, Special Committee on Children In Need of Protection or Services, Summary of Proceedings (1995-96). Thus, once a parent is deemed unfit and has rights to a child terminated, evidence establishing another child is CHIPS within three years of the prior TPR establishes that the parent is still unfit for child-rearing.

second stage of the TPR proceeding at the dispositional hearing, parents can rebut the presumption that they are unfit to care for their children and establish that it is in the child's best interest to remain with them.[14] This hearing satisfies the individualized determination of fitness required by ***Stanley***; there is no requirement under ***Stanley*** that the findings all occur at one stage.[15] *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768 (findings made during dispositional hearing cured failure to take evidence at the unfitness hearing). Thus, § 48.415(10) is narrowly tailored to advance the state's compelling interest in protecting children from unfit parents who have already been determined unfit in a prior TPR.

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[14] The Minnesota Court of Appeals articulated this rationale succinctly:

> A parent who has had his or her parental rights involuntarily terminated has been adjudicated as posing a threat to the child now and into the future. Generally speaking, the best evidence of how a parent will treat one child is how a parent has treated other children. Consistent with strict scrutiny, the state may, as *parens patriae*, invoke its power to protect children "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Applying these standards, we hold that the statutory presumption furthers the compelling state interest of protecting children … from parents who have previously been found to be abusive to, or neglectful of, their children.

In re Child of P.T., 657 N.W.2d 577, 589 (Minn. Ct. App. 2003) (internal citations omitted).

[15] In ***Stanley v. Illinois***, 405 U.S. 645 (1972), the father's rights to his children were automatically terminated under an Illinois law that stated unwed fathers were unfit to care for the children and the children automatically became wards of the state. 405 U.S. 645, 645 (1972). Unlike the procedure for TPRs in Wisconsin, which consists of two stages where a parent still can be heard after a finding of unfitness during the grounds stage, the TPR at issue in ***Stanley*** contained no hearing. There was absolutely no opportunity for the father to show fitness. Wisconsin law provides a forum for the parent to be heard regardless of a finding of unfitness.

¶15 Lawana argues in her reply brief that the statutory scheme renders her termination unconstitutional because she had met nearly all of her conditions required for the return of her children, that the ***P.P.*** case does not apply and a parent cannot raise the earlier unfitness determination at the dispositional hearing. We are not persuaded. As pointed out by the trial court, it was Lawana's failure to appear for hearings which created the problem she now complains about. Thus, if we conclude that the statutory scheme is unconstitutional, we would in essence encourage and reward dilatory parents who fail to comply with court orders and fail to appear in court. Given our standard of review, such a conclusion cannot be made.

B. As-Applied Substantive Due Process Challenge

¶16 In an as-applied challenge to the constitutionality of a statute, the challenging party must establish beyond a reasonable doubt that the statute is unconstitutional as applied to the specific circumstances at hand. ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶17 Lawana argues that she was never afforded her individualized determination of fitness because her prior TPR was grounded on a default and thereby deprived of her right to substantive due process. This argument is incorrect. Despite Lawana's attempt to characterize the argument as something other than a collateral attack, that is exactly what it is; therefore, it is barred by ***Nicole W.***, 2007 WI 30, ¶27, "A collateral attack on a judgment is an 'attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" ***Id.*** (internal quotation omitted). Lawana's

decision not to appear at the prior hearing was her choice and she should not get the benefit of her failure. To do so otherwise would "give parents who failed to appear and who allow themselves to be defaulted, somehow more rights, because they have a shield against WIS. STAT § 48.415 Sub 10, that other parents don't have. And that just seems totally illogical …." Thus, because this argument is barred as a collateral attack on a prior judgment, there is no violation of Lawana's substantive due process rights.[16]

CONCLUSION

¶18 This court concludes that WIS. STAT. § 48.415(10) is valid both on its face and as-applied to Lawana's situation. The statutory scheme of § 48.415(10) is akin to that of WIS. STAT § 48.415(4), which was held valid in ***P.P.***, and is narrowly tailored to advance the compelling interest of the state in protecting children against unfit parents who have prior TPRs. Additionally, a prior TPR based on a default judgment holds as much weight as any other prior TPR. To argue otherwise would unjustly benefit the parent and is barred by ***Nicole W.*** as a collateral attack on the prior TPR. Accordingly, the decision of the circuit court is affirmed.

By the Court.—Order affirmed.

[16] Even if Lawana's argument is not considered a collateral attack, clear and convincing evidence of Lawana's unfitness was presented at the July 22, 2002 hearing to terminate her parental rights to Cedric and Lasander, thereby satisfying the requirements of ***Stanley*** and ***Santosky v. Kramer***, 455 U.S. 745 (1982) (stating a clear and convincing evidence standard meets constitutional due process scrutiny).

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