COURT OF APPEALS DECISION DATED AND FILED

July 15, 2008

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 No. 2008AP196

Cir. Ct. No. 2007TP222

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

OTIS G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

¶1 WEDEMEYER, J.[1] Otis G. appeals from an order granting the State's motion for partial summary judgment as to the grounds phase pursuant to WIS. STAT. §§ 802.08, and 48.415(9) (2005-06),[2] in a termination of parental rights action, which sought to terminate his parental rights to Davonta S. Otis claims that WIS. STAT. § 48.415(9) is unconstitutional because: (1) it creates an irrebuttable presumption of unfitness, which denies him due process of law; and (2) it is unjustifiably not gender neutral, which denies him the equal protection of the law. Otis also claims that a finding of unfitness based solely on a violation of WIS. STAT. § 948.02(2) constitutes cruel and unusual punishment. We agree with the trial court that WIS. STAT. § 48.415(9) is narrowly tailored to meet the State's compelling interest in protecting children from their unfit parents; the statute is not facially discriminatory; and a finding of unfitness pursuant to WIS. STAT. § 948.02(2) does not constitute cruel and unusual punishment. Accordingly, this court affirms.

BACKGROUND

¶2 Davonta was born on July 18, 2000. Her mother, Sharkee S., was born on June 17, 1986. Otis was born on August 28, 1984. Therefore, at the time of conception, the mother was approximately 13 years, 3 months old and the father was approximately 15 years, 1 month old.

¶3 On August 8, 2007, the State filed a petition requesting the termination of Otis's parental rights to Davonta, alleging grounds against Otis

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

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

pursuant to WIS. STAT. § 48.415(9), "Parenthood as a Result of Sexual Assault." The State filed a motion for partial summary judgment on October 30, 2007, based on the indisputable fact that the mother of Davonta was under the age of sixteen when she and Otis conceived Davonta. Otis filed a response to that motion and a motion to dismiss on November 23, 2007.

¶4 On December 28, 2007, a hearing was held in the Milwaukee County Circuit Court regarding the motion for partial summary judgment and the motion to dismiss. The trial court granted the State's request for partial summary judgment as to the grounds phase pursuant to WIS. STAT. §§ 802.08 and 48.415(9). Immediately thereafter, the trial court made a finding of unfitness in accordance with WIS. STAT. § 48.424(4). A written order to that effect was signed on January 10, 2008.

¶5 Otis filed a petition for leave to pursue an interlocutory appeal on January 25, 2008, which this Court granted on March 25, 2008. Otis now appeals from the trial court's order granting partial summary judgment.

DISCUSSION

¶6 Otis first claims that the trial court erred in ruling that WIS. STAT. § 48.415(9) does not violate his due process rights and is constitutional. For reasons to be stated, we do not agree that the trial court erred. We affirm.

¶7 We review constitutional challenges to a statute that present a question of law *de novo*. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶14, 279 Wis. 2d 169, 694 N.W.2d 344. Statutes are presumed constitutional, and any doubt as to the constitutionality of a statute is resolved in favor of upholding the statute. ***Id.***, ¶¶16-17; *see* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, 271 Wis.

2d 51, 678 N.W.2d 831. "[G]iven a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality." ***Ponn P.***, 279 Wis. 2d 169, ¶17. 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)).

¶8 The constitutional right to substantive due process protects 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; *see also* ***Ponn P.***, 279 Wis. 2d 169. When a fundamental liberty interest is at stake, a statute that imposes on that interest must withstand strict scrutiny; the statute must be narrowly tailored to advance a State's compelling interest. ***Kelli B.***, 271 Wis. 2d 51, ¶8. Case law has established that parents who have a substantial relationship with their children have a fundamental liberty interest in parenting. ***Id.***; ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972). It is also well established that the State has a compelling interest in the protection of children from their unfit parents; such is the purpose of The Children's Code. *See* WIS. STAT. § 48.01.

¶9 The State argues that a fundamental interest is not at stake here. The State asserts that Otis has not shown that he has a fundamental liberty interest at stake by means of having a substantial relationship with his child, a marked distinction from the father in ***Stanley***, 405 U.S. 645, and a biological connection alone does not create a fundamental liberty interest. ***Lehr v. Robertson***, 463 U.S. 248, 256 (1983). The State contends that without a fundamental liberty interest at stake, the State is only required to show that WIS. STAT. § 48.415(9), as applied to

Otis, only needs to "bears a rational relation to some legitimate end." ***Kelli B.***, 271 Wis. 2d 51, ¶17.

¶10 It is inconsequential in this case whether the State needs to show that the statute bears a rational relation to some legitimate government end, or meet the heightened standard that the statute must be narrowly tailored to advance the State's interest in protecting children from their unfit parents; WIS. STAT. § 48.415(9) passes constitutional muster under both standards. As such, we will address the higher burden.

¶11 WISCONSIN STAT. § 48.415 is narrowly tailored to cover a specific type of parent, here a parent under the age of sixteen. It does not reach those parents who have merely conceived children out of wedlock, unlike the challenged statute in ***Stanley.*** 405 U.S. 645. Nor does the statute encompass those who conceive children with financially poor persons. The statute advances the State's compelling interest of reducing the number of children born to and raised by persons under sixteen, thereby reducing the costs to Wisconsin residents of raising these children. We agree with the trial court that WIS. STAT. § 48.415(9) does not violate Otis's constitutional right to due process of law. As such, we affirm.

¶12 Otis next contends that the trial court erred in ruling that WIS. STAT. § 48.414(9) does not violate his equal protection right and is constitutional. He claims that the statute is not gender neutral and there is no justification for this disparity and therefore he is denied equal protection under the law. For reasons to be stated, we do not agree that the trial court erred. We affirm.

¶13 As with the preceding section, this court reviews constitutional challenges *de novo*. ***Ponn P.***, 279 Wis. 2d 169, ¶14. The statute must be shown to be unconstitutional beyond a reasonable doubt. ***Id.***, ¶18. A statute must

obviously, facially discriminate against one gender for the equal protection clause scrutiny to apply. A statute that facially discriminates between the genders is subject to the equal protection clause scrutiny and must be shown to serve important State goals through means that, while discriminatory, are "substantially related" to those goals. ***In Interest of Baby Girl K.***, 113 Wis. 2d 429, 335 N.W.2d 846 (1983).

¶14 Otis is incorrect in his assertion that WIS. STAT. § 48.415(9) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and its corollary in Article 1, Section 1 of the Wisconsin Constitution. The statute is neither facially discriminatory nor unconstitutional beyond a reasonable doubt. A careful reading of the substantive provisions in the statute refutes Otis's claim. It states that "(p)arenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of a sexual assault in violation of s. 940.225(1), (2) or (3), 948.02(1) or (2), 948.025, or 948.085." Nothing in the substantive provisions, the elements to be proved, excludes females from the purview of the statute. The criminal statutes referred to allow a female to be prosecuted under any of those provisions as well. Had the legislature intended to limit the scope of the statute, they could have easily done so by substituting "fatherhood" for "parenthood" or "fathered" for "conceived." Otis's argument thus fails due to the gender-neutral elements listed in WIS. STAT. § 48.415(9). We agree with the trial court that WIS. STAT. § 48.415(9) does not violate Otis's right to equal protection under the law.

¶15 Otis's third claim is that a finding of unfitness based on a violation of WIS. STAT. § 948.02(2), per WIS. STAT. § 48.414(9) equates to an infliction of cruel or unusual punishment prohibited by the Eight Amendment to the United States Constitution, and its corollary, Article 1, Section 6 of the Wisconsin

Constitution. We agree with the trial court that a finding of unfitness based on conduct in violation of WIS. STAT. § 948.02(2) does not constitute cruel and unusual punishment.

¶16 A penalty authorized by statute violates constitutionality if it is out of line in regards to the public interest sought to be protected. ***State v. Seraphine***, 266 Wis. 118, 121, 62 N.W.2d 403 (1954). Furthermore, the penalty must be excessive, unusual, and disproportionate so "as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Hammad***, 212 Wis. 2d 343, 356, 569 N.W.2d 68 (Ct. App. 1997).

¶17 There is no need to evaluate whether the statute shocks the public sentiment or is excessive under the circumstances because a finding of unfitness itself does not terminate parental rights; there are no "punishments" involved at this stage. In order to actually terminate someone's parental rights, a dispositional hearing must be held after the finding of unfitness is made pursuant to WIS. STAT. §§ 48.424(4), 48.426, and 48.427. *See* ***Oneida County Department of Social Services v. Nicole W.***, 2007 WI 30, ¶13, 299 Wis. 2d 637, 728 N.W.2d 652. A finding of unfitness moves the process to another stage. It does not relinquish a parent's custodial, guardianship, and all other rights to their child. Therefore, there is no punishment or final consequence in a finding of unfitness.

By the Court.—Order affirmed.

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