COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2009

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. 2008AP3086
2008AP3087

Cir. Ct. Nos. 2006TP327
2006TP328

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

Appeal No. 2008AP3086

IN THE INTEREST OF VANESSA P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT H.,

RESPONDENT-APPELLANT,

DENICE P.,

RESPONDENT.

Appeal No. 2008AP3087

IN THE INTEREST OF ROBERT P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT H.,

RESPONDENT-APPELLANT,

DENICE P.,

RESPONDENT.

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

¶1 BRENNAN, J.[1] Robert H. appeals from a judgment terminating his parental rights to his daughter, Vanessa P. (V.P.) born October 15, 2004, and his son, Robert P. (R.P.) born January 21, 2006,[2] on the grounds that both children were born of incestuous parenthood, contrary to WIS. STAT. § 48.415(7)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] By order dated January 13, 2009, we granted Robert's motion to consolidate the appeals with respect to both V.P. and R.P.

(2007-08), and it was in the best interests of the children to terminate parental rights.[3] Robert claims that termination based on § 48.415(7), as applied to him, violates his constitutional right to substantive due process. Because the statute as applied does not violate Robert's right to substantive due process, we affirm.

BACKGROUND

¶2 It is undisputed that Robert, and the children's mother, Denice P., are full biological brother and sister. Robert and Denice stated that they did not know about their biological relationship at the time either V.P. or R.P. was conceived, but the trial court found that the true biological connection was known, and that finding is not challenged on appeal. When Robert and Denice were children, each was removed from the home of their biological mother and placed into foster care. Robert was placed with Mr. and Mrs. H., when he was two years old, and was eventually adopted by the H.'s. Denice was placed with Ms. A. and other foster placements.

¶3 The H.'s would host family picnics for Robert's biological family twice a year and Denice would sometimes attend. When Robert was eight years old, the H.'s moved away from Milwaukee, but Mrs. H. would talk to Robert about his biological family and show him pictures every three months. Sometime in 1998, the H.'s moved back to the Milwaukee area and Robert attended West Allis Central High School's special education classes. After graduating from

[3] The trial court terminated both Robert's parental rights and the parental rights of his sister, Denice. This appeal addresses only Robert's challenge to the termination. Denice appealed the orders terminating her parental rights via a consolidated no-merit appeal, No. 2008AP3084-NM (Vanessa) and No. 2008AP3085-NM (Robert).

Central, Robert reconnected with Denice. He worked at a factory and also at Pick 'n Save.

¶4 The court heard a variety of scenarios as to their reunion: through a meeting at Pick 'n Save, through their biological father, Donald P., or simply running into each other on the street. A short time after graduating from Central, Robert asked Mrs. H. if it would be okay for him to go live with his sister, Denice, to help her care for her son, Mikey. Robert moved in with Denice. Both Mrs. H. and Robert's grandmother advised Robert that it would be morally wrong to have sex with Denice because she was his biological sister. Despite the warning, Robert and Denice began a sexual relationship, which resulted in the birth of V.P. and R.P.

¶5 In July 2006, both V.P. and R.P. were removed from the home as children in need of protection or services, and placed in foster care.[4] The Bureau of Milwaukee Child Welfare provided services to Robert. In July and September of 2006, Robert told Milwaukee police that he began a sexual relationship with his sister, Denice, shortly after he moved in, but it was "not wrong" because they had different last names. Robert told a social worker that he had the sexual relationship with his sister, Denice, because other women may have had sexually transmitted diseases. He also told Mrs. H. that Donald stated it was okay for Robert to have sex with Denise because Robert could not get a girlfriend.

¶6 On September 19, 2006, the State filed a petition seeking to terminate Robert's parental rights to both children on the grounds that they were

[4] Michael P., Denice's first-born child, was also removed from her home at the same time. Michael is not involved in this action.

the product of incestuous parenthood, contrary to WIS. STAT. § 48.415(7). A variety of procedural hearings and delays, not pertinent to this appeal, occurred.

¶7 The trial court ordered Robert to undergo a competency exam by psychologist, Dr. Kenneth Sherry. Dr. Sherry found Robert not competent and diagnosed him as having mild mental retardation and adjustment disorder with mixed mood. Robert did not contest the finding, and a guardian *ad litem* was appointed on his behalf. Robert then filed motions for dismissal based, in part, on his constitutional argument, and the State filed a motion for partial summary judgment as to the grounds phase of the termination petition.

¶8 After additional proceedings and an evidentiary hearing on the grounds phase, the trial court granted the State's motion for partial summary judgment,[5] finding that grounds existed to terminate parental rights; namely, the incestuous parenthood ground of WIS. STAT. § 48.415(7). The trial court, as noted above, also found Robert's and Denice's claims of ignorance as to their biological connection to be incredulous. The case proceeded to a contested dispositional hearing, which was held on multiple dates. In May 2008, the trial court found that termination of parental rights was in the best interests of V.P. and R.P. Orders terminating Robert's parental rights were entered on July 14, 2008. Robert now appeals from those orders.

[5] Summary judgment is appropriately granted on the grounds phase to a TPR "where the requirements of the summary judgment statute and the applicable legal standards … have been met." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶5, 271 Wis. 2d 1, 678 N.W.2d 856.

DISCUSSION

¶9 Robert raises a single argument in this appeal: WIS. STAT. § 48.415(7), as applied to him, denies him substantive due process because none of the compelling interests the State has in discouraging incestuous parenthood apply under the circumstances in this case. The trial court rejected Robert's constitutional claim, finding that the State had legitimate compelling interests. We agree. Section 48.415(7) provides:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(7)** INCESTUOUS PARENTHOOD. Incestuous parenthood, which shall be established by proving that the person whose parental rights are sought to be terminated is also related, either by blood or adoption, to the child's other parent in a degree of kinship closer than 2nd cousin.

¶10 The constitutionality of a statute is a question of law, reviewed *de novo*. ***State v. Allen M.***, 214 Wis. 2d 302, 313, 571 N.W.2d 872 (Ct. App. 1997). Statutes are presumed constitutional, and courts will indulge every presumption favoring the validity of the law. *See* ***id.*** A challenger must prove the statute unconstitutional beyond a reasonable doubt. ***Id.*** Any factual findings are subject to the clearly erroneous standard of review. *See* WIS. STAT. § 805.17(2). Here, Robert does not challenge the trial court's findings of fact.

¶11 Instead, Robert contends that even though he and Denice knew their true biological relationship, termination on the ground of incestuous parenthood is unfair as applied to him because he grew up in an adopted home away from Denice, has a different last name than Denice and, thus, in essence, they did not

grow up as biological siblings normally would. Although these factors may have provided justification for Denice and Robert to engage in a sexual relationship, none of the factors change the absolute fact that they are biological siblings and none of the factors render WIS. STAT. § 48.415(7) unconstitutional on substantive due process grounds.[6]

¶12 Substantive due process bars state action that violates fundamental rights and liberty interests, regardless of procedural fairness. *See* ***Monroe County DHS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831. "Governmental action violates 'substantive due process' when the action in question, while adhering to the forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people under the guise of law." ***Reginald D. v. State***, 193 Wis. 2d 299, 307, 533 N.W.2d 181 (1995).

¶13 Like in ***Allen M.*** and ***Kelli B.***, our first determination in this case involves the correct level of scrutiny to apply in evaluating the substantive due process challenge here. If a fundamental liberty interest is at stake, we must apply strict scrutiny, but if not, then the rational basis standard applies. *See* ***Kelli B.***, 271 Wis. 2d 51, ¶17. ***Allen M.*** applied strict scrutiny without directly resolving whether a fundamental liberty interest was at stake. ***Id.***, 214 Wis. 2d at 314 & n.12. ***Kelli B.*** also applied the strict scrutiny analysis. ***Id.***, 271 Wis. 2d 51, ¶¶20-25. We elect to do the same here. Thus, if the statute "is narrowly tailored

[6] Robert does not specify whether he is relying on the due process clause of the Fourteenth Amendment to the United States Constitution or Article I, section 1 of the Wisconsin Constitution. *See* U.S. CONST. amend. XIV; WIS. CONST. art. I, § 1. Regardless, the analysis is the same. *See* ***Reginald D. v. State***, 193 Wis. 2d 299, 533 N.W.2d 181 (1995).

to advance a compelling interest that justifies interference" with Robert's parental rights, we will uphold it as constitutional. *See* ***id.***, ¶17.

¶14 We have already declared the incestuous parenthood ground for termination to be constitutional in ***Allen M.***, 214 Wis. 2d at 314-15. That case also involved a brother and sister who parented three children together and argued that the statute "violates their constitutional rights of due process and equal protection." ***Id.*** at 306. We held that: "no fundamental principle of justice is offended when a state determines that siblings … are unfit to provide parenting for the children they produce through their non-marital, incestuous relationship." ***Id.*** at 315. We based our decision, in part, on the fact that the termination statutes place "considerable discretion in the trial court, thereby precluding the possibility that a proper application of § 48.415(7) … would deprive a parent of due process rights." ***Id.*** (citation omitted).

¶15 Wisconsin's termination of parental rights statutes involves a two-phase process. *See* ***Sheboygan County DHSS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. The first phase requires a finding that grounds exist demonstrating parental unfitness. ***Id.***; WIS. STAT. § 48.415(1). If grounds for termination are found, rights are not automatically terminated. ***Id.***, ¶¶26-28; WIS. STAT. § 48.424(3). Rather, the case proceeds to the second phase, which involves a determination as to whether termination is in the best interests of the child. ***Id.***, ¶28; WIS. STAT. § 48.424(3), (4). Under WIS. STAT. § 48.427(2), the court has the authority to dismiss the petition outright when it feels the circumstances do not "warrant the termination of parental rights." The "discretion that the statute vests in the court to dismiss the petition for termination if it finds termination is not

warranted under the standards assures full, substantive due process." ***Allen M.***, 214 Wis. 2d at 315-16 (citation omitted).

¶16 Robert argues that none of the compelling state interests of deterring incestuous relationships apply to him, because Robert and Denice were raised in separate households with different adopted parents and grandparents. We are not convinced.

¶17 The State has a compelling interest in protecting children from the adverse effects of incestuous relationships and the dysfunctional family that a sibling parentage would provide. Incest has been deemed unacceptable, immoral and criminal. Our statutes declare that incest is a serious crime, *see* WIS. STAT § 944.06, and prohibits marriage amongst family members, *see* WIS. STAT. § 765.03. The purposes behind such laws include preventing genetic defects, preventing the psychological damage, emotional harm and "fundamentally disordered circumstances in which the child of an incestuous relationship will be raised." ***Allen M.***, 214 Wis. 2d at 320. None of these factors change because Robert and Denice did not grow up as typical biological siblings. There is still the genetic question mark, there is still the potential for psychological and emotional harm and there is still the fact that V.P. and R.P. would be raised by parents who are biological siblings. They are biological siblings, who knew they were brother and sister, but choose to engage in the incestuous relationship regardless of the fact that their conduct constituted criminal activity. They are a couple that will never have the option of getting married. Further, V.P. and R.P. have the same biological grandpa, grandma, aunts and uncles. We conclude that the State has a compelling interest under the circumstances presented here and that the statute is

narrowly tailored to protect that interest. Accordingly, we reject Robert's contention that WIS. STAT. § 48.415(7) is unconstitutional as applied to him.[7]

¶18 Robert asserts that the concern of genetic abnormalities is neutralized once the child is born and should have no impact. We cannot agree. A similar argument was rejected by this court in ***Allen M.***: "Not only does the State's compelling interest in the protection of that child continue, but the State's equally compelling interest in deterring additional incestuous parenthood, by those parents and others, remains.… Thus, § 48.415(7), STATS., further promotes the State's compelling interest in deterring incest by, in effect, warning those who might contemplate incest that if they produce a child, they will not necessarily be permitted to parent the child." ***Allen M.***, 214 Wis. 2d at 320 (citation omitted). Moreover, sometimes genetic abnormalities not immediately apparent, are revealed later.[8]

¶19 We are also not persuaded by Robert's complaint that the trial court used additional information at the dispositional hearing, which was not presented at the grounds phase. Part of what makes the TPR statutes fair is the opportunity afforded the parent at the dispositional hearing to present evidence demonstrating that it is in the best interest of the child to not terminate the parental rights. Robert

[7] Robert argues that the facts here are more akin to ***Monroe County DHS v. Kelli B.***, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831, where the supreme court held that WIS. STAT. § 48.415(7) was unconstitutional as applied to Kelli, who had parented three children with her biological father. *See* ***Kelli B.***, 271 Wis. 2d 51, ¶¶1-2. We disagree. ***Kelli B.***, involved a father/daughter incestuous relationship, wherein the court found the daughter to be a victim. ***Id.***, ¶26. The facts in Robert's case are very different. Robert engaged in a consensual sexual relationship with his sister. Accordingly, ***Kelli B.*** is distinguishable.

[8] The record reflects that V.P. and R.P. will be monitored by Children's Hospital until 2011 as a result of their incestuous parentage to watch for any problematic genetic markers.

complains that the trial court here based its dispositional ruling, in part, on the fact that V.P. and R.P. have special needs and Robert has cognitive delays.

¶20 To the contrary, the trial court properly considered the children's special needs and Robert's cognitive delays at the dispositional hearing. WISCONSIN STAT. § 48.426(3) sets forth factors for the trial court to consider in rendering its dispositional decision. Among those factors are: "age and health of the child" and "whether the child has substantial relationships with the parent." The children's special needs are pertinent to their health and Robert's cognitive delays are relevant to what kind of relationship he is capable of establishing with others. Thus, the trial court's consideration of these factors was proper.

¶21 Because the statutory scheme provides the trial court the discretion to not terminate parental rights even if grounds exist to do so, we hold that WIS. STAT. § 48.415(7) is not unconstitutionally applied on substantive due process grounds in this case. The trial court here, considered the circumstances, including the fact that Robert and Denice did not grow up as typical biological siblings would. The trial court considered all the factors set forth in WIS. STAT. § 48.426 to assess whether it would be better for V.P. and R.P. to remain with Robert despite the incestuous parenthood. Thus, the trial court properly exercised its discretion in terminating Robert's parental rights.

¶22 Based on the foregoing, we conclude that Robert has failed to prove beyond a reasonable doubt that the statute, as applied, violates his substantive due process. Termination of Robert's parental rights under the statute was fair and

was narrowly tailored to advance the State's compelling interest underlying the statute.[9]

By the Court.—Orders affirmed.

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

[9] We note that Robert declined to file a reply brief. That which is not refuted is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 297 N.W.2d 493 (Ct. App. 1979).