**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 30, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-2169** **Cir. Ct. No. 02TP000456**

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

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

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**PAMELA P.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 FINE, J. Pamela P. appeals the trial court's order terminating her parental rights to her daughter Princess P. She also seeks review of the trial court's denial of her post-notice-of-appeal motion to vacate that order and to

dismiss the termination-of-parental-rights case against her.[1] Her only contention on appeal is that the trial court's application of WIS. STAT. § 48.415(6), which permits termination of a person's parental rights if he or she "never had a substantial parental relationship with the child," violated her right to substantive due process. We disagree and affirm.

**I.**

¶2 Pamela P. concedes in her main brief on this appeal that she "has had a lifelong problem with alcohol and drugs." And, as is almost always the situation, her drug and alcohol problems also hurt her children. Indeed, as Pamela P. also concedes in her main brief, not counting Princess, she "gave birth to 5 children who were tested positive for cocaine or alcohol or both." Her main brief succinctly sets out both the sordid history and the predicate for her appeal:

> Princess P. was born November 18, 2001 and also tested positive for cocaine. Ms. P. did not have any prenatal care for Princess. Princess was born prematurely and weighed only 4 pounds and 4 ounces. Princess was taken into the State's custody immediately after her birth.

[1] Pamela P. filed the post-appeal motion following our remand for that purpose. The motion incorrectly denominates the document terminating Pamela P.'s parental rights to Princess as a "judgment." It is an order and was correctly identified as such in Pamela P.'s notice of appeal. The trial court denied the motion for post-termination relief in a letter to the parties, and it does not appear that a formal order denying the motion was entered. None of the parties raises any jurisdictional hurdle to our consideration of Pamela P.'s contention that the trial court violated her constitutional rights by relying on WIS. STAT. § 48.415(6), and we perceive none. *See* WIS. STAT. RULE 809.107(6)(am) (appellate briefs may raise issues litigated on remand); ***State v. Jacobus***, 167 Wis. 2d 230, 233–234, 481 N.W.2d 642, 643 (Ct. App. 1992) (per curiam) (court of appeals has jurisdiction to consider order entered after notice of appeal has been filed if that order is the result of action taken by the trial court following remand for further proceedings); WIS. STAT. RULE 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.") (made applicable to appeals by WIS. STAT. RULE 809.84); *see also* WIS. STAT. RULE 807.07(1) (waiver of irregularities).

> On February 4, 2002, Princess was found to be a child in need of protection and services and was ordered placed in foster care. She has never been in her mother's custody. Ms. P. has not provided any financial support for Princess.

(Record references omitted.) Citing no direct supporting authority, Pamela P. contends that Princess's immediate removal from her custody made it "fundamentally unfair" to use WIS. STAT. § 48.415(6) as a ground to terminate her parental rights to the baby because the State, she argues, never gave her a chance to establish "a substantial parental relationship with" Princess.

## II.

¶3 WISCONSIN STAT. § 48.415 provides, as material here:

> 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:
>
> ....
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Pamela P. waived her right to a jury, and the trial court found after a bench fact-finding hearing that the State had proven that there were grounds under § 48.415(6) to terminate her parental rights to Princess. *See* WIS. STAT. § 48.424(1). The trial court also found that it was in Princess's best interest to sever Pamela P.'s parental ties to her. *See* WIS. STAT. §§ 48.424(1), (4); 48.426(2).

¶4 As noted, Pamela P. argues that she could not assume "a substantial parental relationship with" Princess because the State took Princess from her at birth. Significantly, however, she does not assert that the State did not have either factual justification or legal authority to take Princess from her, even though her successful post-appeal motion asking us to remand this matter to the trial court asserted that a remand was necessary to supplement the record to show "why" Princess was removed from Pamela P. at birth. The only material Pamela P. submitted to the trial court after remand in support of her motion to vacate the termination order and dismiss the case were the petitions that were filed to determine that both Princess and Pamela P.'s other children were children in need of protection or services. *See* WIS. STAT. § 48.13. Thus, by not contesting the matters, Pamela P. concedes that the State had both the requisite justification and authority. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matter not rebutted is admitted); ***Reiman Assocs. v. R/A Adver.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (matter not argued is waived). Moreover, the record is replete with not only the horrendous impact Pamela P.'s drug use had on her children, but also descriptions of the deplorable conditions that her other children were forced to endure as a result of Pamela P.'s inability to give them even the most minimal parental care. Thus, one experienced social worker testified that Pamela P.'s

"home was one of the wors[t] homes that I ever witnessed" and that Pamela P.'s other children were dirty and often looked malnourished. Additionally, Pamela P. does not contend that the government interfered with any post-removal attempts she made to either bond with Princess or assume her parental responsibilities for the baby after Princess was taken from her at birth.

¶5 As noted, Pamela P. contends that the use of WIS. STAT. § 48.415(6) in this case violated her rights to substantive due process. Substantive due process protects persons from government conduct that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty. ***United States v. Salerno***, 481 U.S. 739, 746 (1987). There is no doubt but that the parental/child relationship is one of those fundamental rights secured against unwarranted interference by the government. ***Santosky v. Kramer***, 455 U.S. 745, 753–754 & 754 n.7 (1982). But once the parents do something or fail to do something that requires society's intervention to protect their children, that fundamental right must give way to a higher "countervailing interest." *See, e.g.*, ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 661, 599 N.W.2d 90, 92 (Ct. App. 1999) (quoted sources omitted).

¶6 As we have seen, Princess's removal from Pamela P. was triggered by things that Pamela P. did. We do not have to decide, however, whether this alone would justify a finding under WIS. STAT. § 48.415(6) that Pamela P. did not assume her parental responsibilities for Princess. *But see* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 683–684, 500 N.W.2d 649, 654 (1993) ("[T]he Wisconsin legislature has concluded that a person's parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child.") (father in jail, on probation, and subject to restraining order); *see also* ***L.K. v. B.B.***, 113 Wis. 2d 429, 439, 335 N.W.2d 846,

851–852 (1983) ("mere fact" that father was incarcerated during the time he could have established a parental relationship with his child "does not preclude possible termination"). As in ***Ann M.M.***, however, there is more. Like the biological father in ***Ann M.M.***, Pamela P. did nothing to try to assume her parental responsibilities for her child after the government's intervention. *See* ***Ann M.M.***, 176 Wis. 2d at 683–684, 500 N.W.2d at 653–654. Thus it is misleading hyperbole, to say the least, for Pamela P. to contend that it was "quite impossible for Ms. P to exercise the daily supervision and care of the child required by the statute when the State has prevented her from doing exactly that." Pamela P. never even tried. Thus, this is not a case, as Pamela P. asserts it to be, where a birth-mother is being punished for pre-birth conduct. The pre-birth conduct triggered the need to take Princess from Pamela P. at birth, but it was Pamela P.'s post-birth conduct in not seeking to establish a parental bond with Princess that justified the trial court's finding that termination of her parental rights to Princess was permitted by § 48.415(6).

¶7 Other than contest this termination-of-parental-rights proceeding, Pamela P. did little to attempt or even to demonstrate that she *wanted* to assume parental responsibilities for Princess: she continued to use cocaine after Princess was born; she never completed any drug or alcohol treatment programs that were offered to her; she remained in the abusive, drug-pervasive relationship with Princess's father (who was also the father of Pamela P.'s ten other children); she did not show up for Princess's child-in-need-of-protection-or-services dispositional hearing; and, although she made many of the monthly supervised visits with Princess, she did not go to a medical appointment for the baby even though she was given a bus ticket.

¶8 In sum, as the trial court pointed out so eloquently in its letter denying Pamela P.'s post-termination motion, despite the fact that Princess was taken from Pamela P. at birth, Pamela P.

> could [still] have developed a substantial parental relationship with her child but she simply did not. She could have stopped using cocaine. She could have established and maintained a safe, nurturing, loving home. She could have desperately sought out visitation and maintained consistent visitation with her child. [The social-work agency] did not prohibit her from doing any of these things. It was [Pamela P.]'s own remarkably destructive choices that precluded her from meeting her parental responsibilities and establishing and maintaining a substantial parental relationship.

Contrary to Pamela P.'s contention—largely undeveloped and without citation to the record—that the State did not prove that she "never" had a "substantial parental relationship" with Princess, as is required by WIS. STAT. § 48.415(6), proof of that requirement was overwhelming. None of Pamela P.'s constitutional rights was violated.

*By the Court*.—Order affirmed.

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