COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1800 **Cir. Ct. No. 2014TP53**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

J. D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

¶1 LUNDSTEN. J.[1] J.D. appeals the circuit court's order terminating her parental rights to D.O. based on the parental unfitness ground of "continuing denial of periods of physical placement or visitation." *See* WIS. STAT. § 48.415(4). J.D. argues that this statutory ground is unconstitutional as applied to her. I reject J.D.'s constitutional challenge, and affirm.

Background

¶2 In June 2014, the Dane County Department of Human Services petitioned to terminate J.D.'s parental rights to D.O., alleging continuing denial of periods of physical placement or visitation as the sole ground for involuntary termination. This ground requires proof of the following elements:

> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

WIS. STAT. § 48.415(4).

¶3 In its petition, the Department alleged that an order denying J.D. periods of physical placement or visitation with D.O. was entered on May 16, 2013, under WIS. STAT. § 48.363, as part of a prior CHIPS proceeding. The

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Department further alleged that the May 16, 2013 order contained the required notice; that at least one year had elapsed since the order was entered; and that the court had not subsequently modified the order to permit periods of physical placement or visitation.

¶4 The Department moved for partial summary judgment and submitted a certified copy of the May 16, 2013 order, including the required warnings and conditions to be granted visitation. The Department argued that there was no genuine issue of material fact as to any of the WIS. STAT. § 48.415(4) requirements.

¶5 J.D. responded to the Department's partial summary judgment motion by filing a motion to dismiss. She argued that WIS. STAT. § 48.415(4), "as applied to the facts of this case, constitutes a violation of [J.D.]'s right to Substantive Due Process."

¶6 The circuit court granted the Department's partial summary judgment motion and denied J.D.'s motion to dismiss. The case proceeded to the dispositional phase, and the circuit court terminated J.D.'s parental rights to D.O.

Discussion

¶7 This court reviews a constitutional challenge to a statute de novo. ***State v. Wood***, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63. The party bringing the challenge has the burden to prove "beyond a reasonable doubt" that

the statute is unconstitutional. ***Id.*** For the reasons explained below, I conclude that J.D. fails to carry that burden.[2]

¶8 J.D. bases her constitutional challenge to WIS. STAT. § 48.415(4) on ***Dane County DHS v. Ponn P.***, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344. In ***Ponn P.***, the parent brought a facial challenge to § 48.415(4) on substantive due process grounds, arguing that this statutory ground allows the termination of parental rights without any evidence of unfitness. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶¶15, 24. The supreme court in ***Ponn P.*** upheld the facial constitutionality of § 48.415(4) but left open the possibility of future as-applied challenges. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶¶25-26, 32.

¶9 More specifically, the court in ***Ponn P.*** upheld WIS. STAT. § 48.415(4) based on the "statutory step-by-step process"—typically prior CHIPS proceedings—that leads up to a termination of parental rights under § 48.415(4). *See* ***Ponn P.***, 279 Wis. 2d 169, ¶¶26, 32. The court characterized this step-by-step process 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 by § 48.415(4)." ***Id.***, ¶32. The court reasoned that "[t]he findings that are required for a court to proceed against a parent at each of the steps prior to the final step under § 48.415(4) involve an evaluation of a parent's fitness." ***Id.***

[2] Because I reject J.D.'s as-applied challenge on its merits, I need not address the Department's argument that J.D.'s challenge is an impermissible collateral attack on the underlying CHIPS proceeding.

¶10 Regarding as-applied challenges, the court in ***Ponn P.*** stated that its decision did not preclude future as-applied challenges to WIS. STAT. § 48.415(4) based on the "reasons" that a parent failed to obtain modification of the order denying visitation or physical placement. ***Ponn P.***, 279 Wis. 2d 169, ¶25 ("[W]e do not preclude an as-applied substantive due process challenge to the statutory scheme underlying § 48.415(4) so that the reasons for failing to modify the order denying visitation or physical placement may be explored, in a proper case."); *see also* ***id.***, ¶25 n.6.

¶11 Although J.D. characterizes her constitutional challenge to WIS. STAT. § 48.415(4) as an as-applied challenge, some of her arguments seem aimed at the facial constitutionality of the statute. In particular, J.D. argues that the ***Ponn P.*** court failed to establish a "mechanism" to ensure "fair procedures" and "necessary findings" when the ground for termination is § 48.415(4). Whether intending to or not, J.D. in effect argues that some such additional procedure is always necessary and such additional procedural protection should have been incorporated into the ***Ponn P.*** decision. However, J.D. fails to explain what procedure would suffice, apart from a fact-finding hearing at the unfitness phase in every § 48.415(4) case. And, requiring a fact-finding hearing on unfitness in every such case is inconsistent with ***Ponn P.*** and ***Steven V. v. Kelley H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856. *See* ***id.***, ¶¶6, 35-37, 44 (allowing partial summary judgment in the unfitness phase of termination proceedings when there is no genuine issue of material fact as to the grounds elements). Thus, any argument regarding the general need for additional procedures in cases under § 48.415(4) must be directed at the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with

the power to overrule, modify or withdraw language from a previous supreme court case.").

¶12 Turning to what remains of her arguments, J.D. contends, as I understand it, that there are particular facts here that make WIS. STAT. § 48.415(4) unconstitutional as applied in her situation. As support, she points to four "differences" between ***Ponn P.*** and her case. To quote her principal brief, J.D. argues:

> The differences that break the uninterrupted procedures that funnel parents, who have had their visits suspended, to an unfitness finding under 48.415(4) are numerous.
>
> First, Ponn P.'s visits [in the underlying CHIPS proceeding] were suspended after he pled to felony child abuse, while J.D. agreed to suspend her visits so as to allow her to implement the agreed upon plan to resume visits through family therapy.
>
> Second, Ponn P. [pled] no contest to the petition for termination of parental rights, while J.D. contested the petition.
>
> Third, Ponn P. did not make any effort to resume visits while J.D. made a successful effort to comply with the plan to resume visits.
>
> Fourth, the record [was] silent on the Department's actions in ***Ponn P.*** apart from obtaining an order suspending visits, while J.D.'s Social Worker provided misinformation to the CHIPS Court that seriously impaired J.D.'s efforts to resume visits.

(Paragraph breaks added; record citations omitted.) In the following sections, I explain why these asserted differences do not demonstrate an unconstitutional application of § 48.415(4) to J.D.

First Difference: J.D.'s Agreement To Suspend Visits

¶13 J.D. provides no explanation as to why it matters that, unlike Ponn P., she agreed to suspend visits in the underlying CHIPS proceeding. That is, J.D. does not explain why her agreement was a departure from the "statutory step-by-step process" that ***Ponn P.*** tells us is essential to the constitutionality of WIS. STAT. § 48.415(4). *See* ***Ponn P.***, 279 Wis. 2d 169, ¶¶26, 32. J.D. does not assert, for example, that her agreement to suspend visits violated the statutory CHIPS procedures or relieved the CHIPS court of its duty to make pertinent findings.

¶14 Given J.D.'s limited argument, I need not recount all of the steps that occurred in the underlying CHIPS proceeding. I do note, however, that the initial CHIPS dispositional order contains a number of pertinent findings that indicate J.D.'s parental unfitness, including that: D.O. was in need of protection or services because of abuse; J.D. "has significant mental health issues that impact her ability to properly and safely respond to the needs of" D.O.; "[e]mergency circumstances resulted in the immediate removal of [D.O.] from [the] home"; and continued placement in the home was "contrary to [D.O.]'s welfare." Thus, even if I were to look more closely at this first alleged factual difference, it turns out that both situations involve findings that were related to significant child safety concerns.

Second Difference: Contested Termination Petition

¶15 As with the previous "difference," J.D. provides no explanation as to why contesting the termination petition would matter. It is true that the court in ***Ponn P.*** concluded that Ponn P.'s as-applied challenge was barred by his no contest plea to the termination petition. *See* ***id.***, ¶25. It is also true that J.D.

preserved her as-applied challenge by raising it in the circuit court and *contesting* the termination petition. However, J.D.'s decision to contest the termination petition does nothing to undermine the ***Ponn P.*** court's "funnel" reasoning. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶32.

Third And Fourth Differences: J.D.'s Efforts To Resume Visits; Misinformation Provided By Social Worker To The CHIPS Court

¶16 I group J.D.'s third and fourth "differences" arguments together because these arguments go hand in glove. As pertinent here, one of the steps in the statutory step-by-step process described in ***Ponn P.*** was that the parent must have the opportunity to seek modification of a no-visitation order by meeting set conditions for visitation. *See* ***id.***, ¶26. And, as already noted, the court in ***Ponn P.*** expressly left open the possibility of an as-applied challenge to WIS. STAT. § 48.415(4) based on the "reasons" that a parent failed to obtain such a modification. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶25 & n. 6.

¶17 As I understand it, J.D. argues that the reason she failed to obtain modification of the May 16, 2013 no-visitation order was that a department social worker provided the circuit court with misinformation relating to D.O.'s involvement in therapy. J.D. appears to argue that, but for this misinformation, she would have met the conditions for visitation and, within one year of the May 16, 2013 order, obtained a modification of the order. Such modification, in turn, would have precluded the termination of her parental rights based on WIS. STAT. § 48.415(4).

¶18 I reject J.D.'s argument because, although she identifies generally the source and topic of alleged misinformation, she fails to adequately explain what that misinformation was, let alone explain how the misinformation would

have stopped her from obtaining modification of the May 16, 2013 order. J.D. does not, for example, explain what conditions she was required to meet to regain visitation, and how the alleged misinformation prevented her from meeting those conditions or from otherwise obtaining modification of the order. This court has neither the duty nor the resources to sift the record to find factual support for a party's argument. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).[3] And, it is far from obvious what factual support there might be in the record to support J.D.'s argument. Accordingly, I reject J.D.'s argument that she had a viable constitutional defense based on the reasons why the order was not modified.

¶19 Before concluding, I address two additional arguments that J.D. makes. First, J.D. cites to ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, appearing to argue that this case provides support for her as-applied challenge. I acknowledge that ***Jodie W.*** supports the proposition that, if J.D. can show that misinformation resulted in her being subjected to an impossible condition, then an as-applied challenge might have merit. However, for reasons already explained, J.D. fails to make a showing that her inability to regain visitation was based on her failure to meet a condition that was the result of misinformation.

¶20 Second, J.D. argues that her case is similar to one in which a jury's verdict on grounds for termination was overturned because of a defective dispositional order that did not comply with statutory requirements. *See* ***Portage***

[3] The circuit court allowed the parties to submit briefs and factual materials relating to J.D.'s as-applied constitutional challenge. As a result, the record contains a significant amount of material relating to the underlying CHIPS proceeding.

Cty. DHHS v. Shannon M., No. 2014AP1259, unpublished slip op. ¶¶3-5, 10 n.3, 11, 13 (WI App Oct. 2, 2014). It should be obvious, without further discussion, that J.D.'s case is not factually similar to ***Shannon M.***, and I see no reasoning in ***Shannon M.*** that supports J.D.'s constitutional argument.

¶21 In sum, J.D. fails to show beyond a reasonable doubt that WIS. STAT. § 48.415(4) is unconstitutional as applied to her.

Conclusion

¶22 For the reasons stated above, I affirm the circuit court's order terminating J.D.'s parental rights to D.O.

By the Court.—Order affirmed.

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