COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2015

Diane M. Fremgen
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. 2015AP1477
2015AP1478

Cir. Ct. Nos. 2014TP137
2014TP138

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

N.J.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

N.J.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] N.J. appeals from circuit court orders terminating her parental rights to G.H. and J.H. She argues that WIS. STAT. § 48.415(6), as applied to her, violates her right to substantive due process because she was found to have failed to assume parental responsibility despite the Milwaukee Child Welfare Bureau's alleged failure to make reasonable efforts to reunite her with her children. For the reasons that follow, we affirm.

BACKGROUND

¶2 G.H. was born in Des Moines, Iowa, on July 25, 2008, to N.J. and M.H., and J.H. was born in Madison, Wisconsin, on September 1, 2009, to N.J. and M.H. N.J. and M.H. were never married; however, it is undisputed that M.H. is the father of both G.H. and J.H.[2]

¶3 N.J. and M.H. moved to Iowa prior to G.H.'s birth "[t]o get a new start on things," and they shared an apartment there. N.J. learned she was pregnant with G.H. early in her pregnancy, and she began receiving prenatal care when she was about three months pregnant. There were no reported complications

[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.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision resolving TPR appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline in this matter through the date of this decision.

[2] M.H. is deceased.

with her pregnancy with G.H., and G.H. was born a couple of weeks early when N.J.'s physician chose to induce labor. While living in Iowa, M.H. was incarcerated for his fourth OWI offense, leaving N.J. to provide all daily care for G.H. for a period of time. While M.H. was incarcerated, N.J., who was then pregnant with J.H., moved back to Wisconsin with G.H. in or around June 2009.

¶4 Prior to becoming pregnant with J.H., N.J. was prescribed Vicodin by her physician in Iowa. N.J. continued to take Vicodin after learning she was pregnant with J.H., of which her Iowa physician was apparently aware. However, upon returning to Wisconsin, N.J.'s physician was upset that she was taking Vicodin while pregnant. During her pregnancy with J.H., N.J. developed preeclampsia and other medical issues, and she was hospitalized for approximately one month. J.H. was born approximately one month premature, and within a few months of her birth, J.H. was diagnosed with a medical condition that required corrective surgery. Prior to the diagnosis, N.J. took J.H. to numerous doctors' appointments and frequently took J.H. to the hospital multiple times per week. After her corrective surgery, J.H. did not require many additional follow-up appointments, and N.J. continued to take her children for their well-baby check-ups.

¶5 M.H. moved back to Wisconsin after his release from prison in Iowa and he moved in with N.J., G.H., and J.H., who had been born while M.H. was still incarcerated. N.J. was working during that time, and either M.H. or N.J.'s boss's daughter would take care of G.H. and J.H. while she was working.

¶6 During 2010, N.J. and M.H. moved to a new apartment, and sometime thereafter—the exact date is unclear—M.H. moved out of the apartment and he, along with G.H. and J.H., moved in with his father. At some point after

M.H. moved out with their children—again, the exact timing is somewhat unclear—N.J. allowed her new boyfriend, R.R., whom she was aware was a drug user, to move in with her.

¶7 In September 2010, N.J.'s deferred prosecution agreement in a 2009 case stemming from possession of an electric weapon (taser) was revoked, and she received a two year probation sentence. Shortly thereafter, the Bureau of Milwaukee Child Welfare ("Bureau") first became involved with G.H. and J.H. on November 16, 2010, when the Bureau received a referral stating that J.H. had a severe diaper rash and that neither N.J. nor M.H. had sought treatment for J.H. The referral also stated that according to M.H., he did not have the medical cards for G.H. and J.H.

¶8 The Bureau received another referral for G.H. and J.H. on November 24, 2010, stating that M.H. had allowed N.J. to take G.H. and J.H. for a visit but that she had not returned at the agreed upon time and that M.H. had no idea where the children were. M.H. also informed the Bureau that he believed N.J. was using drugs and that he also believed that N.J. did not have a residence at the time. Although an Initial Assessment worker was able to contact N.J. via telephone, she was uncooperative and would not accurately identify her location.

¶9 Five days later, the Initial Assessment worker learned that N.J. had been arrested in Washington County on November 25, 2010, after fleeing from police when she was pulled over with G.H., J.H., and her boyfriend, R.R., in the car.[3] N.J. testified that she ran, leaving her children in the car, because she "had a

[3] At the time that she learned of N.J.'s November 25, 2010 arrest, the Initial Assessment worker also learned that N.J. had tested positive for cocaine and opiates on October 12, 2010.

warrant out for [her] arrest" and she did not want to be arrested, and she also testified that she was using cocaine. At that time, neither G.H. nor J.H. were wearing a coat, shoes, or socks, despite it being November, and neither child was appropriately secured in a car seat. During the course of the November 25, 2010 traffic stop, R.R. was found to be in possession of a crack pipe. N.J. was charged and convicted of bail jumping, and she remained in the Washington County Jail from November 25, 2010, through December 15, 2010, when she was released on cash bail. She was then transferred to the Dodge County Jail, where she received a ninety-day sentence with a credit for seventy days as a result of revoked probation.

¶10 As a result of the foregoing events, the Honorable Stephanie Rothstein signed orders for Temporary Physical Custody of G.H. and J.H. on December 1, 2010, placing G.H. and J.H. with M.H.[4]

¶11 On January 19, 2011, G.H. and J.H. were found to be in need of protection and services, and on February 16, 2011, the Honorable Stephanie Rothstein signed an in-home CHIPS dispositional order that would expire one year later, on February 16, 2012.[5] Pursuant to the CHIPS order, G.H. and J.H. were placed with M.H., and the CHIPS order also set forth conditions of return/supervision and goals for both M.H. and N.J.

[4] We note that on the order filed in G.H.'s case, placement is identified as "out-of-home," whereas in J.H.'s case, the placement as identified as "in-home." Nevertheless, both orders identify the Bureau as having primary responsibility for providing services, and M.H. is identified as having placement in both.

[5] CHIPS is an acronym for "Child In Need of Protection or Services." The CHIPS order was allowed to expire.

¶12 As to N.J., the CHIPS order set forth numerous goals and conditions, including, but not limited to: (1) controlling her urges and impulses to use and abuse substances and to maintain absolute sobriety; (2) demonstration of impulse control and creating a positive support system in her life to assist with providing safe and adequate care for G.H. and J.H.; (3) refraining from criminal activity in order to provide stable care for G.H. and J.H., and placing the needs of G.H. and J.H. before her own; and (4) maintaining a relationship with G.H. and J.H. by regularly participating in successful visitation. The CHIPS order further required N.J. to "cooperate with the [Bureau] by staying in touch with [her] ongoing case manager, letting the case manager know [her] address and telephone number, and allowing the ongoing case manager into [her] home to assess the home for safety." Despite the requirement that she maintain contact with the Bureau, numerous case managers testified that they had difficulty reaching N.J. due to her having failed to keep the Bureau appraised of an accurate address for which she could be contacted and located.

¶13 In addition to the requirements imposed upon N.J. and M.H., the CHIPS order also released exclusive jurisdiction to the Family Court as noted in the order, and the Family Court ultimately granted M.H. sole placement of G.H. and J.H. N.J. did not appear at that hearing.

¶14 While the 2011 CHIPS order was in place, N.J. was again arrested on July 25, 2011, in Washington County. She was charged and convicted of bailing jumping in that case, and she received a ninety-day jail sentence with Huber release privileges. N.J. was arrested again on August 23, 2011, after she walked away from Huber release, and she was charged with Escape-Criminal Arrest.

¶15 On February 17, 2012, N.J. was arrested in Milwaukee County for possession of cocaine as a second offense, as well as felony bail jumping. She was released two days later but returned to custody on March 22, 2012, after failing to appear at a court hearing. N.J. was then convicted in a Washington County case on June 6, 2012, and she received a four-month sentence with Huber release privileges after one month. On August 23, 2012, N.J. returned to the Washington County Jail after Huber release with a vial containing heroin residue, which resulted in an additional Washington County charge for possession of narcotics. In the meantime, N.J. was convicted in the Milwaukee County possession and bail jumping case in mid-June 2012, and she received a three-month stayed sentence for each charge and eighteen months of probation.

¶16 As a result of these numerous charges and sentences, N.J. remained in custody from approximately March 22, 2012, through early September 2012. Per her testimony at the grounds phase of the TPR proceeding, after her September 2012 release, she lived off and on with M.H. and her children. N.J. also testified that during the time she was living with M.H. and her children, she and M.H. were actively doing drugs.

¶17 On January 3, 2013, the Bureau received another referral for G.H. and J.H. because M.H. was in custody as a result of his arrest on December 31, 2012, for a DUI. N.J.'s whereabouts were unknown at the time that the Bureau showed up at M.H.'s house on January 3, 2013; however, N.J. testified that she was actually in the house at that time but that she hid upstairs when the social worker and police arrived because she had open warrants and feared that she would be arrested.

¶18 G.H. and J.H. were then detained and placed with their maternal grandmother. The Honorable Dennis Cimpl then granted temporary physical custody of G.H. and J.H. to the Bureau on January 7, 2013.

¶19 Shortly after her children were placed with her mother, N.J. was arrested again on January 16, 2013, and she was charged with theft in Milwaukee County. She was released on bond on January 19, 2013, and was turned over to Justice 2000 for monitoring. Justice 2000 filed a violation report on January 24, 2013, and N.J. failed to appear at a criminal court hearing on February 7, 2013. A warrant was thereafter issued as a result of her failure to attend the court appearance.

¶20 N.J. not only failed to attend hearings in her own criminal cases—she also failed to attend multiple Children's Court hearings in the 2013 CHIPS case: the initial appearance scheduled for January 30, 2013, and the adjourned initial appearance on February 27, 2013. Having failed to appear at either hearing regarding her children, N.J. was defaulted.

¶21 N.J.'s pattern of arrests continued when she was arrested in Waukesha County on April 12, 2013, this time for retail theft, and she was released on bail on April 29, 2013. While she was in custody, the CHIPS cases for G.H. and J.H. went to disposition on April 23, 2013, and the court signed a dispositional order for both G.H. and J.H. and found that the Bureau had made reasonable efforts to prevent G.H. and J.H. from being removed from M.H.'s home. At that time, the court placed G.H. and J.H. with D.H. and V.H.,

which is where they have remained ever since.[6] Although N.J. was in custody at the time of that hearing, she was assigned an attorney who was present at the dispositional hearing.

¶22 A Permanency Plan Review Hearing was held in G.H. and J.H.'s cases on June 25, 2013, and the Bureau was found to have made reasonable efforts to achieve the permanency goal of the permanency plan.

¶23 N.J. returned to custody in September 2013, when she received a sixty-day sentence, with twenty-one days credit, in the Waukesha County retail theft case. After she was released from custody in Waukesha County in December 2013, she was transferred to the Washington County Jail for a bench warrant that had been issued on July 17, 2013, as a result of her failure to appear for a court hearing.

¶24 Another Permanency Plan Review Hearing in G.H. and J.H.'s cases was held on December 16, 2013, and the Bureau was again found to have made reasonable efforts to achieve the permanency goal of the permanency plan. N.J. did not attend that hearing because she remained in custody at that time.

¶25 On March 5, 2014, N.J. was sentenced to three years in prison and two years of extended supervision. She was transferred to Taycheedah Correctional Institute on March 12, 2014, where she remains incarcerated.[7]

[6] G.H. and J.H. had initially been placed with their maternal grandmother when they were detained in January 2013; however, a few months later, she requested that the children be moved to foster care.

[7] N.J. testified that she could potentially become eligible for early release programming in October 2015, although the record does not reflect whether that has occurred.

¶26 On May 28, 2014, the State filed petitions for termination of N.J.'s parental rights for both G.H. and J.H.[8] The petitions alleged that: (1) N.J. had abandoned G.H. and J.H.; (2) G.H. and J.H. were in continuing need of protection and services; and (3) N.J. had failed to assume parental responsibility of G.H. and J.H. N.J. contested the allegations, and a court trial was held on October 22-24, 2014, after N.J. waived her right to a jury trial. After the second day of trial, the State moved to dismiss both the abandonment and CHIPS grounds for termination of parental rights, leaving only the ground for failure to assume parental responsibility.

¶27 Based on the evidence and testimony presented, the trial court found a factual basis to terminate N.J.'s parental rights to G.H. and J.H. based on failure to assume parental responsibility, and the trial court therefore made the requisite unfitness finding as required under WIS. STAT. § 48.423(4).

¶28 The matter proceeded to a dispositional hearing before the trial court on February 20, 2015, and the trial court heard testimony from multiple individuals, including the children's case manager supervisor and Guardian ad Litem social worker. At the time of the dispositional hearing, G.H. and J.H. had been placed with their approved adoptive resource for almost two years, and there was testimony that they referred to the adoptive resource as "mom and dad." After hearing the testimony and considering the evidence regarding the standards

[8] The petition as to G.H. was filed in Milwaukee County Circuit Court case number 2014TP137 and the petition as to J.H. was filed in Milwaukee County Circuit Court case number 2014TP138. Those cases were consolidated. The order terminating N.J.'s parental rights as to G.H. was filed in appeal number 2015AP1477 and the order terminating N.J.'s parental rights as to J.H. was filed in appeal number 2015AP1478. We consolidated these appeals in an order dated August 18, 2015.

and factors set forth in WIS. STAT. § 48.426, the trial court found that terminating N.J.'s parental rights was in G.H.'s and J.H.'s bests interests.

¶29 N.J. now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶30 On appeal, N.J. challenges the termination of her parental rights to G.H. and J.H., arguing that her due process rights were violated. Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. During the grounds phase, "'the parent's rights are paramount.'" *See* ***id.***, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the court … the court shall find the parent unfit." WIS. STAT. § 48.424(4). "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶31 In order to establish failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), the State must establish that the parent has not had a substantial parental relationship with the child. Section 48.415(6) defines a "substantial relationship" as:

> 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 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 expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

In ***Tammy W-G v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, our supreme court described the statute as "prescrib[ing] a totality-of-the-circumstances test." ***Id.*** ¶3. The court concluded that a factfinder applying the test "should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child[ren] and exposure of the child[ren] to a hazardous living environment." ***Id.*** The supreme court's language in ***Tammy W-G.*** has been incorporated into WIS JI—CHILDREN 346. If a parent is found to be unfit in the grounds phase, the proceeding moves to the dispositional phase. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶28.

¶32 N.J. claims only that WIS. STAT. § 48.415(6) is unconstitutional as applied to her because the trial court concluded that grounds existed to find that she had failed to assume parental responsibility despite alleged failures on the part of the Bureau—she does not otherwise challenge the sufficiency of the evidence or directly challenge the trial court's findings during the dispositional phase of the proceedings.[9] Whether a statute, as applied to a parent, violates the parent's constitutional right to substantive due process is a question subject to independent appellate review. ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51,

[9] Accordingly, we limit our discussion to the testimony and evidence presented during the grounds phrase of the termination proceedings.

678 N.W.2d 831. We begin with the presumption of the statute's constitutionality. ***Id.***

¶33 Because termination of parental rights interferes with a fundamental right, strict scrutiny is applied to the statute. *See* ***id.***, ¶¶17, 23. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. ***Id.***, ¶17. Because the Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***id.***, ¶25, the sole issue here is whether that statute, as applied to N.J., is narrowly tailored to meet the State's compelling interest in protecting G.H. and J.H., *see* ***id.***, ¶17.

¶34 In advancing her argument that termination of her parental rights to G.H. and J.H. pursuant to WIS. STAT. § 48.415(6) violates her substantive due process rights because the trial court terminated her parental rights despite the Bureau's alleged failure to provide reasonable efforts, N.J. places substantial emphasis on the Bureau's alleged actions and inactions during her periods of incarceration. However, she fails to point to any authority requiring the Bureau to have made "reasonable efforts" when the State seeks to terminate parental rights based on WIS. STAT. § 48.415(6). Perhaps recognizing this, she also argues that the Bureau's lack of reasonable efforts—which *is* a required finding under other grounds for termination of parental rights, such as Section 48.415(2)—taints the evidence related to failure to assume parental responsibility. We disagree with N.J.

¶35 During the grounds phase, the trial court heard substantial testimony as to not only N.J.'s actions and inactions as to her children, but also as to the

Bureau's actions and inactions during the pendency of the CHIPS proceedings. At the conclusion of testimony in the grounds phase of the hearing, the trial court noted its disappointment with the Bureau, stating that:

> the testimony is fairly clear that the Bureau of Milwaukee Child Welfare … did a substandard job. The State wisely elected to dismiss the continuing CHIPS ground as it would have required that the bureau had made reasonable efforts to assist [N.J.] in meeting the goals or the conditions for return. The bureau didn't do that. They did a poor job.

N.J. appears to rest her hat on the trial court's statement; however, reasonable efforts are not required under the failure to assume parental responsibility ground—nowhere in WIS. STAT. § 48.415(6) does it state that parental rights can be terminated based on failure to assume parental responsibility only where the State or the Bureau has made reasonable efforts.[10]

¶36 While the trial court noted that the Bureau's failures "color[ed] the evidence" in this case, the trial court also recognized that "it is also true that this case is colored by [N.J.'s] own behavior." In particular, the trial court cited her "regular drug use for an extended period of time, regular incarceration over a period of time, some inquiry, but not enormous inquiry, not even enormous, but not significant inquiry about how her kids were doing." Accordingly, the trial court concluded that the State had proven, by clear, satisfactory, and convincing evidence, that grounds existed to terminate N.J.'s parental rights based on her failure to assume parental responsibility.

[10] We note that regardless of the trial court's statements regarding the Bureau's substandard performance, the record contains multiple references to Permanency Plan Review Hearings at which the CHIPS court concluded that the Bureau *had* made reasonable efforts to effectuate the Permanency Plan in effect at that time.

¶37 The trial court correctly noted that the totality of the circumstances test applies where the State seeks to terminate parental rights based on WIS. STAT. § 48.415(6). Importantly, the totality of the circumstances test considers the entire lifespan of G.H. and J.H.—not only the time periods during which N.J. was in jail or incarcerated and not only during the time periods during which the Bureau was involved.

¶38 In arguing that the Bureau allegedly failed to make reasonable efforts, thereby making WIS. STAT. § 48.415(6) unconstitutional as applied to her, N.J. ignores the impact of her own actions and inactions throughout the course of G.H.'s and J.H.'s entire lives. N.J. testified, for example, that: (1) she was a more "lax" parent while she was on drugs; (2) she "let [G.H. and J.H.] do whatever they wanted" while she was using drugs and that they could "go wherever they wanted; stay up as late as they wanted"; (3) G.H. and J.H. "didn't have a structured life" as a result of her drug use; and (4) she left G.H. and J.H. with M.H. despite being aware that he was actively using illegal drugs such as heroin. Despite these admissions, N.J. remarkably believed that she had provided her children with a safe environment.

¶39 Additionally, during the course of her young children's lives, N.J. was arrested on numerous occasions, and she often chose not to attend court hearings related to G.H.'s and J.H.'s CHIPS cases because she was more concerned about her own outstanding warrants because she feared going to prison.[11] In fact, N.J. testified that on account of her open warrants, her thought

[11] From the time her children were born, N.J. had eight separate criminal convictions that caused her to be away from her children for a substantial amount of time. At the time of the fact-finding hearing in October 2014, she had been in custody for fourteen straight months, and since November 2009, she has been incarcerated for a total of over two years.

process was a "catch me if you can-type of thing" since she was "going to jail anyways."

¶40 N.J. additionally testified that she was not aware of who her children's teachers were, that she was not aware of the name of her children's physician, and she was not even aware that they were seeing a dentist, let alone the name of the dentist.

¶41 It is undisputed that N.J. generally refused to work with the Bureau in relation to her children's CHIPS cases. N.J. testified, for example, that she did not work with the Bureau because she did not trust or have faith in the Bureau and that she "didn't want to, or try to, work with them until the end." She also indicated that she did not want to cooperate with the Bureau because she was seeing G.H. and J.H. while they were placed with M.H., even though she was aware that she was not supposed to be seeing or living with G.H. and J.H. without supervision. In testifying about her lack of interaction with the Bureau, N.J. confirmed that it was *her choice* not to be one-hundred percent involved in G.H.'s and J.H.'s CHIPS cases.

¶42 While we recognize that the Bureau's inaction—particularly as to the involvement of case managers as is reflected in the testimony—may have made it more difficult for N.J., particularly while she was incarcerated, to comply with some of the requirements set forth in the CHIPS order, the trial court's conclusion that N.J. did not assume parental responsibility for her children was not based solely upon the Bureau's actions and inactions. Rather, in concluding that the State had carried its burden of establishing failure to assume parental responsibilities pursuant to WIS. STAT. § 48.415(6), the trial court took great care in detailing its findings of fact and its credibility determinations.

¶43 The trial court stated, for example, that N.J. was "a fairly credible witness when she is under direct examination by the State." However, the trial court also stated that "it's a mixed bag for [N.J.]" because she admitted that she had a poor memory, which "undermines one's credibility." The trial court also noted that N.J.'s testimony conveyed a sense of familiarity with the criminal justice system and that she discussed short-term jail sentences with "a casual level of comfort." Despite believing that N.J. was a fairly credible witness under direct examination, the trial court pointed to other examples of her testimony that it found concerning because N.J. made "an intentional attempt to create a false impression," and the trial court believed that such examples undermined her credibility.

¶44 In weighing the evidence and testimony under the totality of the circumstances test, the trial court found that N.J. had expressed concern for or interest in the support, care, and wellbeing of G.H. and J.H., particularly citing to letters that she had written to the ongoing case manager. However, the trial court also concluded that N.J. had not been paying child support and that even though she testified she had been providing economic support while they were placed with M.H., she also testified that she was aware that M.H. was using at least some of the money she provided to buy illegal drugs that he then used while caring for G.H. and J.H. Based on such testimony, the trial court believed that N.J. had exposed her children to a hazardous living environment, and that conclusion was further supported by N.J.'s testimony as to her own drug use around G.H. and J.H. The trial court also noted the reasons for N.J.'s lack of involvement with G.H. and J.H., which included the multiple times she was in custody, her illegal drug use, and her decision not to become involved with her children or the Bureau due to her own outstanding warrants.

¶45 Based on the evidence and testimony presented at trial, the trial court stated that "[e]arly in their lives … [N.J.] did exercise a significant degree of responsibility for [G.H. and J.H.'s] daily supervision." However, the trial court did not believe that N.J. had "exercised or accepted and exercised significant responsibility for daily supervision" after she moved back to Wisconsin from Iowa. Accordingly, based on the totality of the circumstances throughout the course of G.H.'s and J.H.'s entire lives, the trial court determined that the State had demonstrated that N.J. had failed to accept and exercise significant responsibility for their daily care and supervision.

¶46 The trial court similarly determined that N.J. had not accepted and exercised significant responsibility for G.H.'s and J.H.'s education, although there had been some minimal amount of acceptance, and the trial court also concluded that although N.J. had provided some protection, including trying to shield G.H. and J.H. from her and M.H.'s drug use, she had not taken significant responsibility for their protection. Likewise, the trial court concluded that N.J. provided some care, particularly while still living in Iowa and shortly after J.H. was born, but that there was not significant responsibility for their care. In particular, the trial court noted that N.J.'s level of care for G.H. and J.H. "began to fade some when her drug use began to take over. The level of care began to diminish."

¶47 Despite N.J.'s suggestion, this is not a case where the Bureau kept G.H. and J.H. from N.J. or prevented her from engaging with her children or even the Bureau. To the contrary, N.J.'s own testimony clearly reveals that *she chose* on multiple occasions throughout G.H.'s and J.H.'s lives to undertake actions that removed her from assuming parental responsibility and playing a substantial role in their lives, whether it was due to her drug use, incarceration, or her conscious decision not to engage with the Bureau while her children were under CHIPS

orders. These were choices that N.J. made—they were not forced upon her, and these were choices that are separate and apart from any alleged failure on the part of the Bureau in regard to the CHIPS cases.

¶48 Ultimately, as we have discussed, the determination of failure to assume parental responsibility is based on a totality of the circumstances test, which covers a child's *entire lifetime*, not just a snapshot period of time in the child's life. The record is replete with evidence and testimony adduced at trial on which the trial court appropriately relied in reaching its conclusion that N.J. had failed to assume parental responsibility for G.H. and J.H., regardless of whether the Bureau failed to make reasonable efforts. Importantly, N.J.'s own testimony regarding her actions and inactions during the times that she was *not* incarcerated—both while CHIPS cases were in place and when they were not—is sufficient to conclude that WIS. STAT. § 48.415(6), regardless of any potential failure on the part of the Bureau, is not unconstitutional as applied to N.J.

¶49 For the reasons stated, the orders terminating N.J.'s parental rights are affirmed.

By the Court.—Orders affirmed.

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