COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1583

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

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

STATE OF WISCONSIN,

PETITIONER,

V.

PATRICIA A.M., A/K/A PATTY A.T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Patricia A.M. appeals from an order terminating her parental rights to Jacob D.M. after being found unfit pursuant to

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

§ 48.415(7), STATS. She claims the statute is unconstitutional because it violates her rights of due process and equal protection in that: (1) the statute is not narrowly tailored to serve a compelling state interest; and (2) the statute is overinclusive[2] and underinclusive. Because the statute is narrowly tailored to serve a legitimate state interest, and because it is neither overinclusive nor underinclusive, this court affirms.

I. BACKGROUND

Jacob D.M. was born on June 17, 1996. His biological parents are Patricia A.M. a/k/a Patty A.T. (hereinafter Patricia) and Allen M. Patricia and Allen are also biological siblings. On July 8, 1996, Jacob was removed from his parental home and ordered by the court to be placed in foster care. A Termination of Parental Rights petition was filed by the State pursuant to § 48.415(7), STATS.[3]

A trial to the court was held on February 10, 1997, regarding the Termination of Parental Rights petition. Based on the genetic evidence presented at trial, the court found, by clear and convincing evidence, that Allen was the

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[2] Although Patricia uses the term "overbroad," this court interprets her argument to, in effect, assert that the statute is overinclusive because application of the overbreadth doctrine is limited to First Amendment cases. *See* ***United States v. Salerno***, 481 U.S. 739, 745 (1987).

[3] Section 48.415(7), STATS., provides:

> **48.415 Grounds for involuntary termination of parental rights.**
>
> ….
>
> **(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.

biological father of Jacob.[4] The court then found that Jacob was the result of an incestuous relationship, and that Patricia and Allen were unfit pursuant to § 48.424(4), STATS.[5]

At the dispositional hearing, substantial evidence was presented regarding Patricia and Allen's history with social services. It was well documented that Patricia and Allen were themselves subjected to abuse and neglect as children. As a result, they were in and out of foster care throughout their childhood. Also, there was a history of incest among several of the fourteen members of their immediate family. Further evidence showed that Patricia had three daughters prior to Jacob. Two of these daughters were fathered by Allen. Parental rights to the first daughter Allen fathered, Christina M., were terminated in Texas, and the parental rights for the other daughter Allen fathered, Tiffany N.M., were terminated in Milwaukee.

Testimony indicated that, prior to the termination of parental rights, Tiffany endured a history of neglect and abandonment, which included hospitalization for failing to thrive. Also, as a result of the incestuous relationship, Tiffany experienced a number of genetic problems, and showed signs of severe

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[4] These findings are not disputed for the purposes of this appeal.

[5] Section 48.424(4), STATS., provides in relevant part:

> **48.424 Fact-finding hearing.**
>
> ….
>
> **(4)** If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427 (2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427.…

mental retardation. At the age of three, Tiffany was totally nonverbal and described as "almost animalistic." Further evidence also suggested that Patricia was extremely hostile to caseworkers, and that she refused to acknowledge the problems in her relationship with Allen.

While Jacob appears to be a healthy child, there is no confirmed record that Patricia received any pre-natal care prior to his birth, and she gave birth to Jacob in Illinois to prevent social services in Wisconsin from finding out about him. When social services found out about Jacob's birth, Patricia denied having a relationship with Allen, and claimed that another man was the father of the child. Coupled with the evidence regarding Christina and Tiffany, the court found that terminating all parental rights was in the best interests of Jacob. Patricia now appeals.

II. ANALYSIS

The constitutionality of a statute is a question of law which this court reviews *de novo*. *See* ***Bachowski v. Salamone***, 139 Wis.2d 397, 404, 407 N.W.2d 533, 536 (1987). The party challenging the constitutionality of a statute bears a heavy burden of persuasion. A statute is presumed to be constitutional and the challenging party must demonstrate unconstitutionality beyond a reasonable doubt. *See* ***id***. Furthermore, "[e]very presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." ***Id***.

A statute that affects a fundamental right must be examined under a strict scrutiny standard. *See* ***State ex rel. Stryrowski v. Wilkie***, 81 Wis.2d 491, 506, 261 N.W.2d 434, 441 (1978). Termination of parental rights interferes with a fundamental right. *See* ***In the Interest of Amanda A.***, 194 Wis.2d 627, 639, 534

N.W.2d 907, 911 (Ct. App. 1995). "The state's ability to deprive a person of the fundamental liberty to one's children must rest on a consideration that society has a compelling interest in such deprivation." ***Id***.

A. Due Process Analysis

Patricia argues that the termination of her parental rights pursuant to § 48.415(7), STATS., violates her due process rights. She asserts that the State does not have a compelling interest in applying this statute to her. This court rejects Patricia's claim. This issue was recently addressed and rejected in a case from this court. *See* ***In re Tiffany M. v. Allen M.***, No. 97-0852, slip op. (Wis. Ct. App. Oct. 14, 1997, recommended for publication). In ***Tiffany***, this court rejected a due process constitutional challenge to § 48.415(7) holding that the "statutory scheme … is narrowly tailored to serve the State's compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society." ***Id.***, slip op. at 10. This court is bound by that decision.

Significantly, even if a parent is unfit pursuant to § 48.415, STATS., parental rights will not be terminated if the evidence introduced at the dispositional hearing does not support termination. The trial court conducted the dispositional hearing pursuant to § 48.427, STATS., to determine what was in the best interests of Jacob, pursuant to § 48.426, STATS. The trial court heard evidence on all the statutory factors, including the fact that Patricia was not availing herself of services which could allow her to parent her child, that Jacob was thriving in his foster home, that he has no relationship with his biological family and was removed shortly after birth. The trial court also considered the incestuous parenthood, the damage it did to an older child, the severe pattern of neglect and abuse in the family, and the lack of a mother-son relationship between

Patricia and Jacob. Based on this evidence, it concluded that the parental rights should be terminated. There was no violation of Patricia's due process rights.

B. Equal Protection Analysis

Patricia also argues that termination of her parental rights pursuant to § 48.415(7), STATS., violates her constitutional right to equal protection. She claims the statute is overinclusive and underinclusive, and therefore, it is not narrowly tailored to serve a compelling state interest. This court rejects both contentions.

This court recently considered this question and held that § 48.415(7), STATS., is neither overinclusive or underinclusive. *See* ***Tiffany***, slip op. at 12-18. This court observed that the statutory scheme provides that a parent's rights may not be terminated based solely on a finding of statutory unfitness under § 48.415(7). In addition, the trial court must also find that the evidence produced at the dispositional hearing under § 48.427, STATS., actually warrants termination. Based on this two-step procedure, this court concluded that § 48.415(7) "in combination with § 48.427(2), is not overinclusive." ***Tiffany***, slip op. at 17. In other words, every parent who bears a child from an incestuous relationship will not have the right to parent that child terminated. Their parental rights will only be terminated if the evidence demonstrates that it is in the best interests of the child to do so.

This court also rejected the challenge asserting that § 48.415(7), STATS., is underinclusive. *See* ***Tiffany***, slip op. at 17-18. This court is bound by that determination. Accordingly, this court rejects Patricia's claim that the statute violated her right to equal protection.

By the Court.—Order affirmed.

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