COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3139 **Cir. Ct. No. 01-TP-9**

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

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

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PATRICIA H.,

RESPONDENT-APPELLANT,

JAY H.,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Patricia H. appeals from an order terminating her parental rights to her daughter, Alexandria H. Patricia contends that WIS. STAT. § 48.415(4) is unconstitutional because it denies her due process and that the circuit court erred by instructing the jury that it had taken judicial notice of key facts. We reject her arguments and affirm.

¶2 The Walworth County Department of Health and Human Services (County) filed a petition to terminate Patricia's parental rights to Alexandria on three grounds: first, abandonment, WIS. STAT. § 48.415(1); second, Alexandria's continuing need for protection and services, § 48.415(2); and, third, continuing denial of periods of physical placement or visitation, § 48.415(4). After the typical pretrial maneuvering, the matter proceeded to a jury trial where the County dismissed the first two grounds for termination and proceeded on the theory that termination was warranted because of the denial of continuing periods of physical placement or visitation. The jury returned a special verdict finding both elements of § 48.415(4): first, that Patricia had been denied periods of physical placement or visitation by court order; and, second, at least one year had elapsed since the court order denying periods of physical placement or visitation was issued.[2] After

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 48.415(4), provides:

> **(4)** CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
>
> (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).

(continued)

a dispositional hearing, the circuit court issued an order terminating Patricia's parental rights to Alexandria.

¶3 Patricia's first challenge is to the circuit court's subject matter jurisdiction. She contends that WIS. STAT. § 48.415(4) is unconstitutional on its face because it permits the finding of parental unfitness to be grounded upon visitation orders that are issued based upon the "best interests of the child" and not parental unfitness. She contends that the statute fails to pass constitutional muster because the standard for the issuance of visitation orders does not require clear and convincing evidence of unfitness. The County fails to respond to the merits of Patricia's argument; it asserts that Patricia has waived this argument by failing to raise it below and by failing to notify the attorney general that she was challenging the constitutionality of a statute.

¶4 We will address the merits of Patricia's constitutional challenge because we conclude that in this case waiver does not promote the ends of justice. *See* ***Cynthia E. v. LaCrosse County Human Servs. Dep't***, 172 Wis. 2d 218, 232, 493 N.W.2d 56 (1992).[3] The constitutionality of a statute presents a question of law that we review de novo. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). There is a strong presumption that a statute is constitutional. ***State v. Thiel***, 188 Wis. 2d 695, 706, 524 N.W.2d 641 (1994). When one challenges the

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> (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.

[3] Patricia represents in her reply brief that she did serve the attorney general with a notice of her constitutional challenge; however, she has failed to supplement the record. Nevertheless, for the sake of finality, we will conclude that she has complied with the notification rule of ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979).

constitutionality of a statute, the burden of proof falls upon that party to prove that the statute is unconstitutional beyond a reasonable doubt. ***Winnebago County DSS v. Darrell A.***, 194 Wis. 2d 627, 637, 534 N.W.2d 907 (Ct. App. 1995).

¶5 We must strictly scrutinize a statute that interferes with a fundamental right.

> Strict judicial scrutiny is required when certain fundamental rights are affected by governmental action.… "[A] parental rights termination proceeding interferes with a fundamental right." 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. Additionally, the infringement on such a liberty must be narrowly tailored to serve the compelling state interest.

Id. at 639 (citations omitted).

¶6 It is clear that Patricia is being deprived of a fundamental right and, as a consequence, the State must have both a compelling interest in the deprivation of the right and the State must narrowly tailor the infringement to serve the State's interest. ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982); ***Reno v. Flores***, 507 U.S. 292, 301-02 (1993). The care and protection of children is of compelling interest to the State. A review of Chapter 48 of the Wisconsin Statutes confirms that its paramount goal is to protect children. WIS. STAT. § 48.01(1)(a). The need to protect the health and welfare of children is a compelling interest that would permit the deprivation of a fundamental right. ***R.D.K. v. Sheboygan County Soc. Servs. Dep't***, 105 Wis. 2d 91, 110, 312 N.W.2d 840 (Ct. App. 1981). Thus, the first prong of the analysis is met.

¶7 With regard to the second prong, WIS. STAT. § 48.415(4) establishes that a parent's rights to a child can be terminated if the parent has been denied by a

court order periods of physical placement or visitation and more than one calendar year has elapsed since the order was issued. Patricia does not contest that she has been denied periods of physical placement for more than one year. Rather, she argues that since the statute "automatically" finds actual unfitness without a determination by the fact finder that weighs the seriousness or egregiousness of her conduct which resulted in her being denied periods of physical placement, it is unconstitutional because it is overbroad and over-inclusive. This court is not persuaded. A safeguard is in place which saves § 48.415(4) from a finding of unconstitutionality. As noted in the holding in ***B.L.J. v. Polk County DSS***, 163 Wis. 2d 90, 470 N.W.2d 914 (1991), the existence of WIS. STAT. § 48.427 defeats any constitutional challenge alleging due process violations of § 48.415.

¶8 In ***B.L.J.***, the supreme court held that since WIS. STAT. § 48.427 requires the circuit court to exercise discretion after grounds are established to terminate a person's parental rights, including the option of dismissing the petition if the circuit court determines that it is not in the best interest of the child to proceed, the procedure for termination proceedings did not violate due process and equal protection rights. ***B.L.J.***, 163 Wis. 2d at 103-06, 115. The holding in ***State v. Allen M.***, 214 Wis. 2d 302, 571 N.W.2d 872 (Ct. App. 1997), also acknowledges that this statutory scheme that directs the circuit court to exercise its discretion even after the fact finder has found sufficient grounds to terminate a parent's rights to a child is a sufficient safeguard to comport with constitutional requirements. ***Id.*** at 315-16, 321-23. In applying the holdings of these cases to WIS. STAT. § 48.415(4), this court concludes that § 48.427 provides sufficient safeguards to protect § 48.415(4) from a constitutional challenge. As a consequence, this court determines that § 48.415(4), when read with § 48.427, is

narrowly tailored and serves the legitimate and compelling interests of the State in protecting the welfare of children.

¶9 Patricia's second argument is that the circuit court erred when it instructed the jury that it had taken judicial notice (1) that Patricia had been denied visitations under a court order with proper warnings and (2) that this order had been in effect for a year without modification. She contends that this instruction was the functional equivalent of a directed verdict that blocked her from presenting a defense to the County's allegations. The County responds that there was no error because the use of a directed verdict in TPR proceedings is approved.

¶10 Over Patricia's objections, the circuit court instructed the jury:

> Now, jurors, I have taken judicial notice of certain facts. Now, the express judicial notice means that I have determined certain facts are true and you must accept them as truthful. Now, the court may take judicial notice—this court, as a judge, I may take judicial notice of certain facts and then I may instruct you to accept as established those facts. You shall accept as established the following facts.
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> First, that Patricia [H.] … has been denied visitation under a court order pursuant to the Children's Code and that those denials—that court order contained the notices required about the warnings, the warnings which are called termination of parental rights warnings.
>
> Now, you will be given copies of those orders so you may verify what I determined is true.
>
> Secondly, I have made a finding, and I made a finding that it's true, that one year has elapsed since the court order denying placement or visitation to Patricia [H.] was issued. I determined that by looking at the calendar.
>
> And I further determined that the court has not subsequently modified its order to permit visitation. And we do that by looking in the court file. We see no subsequent orders.
>
> So I have determined that those facts are true.

¶11 We have previously approved of the circuit court taking judicial notice of facts in TPR proceedings. ***D.B. v. Waukesha County Human Servs. Dep't***, 153 Wis. 2d 761, 768, 451 N.W.2d 799 (Ct. App. 1989). In ***D.B.***, Waukesha County sought to terminate the mother's rights on the grounds that the child was in continuing need of protection or services under WIS. STAT. § 48.415(2). ***D.B.***, 153 Wis. 2d at 764-65. The only defense that the mother raised during the trial was whether the court orders contained the statutory notices warning a parent of the grounds for TPR, which may be applicable, and of the conditions necessary for the child to be returned home. ***Id.*** at 766. While instructing the jury, the circuit court took judicial notice that the court orders sent to the mother contained the required statutory notices. ***Id.*** at 767.[4] We held:

> A court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Sec. 902.01(2), Stats. Accordingly, a court may judicially notice facts about its own usual procedures. The court here could have judicially noticed, therefore, that its usual practice was to attach to each order a copy of the termination warnings referred to in the order and then to send both the order and the warning to the parent.
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> However, the trial judge not only judicially noticed those facts but drew an inference from them and concluded that the orders contained, or had attached to them, the required warnings. He did this despite "realiz[ing] that there was a question raised" regarding the required notice. Where the statute directs that certain facts be shown and those facts are in dispute, the inferences to be drawn from those facts are not appropriate for judicial notice. They are

[4] In addition to taking judicial notice of certain facts and instructing the jury that it had taken judicial notice, the circuit court also answered the corresponding questions on the special verdict form. ***D.B. v. Waukesha County Human Servs. Dep't***, 153 Wis. 2d 761, 765, 451 N.W.2d 799 (Ct. App. 1989). D.B. protested that "by directing a portion of the verdict, the court denied her the constitutional right to a jury trial." ***Id.*** We held, "That is incorrect. A termination of parental rights proceeding is civil in nature. Wisconsin civil procedure allows a directed verdict." ***Id***. (citation omitted).

> for the trier of fact. We hold that whether the termination warnings were in fact contained in the orders presented an issue for determination by the jury. This being the case, the court erred in answering question three of the special verdict.

D.B., 153 Wis. 2d at 768 (citation omitted).

¶12 This case is distinguishable from ***D.B.*** as to the disputed questions being raised. Patricia did not dispute that the court orders contained the required notices. Rather, her defense was that a condition precedent to Alexandria's return to Patricia's home—that visitation between mother and daughter be approved by the daughter's therapist—was impossible to fulfill because Alexandria was not in therapy for part of the period she was placed outside of Patricia's home. Her defense did not challenge the facts judicially noticed by the circuit court, and the circuit court did not usurp the role of the jury and draw inferences from the judicially noticed facts. This being the case, the circuit court did not err in taking judicial notice of certain facts.

¶13 The County argues that we can affirm the circuit court's order but for different reasons. ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982). Specifically, the County contends that the circuit court improperly denied its motion for summary judgment because ***Walworth County Department of Human Services v. Elizabeth W.***, 189 Wis. 2d 432, 525 N.W.2d 384 (Ct. App. 1994)—which the circuit court used to justify denying the County's motion—is wrongly decided. The County contends that ***Elizabeth W.*** failed to consider prior case law and failed to conduct a "correct" due process analysis; also, the decision is wide of the mark because it compels the use of scarce judicial resources. The flaw in the County's argument is that—without any critical analysis—it leaps from the general precept that a TPR proceeding is a civil proceeding, ***M.W. and I.W. v. Monroe County Department of Human Services***, 116 Wis. 2d 432, 442, 342

N.W.2d 410 (1984), to the conclusion that the code of civil procedure governs without exception.

¶14 A more serious flaw in the County's argument is its failure to acknowledge the foundation of the decision in ***Elizabeth W.*** The United States Supreme Court has held:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky, 455 U.S. at 753-54. Building on this irrefutable precept and the observation that "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one," ***id.*** at 759 (citation omitted), the Wisconsin Supreme Court recently held that:

> Terminations of parental rights affect some of parents' most fundamental human rights. At stake for a parent is his or her "interest in the companionship, care, custody, and management of his or her child." Further, the permanency of termination orders "work[s] a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship." For these reasons, "parental termination decrees are among the most severe forms of state action."
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> Due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions. Although termination proceedings are civil proceedings, the Due Process Clause of the Fourteenth Amendment to the United

> States Constitution requires that "[i]n order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate."

Evelyn C. R. v. Tykila S., 2001 WI 110, ¶¶ 20-21, 246 Wis. 2d 1, 629 N.W.2d 768 (citations and footnote omitted). In barring the use of summary judgment and putting the County to its proof before a jury in every contested TPR proceeding, ***Elizabeth W.*** provides protection and fairness to the parents when there is an attempt to permanently eradicate the parent-child relationship. A parent's failure to live up to the artificial parenting standards of a governmental agency is not justification to deny him or her basic due process protections. ***Sallie T. v. Milwaukee County DHHS***, 219 Wis. 2d 296, 311, 581 N.W.2d 182 (1998).

¶15 The final flaw in the County's argument is its failure to address the constitutional rule stated in ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), that the court of appeals lacks subject matter jurisdiction to overrule, modify or withdraw language from one of its published opinions. Only the supreme court has the power to overrule or modify ***Elizabeth W.*** If the County wants to use summary judgment motions to resolve contested TPR proceedings, it is free to attempt to convince the United States Supreme Court and the Wisconsin Supreme Court that the parent's right to the custody and care of his or her children is *not* an extremely important interest and is *not* worthy of heightened protections to insure accuracy, fairness and justice.

By the Court.—Order affirmed.

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