COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1974 **Cir. Ct. No. 2010TP34**

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

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

RACINE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

RENEE D.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST and CHARLES H. CONSTANTINE, Judges. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Renee D. appeals from the involuntary termination of her parental rights (TPR) to her son Malachi. Renee argues that the statute subsection allowing involuntary TPR based on child abuse, WIS. STAT. § 48.415(5), is unconstitutionally vague both on its face and as applied to her, and that it violates due process by creating an irrebuttable presumption that she will abuse one child based on her history of abuse of another. Renee also argues that the circuit court erred in granting summary judgment against her because there existed genuine issues of material fact. The statute is constitutional, and the court did not err in granting summary judgment. We affirm.

¶2 The Racine County Department of Human Services filed a petition to terminate Renee's parental rights to her son Malachi, alleging two grounds: child abuse and failure to assume parental responsibility. At her initial appearances, Renee, personally, generally contested the facts alleged and requested a jury trial. The Department filed a motion for summary judgment, which Renee opposed. The circuit court granted summary judgment in part, finding that Renee's undisputed 2001 felony child abuse conviction provided the basis for summary judgment of unfitness on child abuse grounds, but finding that material facts were in dispute on the failure to assume ground. A dispositional hearing was held on March 1, 2012, at which the circuit court found that TPR was in the best interests of Malachi and terminated Renee's parental rights. In a postdisposition motion, Renee sought to vacate the termination order, arguing that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The Honorable Allan B. Torhorst presided over the dispositional phase and entered the TPR order. The Honorable Charles H. Constantine entered the order denying Renee's postdisposition motion.

the child abuse ground for TPR is unconstitutional and that the circuit court had erred in granting summary judgment. The circuit court denied the motion, and Renee appeals.

BACKGROUND

¶3 Renee was convicted of felony child abuse in 2001 for behavior toward her older son Desmond. Renee was sentenced to five years in prison followed by five years extended supervision. Renee voluntarily terminated her parental rights to Desmond in 2007.

¶4 Malachi was born to Renee on February 29, 2008. The Department became involved with Malachi in September 2008, when Renee's cousin took Malachi to a day-care facility, indicating that she could no longer care for Malachi because Renee was "harassing her and threatening to call the police." The cousin had been taking care of Malachi while Renee was in jail. The Department's investigator contacted Renee in jail and asked her for contact information for other relatives who could possibly take care of Malachi, but Renee was unable or unwilling to provide the names of any potential caregivers. Malachi's father and his family were unable to care for Malachi, and, on October 29, 2008, Malachi was found to be a child in need of protection or services (CHIPS). On September 9, 2009, the circuit court extended the CHIPS order for one year. The Department filed the TPR petition on May 25, 2010.

¶5 The Department alleged two grounds for TPR: child abuse, under WIS. STAT. § 48.415(5), and failure to assume parental responsibility, under § 48.415(6). The Department filed for summary judgment on both grounds, and, as indicated above, the circuit granted summary judgment on the child abuse ground. It is on this unfitness ground that Renee's parental rights were terminated.

She challenges the TPR on two grounds: that § 48.415(5) is unconstitutional and that the circuit court erred in granting summary judgment. We set forth the statute, then address each argument in turn.

DISCUSSION

Wisconsin Stat. § 48.415(5): Child Abuse Ground for Involuntary TPR

¶6 The procedure to terminate parental rights involves two steps. ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854. First, there is a fact-finding hearing at which the petitioner must prove the existence of one or more of the ten grounds listed in WIS. STAT. § 48.415. ***Tammy W.-G.***, 333 Wis. 2d 273, ¶18. If the court or the jury finds grounds for termination, the court "shall find the parent unfit." ***Id.*** The issue at this first step is whether statutory grounds for unfitness exist, not the best interest of this child. ***Id.*** At the second phase, the dispositional hearing, the court determines if TPR is in the best interest of the child. ***Id.***, ¶19.

¶7 The grounds for involuntary termination of parental rights are set forth in WIS. STAT. § 48.415. Subsection (5) gives the standard for termination due to child abuse.

> **(5)** CHILD ABUSE. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
>
> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

Thus, § 48.415(5) allows the circuit court to find grounds for TPR based on child abuse if two elements are proved. First, it must be established that the parent has

shown a pattern of physical or sexual abuse that is a substantial threat to the health of the child who is the subject of the petition. Second, it must be proved either (a) that the parent has caused death or injury to a child resulting in a felony conviction or (b) that the child has been removed from the parent's home pursuant to a CHIPS court order. Sec. 48.415(5). In Renee's case, the subsection (5) ground was based on her previous child abuse conviction, so we are looking at (a).

Constitutionality of WIS. STAT. § 48.415(5)

Standard of Review

¶8 Renee's first constitutional challenge to WIS. STAT. § 48.415(5)(a) is that it is void for vagueness in violation of the due process protections in the state and federal constitutions. The constitutionality of a statute presents a question of law that we review de novo. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Legislative enactments are presumed to be constitutional, and the challenger must prove beyond a reasonable doubt that the statute is invalid. ***Id.***

Waiver

¶9 As a threshold matter, the Department argues that Renee waived her constitutional challenge because she did not raise it before the circuit court until the case had been before the court of appeals and then remanded to the circuit court, at Renee's request, for a posttermination motion hearing. Waiver and forfeiture are rules of judicial administration. *See* ***Preston v. Meriter Hosp., Inc.***, 2005 WI 122, ¶16, 284 Wis. 2d 264, 700 N.W.2d 158 (waiver); ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786

N.W.2d 177 (forfeiture). Renee raised her constitutional challenge in the circuit court, albeit in a posttermination motion; we will not apply waiver.[2]

Void for Vagueness in Violation of Due Process Clause

¶10 A statute is unconstitutionally vague only if it fails to give fair notice of the conduct prohibited and fails to provide an objective standard for enforcement. ***State v. Ruesch***, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). Only a fair degree of definiteness is required. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 711, 530 N.W.2d 34 (Ct. App. 1995). To be valid, the statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly. ***Elections Bd. v. Wisconsin Mfrs. & Commerce***, 227 Wis. 2d 650, 676-77, 597 N.W.2d 721 (1999).

¶11 Renee argues that the statute is "void because it fails to provide reasonable notice to parents, and non-arbitrary standards for adjudication to judges and jurors, concerning the essential determination whether a parent has exhibited 'a pattern of … abusive behavior which is a substantial threat to the health of the child' who is the subject of the petition." Renee elaborates that first, "pattern" does not give guidance as to how many instances of abuse are necessary. Second,

[2] The parties dispute the level of scrutiny we must use to test the constitutionality of the statute. Renee urges that the statute impinges on her liberty interest in her relationship with Malachi, and therefore it must survive strict scrutiny. *See* ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶52, 333 Wis. 2d 273, 797 N.W.2d 854. The Department argues that Renee did not have a substantial parental relationship with Malachi and that therefore she did not have a protected, fundamental liberty interest in the child, *see* ***id.***, ¶61, and the statute would only have to be rationally related to a legitimate legislative interest. ***Id.***, ¶69. Whether Renee had a substantial relationship with Malachi was not decided on summary judgment. Under our review, the statute passes under either standard.

Renee argues that "substantial" is an elastic term that allows for subjective, "ad hoc" choices by jurors. Third, Renee points out that the statute does not have a requirement of intent, which Renee claims "exacerbates the problem." Finally, as to this constitutional challenge, Renee argues that "threat to the health" "invites mere speculation into possibilities."

¶12 Renee's argument does not undermine the strong presumption of constitutionality. A "pattern" is more than one instance. *See* ***Monroe Cnty. v. Jennifer V.***, 200 Wis. 2d 678, 684, 548 N.W.2d 837 (Ct. App. 1996). Judges and jurors are routinely asked to apply the qualifier "substantial." *See, e.g.*, WIS JI—CIVIL 1500 (regarding cause, was negligence a substantial factor in producing injury); WIS JI—CRIMINAL 2652 (for criminal negligence for reckless driving causing bodily harm, actor should realize conduct creates substantial risk of death or great bodily harm to another). We do not find the lack of a scienter requirement troublesome; even criminal statutes are not required to include a scienter element. *See* WIS. STAT. § 939.23 (noting particular statutory language that indicates a scienter requirement). Furthermore, we note that the underlying criminal act—child abuse—is an intentional crime. *See* WIS. STAT. § 948.03(2)(b). "Threat to the health" is a phrase that a person, judge or juror of ordinary intelligence can understand. Additionally, the jury instructions clarify that "health" includes physical, emotional, or mental health. WIS JI—CHILDREN 340. While the statute does allow for variance in cases, it is not so ill-defined as to defy discernment. *See* ***State v. Barman***, 183 Wis. 2d 180, 198, 515 N.W.2d 493 (Ct. App. 1994) ("We only require a fair degree of definiteness to uphold a statute; it will not be voided merely by showing that the boundaries of prescribed conduct are somewhat hazy."). Ultimately, Renee has not convinced us that the statute's prohibition of a

pattern of abusive behavior that poses a substantial threat to the health of a child is so vague as to defy compliance and enforcement.

¶13 As applied to Renee, the statute is also valid. Renee does not set forth any facts in her summary judgment motion to show that she did not understand what it meant for her to avoid a pattern of abusive behavior that was a substantial threat to Malachi's health. Renee indicates in her brief that she "disputed the Department's allegations, except for the fact of her single conviction of felony child abuse in 2001." Renee's record citations do not support this assertion. Furthermore, she does not cite to those materials that were before the circuit court on summary judgment. Renee's affidavit in support of her opposition to summary judgment avers facts regarding her attempts to put her life in order—that she was in counseling, was taking all prescribed medications, had her own apartment—but was silent regarding her past child abuse and its alleged threat to Malachi. Renee made no showing that, in her case, the statute failed to give her fair notice of what was prohibited—a pattern of abusive behavior that threatened Malachi.

Mandatory, Irrebuttable Presumption as Due Process Violation

¶14 Renee argues that WIS. STAT. § 48.415(5)(a) violates the due process provisions of the state and federal constitutions by creating an irrebuttable presumption that a person who is convicted of child abuse is an unfit parent for all future children. According to Renee, this violates due process by relieving the government of its burden of proof on an essential fact. *See* ***Francis v. Franklin***, 471 U.S. 307, 317-18 (1985). In her case, Renee argues, this meant that the Department did not have to prove that her past child abuse was a substantial threat to the health of the child who is the subject of the TPR petition. Renee relies on

Jerry M. v. Dennis L.M., 198 Wis. 2d 10, 17-18, 542 N.W.2d 162 (Ct. App. 1995), for the proposition that "the inquiry into whether the parent 'has exhibited a pattern of abusive behavior which is a substantial threat' to the health of the child ends at the time of the felony conviction." ***Id.*** Renee interprets this to mean that "the parent's alleged pattern of abusive behavior must have been a threat to the child's welfare before the parent's felony conviction occurred."

¶15 In ***Jerry M.***, the father killed the mother, then fought TPR on child abuse grounds, arguing that his behavior could not possibly pose a threat to the children because he would be incarcerated for their entire lives. ***Id.*** at 14, 16. This court upheld the circuit court's exclusion of the length of the father's sentences:

> The statute clearly refers to behavior that has occurred in the past and was a threat to the children's welfare. [The father's] past abusive behavior and his false imprisonment of the children were a threat to the children. The language "substantial threat" refers back to the phrase "has exhibited a pattern."

Id. at 17-18 (footnote omitted).

¶16 ***Jerry M.*** does not require that the abusive behavior was a threat to the child prior to the felony conviction. If that were the case, there could never be a TPR based on the felony child abuse ground where the child who is subject of the petition was not part of the parent's life before the conviction. Just as we rejected the absurd result the father urged in ***Jerry M.***—that a parent's rights could not be terminated under the child abuse ground if that parent is subsequently incarcerated—so too here do we reject Renee's interpretation that would preclude *any* TPR on child abuse grounds where the subject child is born after the parent's conviction. What ***Jerry M.*** does tell us is that the threat need not be "present and continuing," ***id.*** at 20, and that the pattern of behavior can be established prior to

the conviction, ***id.*** at 17-18. This does not relieve the state from proving that the parent has exhibited a pattern of abusive behavior that is a substantial threat to the child who is the subject of the petition; it just tells us to look at the behavior that happened before the child abuse conviction to establish a pattern.

¶17 Renee never disputed those portions of the motion for summary judgment setting forth details of her long pattern of abuse of Desmond, her first son, whose abuse sent her to prison. As indicated above, Renee argues in her brief that she disputed these allegations, but we do not see that in her affidavit in opposition to summary judgment. The circuit court's decision did not remove any element from the Department's burden.

Propriety of Summary Judgment

¶18 We review a motion for summary judgment de novo, using the same methodology as the circuit court. ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 278, 509 N.W.2d 323 (Ct. App. 1993). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2). While it is the burden of the moving party to make out a prima facie case for summary judgment, once a prima facie case is established the opposing party must, by affidavits or other submissions, set forth specific facts to show that there is a genuine issue of material fact. Sec. 802.08(3); ***Board of Regents v. Mussallem***, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980).

¶19 Renee points to ***Steven V.*** as authority that a TPR petition based on WIS. STAT. § 48.415(5) should not be decided on summary judgment because it is

"fact-intensive." *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶36, 271 Wis. 2d 1, 678 N.W.2d 856. However, ***Steven V.*** reminds us that the propriety of summary judgment is determined on a case-by-case basis, and the discussion in ***Steven V.*** of the propriety of summary judgment on different grounds for TPR was not "a definitive statement about the propriety of summary judgment in any particular case." ***Id.***, ¶37 n.4. Ultimately, the ***Steven V.*** court held that "partial summary judgment may be granted in the unfitness phase of a TPR case where the moving party establishes that there is no genuine issue of material fact regarding the asserted grounds for unfitness." ***Id.***, ¶53.

¶20 Renee argues that the circuit court erred in granting summary judgment because the motion was "a facially inadequate pleading because it was not 'made on personal knowledge,' setting forth 'such evidentiary facts as would be admissible in evidence,' as required by WIS. STAT. § 802.08(3)." Renee argues that the motion "consisted entirely of second-hand and third-hand hearsay allegations," and that "ostensibly supporting documents were not even attached to the motion."

¶21 At the outset, we agree with Renee that the Department listed in its motion supporting documents that were supposed to be attached but were not. But Renee, in her opposition to the motion, did not oppose any material facts upon which the Department relied, with or without supporting documents. Furthermore, WIS. STAT. § 802.08(2) instructs the court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." There is no requirement that a motion for summary judgment be supported by affidavits, ***Tews v. NHI, LLC***, 2010 WI 137, ¶¶44, 48, 330 Wis. 2d 389, 793 N.W.2d 860,

and the court may rely on the pleadings, ***id.***, ¶49. The TPR petition was the Department's initial pleading in this matter. The petitioner, the case manager, duly sworn and deposed on oath, stated that she was familiar with the records and files concerning Malachi. The detail set forth in the petition came directly from the underlying CHIPS proceedings regarding Malachi, as well as the CHIPS and TPR proceedings involving Desmond, to which Renee was a party. The judgment of conviction for felony child abuse and order for reconfinement after revocation of extended supervision in that case were attached to the petition. If Renee disputed any of the facts set forth in the petition, she should have so stated in her opposing affidavit. Rather, Renee's affidavit sets forth facts regarding her relationship to Malachi and her efforts to improve her life—facts perhaps relevant for the failure to assume ground and at the dispositional stage, but not in opposition to summary judgment on unfitness on the child abuse ground. Finally, Renee, in her opposition to summary judgment, did not raise any objection to the form or content of the Department's motion. *See* ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶24, 285 Wis. 2d 663, 702 N.W.2d 449; ***Young v. Young***, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985) ("The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.").

¶22 Finally, Renee argues that the determination of whether her alleged pattern of abusive behavior is a substantial threat to Malachi's health is a "quintessential jury question." The Department asserted, in its motion for summary judgment, that Renee "has exhibited a pattern of physically abusive behavior which is a threat to Malachi." Renee did not dispute that assertion. The petition contains a detailed description of Renee's abuse of Desmond, which Renee did not dispute. The Department became involved with Malachi when

Renee's cousin took him to day care, indicating that she could no longer care for him because Renee was harassing her. The cousin was taking care of Malachi because Renee was in jail on a parole hold. Renee does not dispute these facts. Renee, under supervised release, engaged in behavior that subjected her to revocation, separating her from and preventing her from caring for her seven-month-old infant son Malachi. Renee's harassment of Malachi's caregiver, her engagement in prohibited activity so as to be reincarcerated, along with her past record of child abuse, constituted a pattern of abusive behavior that was a substantial threat to Malachi's health.

¶23 We agree with the circuit court that there were no genuine issues of material fact and that the Department was entitled to judgment as a matter of law.

By the Court.—Orders affirmed.

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