

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2011

**A. John Voelker
Acting Clerk of Court of Appeals**

NOTICE

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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 No. 2010AP2792

Cir. Ct. No. 2009TP42

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO AALIYAH W., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

**PETITIONER-RESPONDENT,
V.**

ABIGAIL W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 CURLEY, P.J.^[1] Abigail W. appeals the order terminating her parental rights to Aaliyah. Abigail raises a substantive due process challenge to WIS. STAT. § 48.415(2) (2007-08). She claims the statute is unconstitutional as applied to her because one of the conditions for the return of her child in the underlying CHIPS order was impossible for her to meet.^[2] Additionally, she

contends the trial court erroneously exercised its discretion in finding that the termination of Abigail's rights was in Aaliyah's best interest. Because the condition of the return of Aaliyah to Abigail that read "show that you can care for and supervise your child properly and that you understand [her] special needs" was narrowly tailored to meet the compelling State interest in protecting Aaliyah's safety, and was not an impossible condition, and because ample evidence supports the trial court's discretionary decision that it was in Aaliyah's best interest to terminate Abigail's parental rights, this court affirms.

I. BACKGROUND.

¶2 Aaliyah was born on November 21, 2007, to Abigail. Abigail was admitted to the hospital two weeks prior to Aaliyah's birth because Abigail, who is HIV positive, was not taking her medication. This medication was vital to Aaliyah's health as it was needed to prevent Aaliyah's being born HIV positive. The hospital staff also had grave concerns about Abigail's ability to parent Aaliyah due principally to her severe cognitive limitations and her lack of preparedness for the baby. Because Aaliyah had to be on a medication regimen due to the HIV situation, which the hospital staff did not think Abigail could handle, Aaliyah was detained at the hospital and a temporary physical custody order was entered on November 27, 2007. On December 26, 2007, Aaliyah was found to be a child in need of protection or services. Aaliyah was placed in a foster home where she has remained since she was five days old.

¶3 A petition for protection or services was filed and a dispositional order pursuant to WIS. STAT. § 48.355 was entered on January 30, 2008. This order required the following conditions to be met before Aaliyah could be returned to Abigail:

- Stay in touch and cooperate with your worker.
- Have a safe, suitable, and stable home.
- Have regular and successful visits with the child.
- If the order limits your visits, begin to change the reasons for the limits.

Show that you are interested in your child.

- You must not interfere with the placement of your child or with any of the services that they are receiving.
- Complete a psychological evaluation/reevaluation and complete the recommended programs.
- You must not hurt your child or let anyone else hurt your child.
- Show that you can care for and supervise your child properly and that you understand their special needs.
- Complete the following programs: Individual Therapy and Parenting Program.
- Have successful, extended visits with your child and show that you have the desire and ability to take care of your child on a full[-]time basis.
- Special Conditions:
 - Cooperate with housing assistant.
 - Cooperate with training to meet special needs of the child. Show that she understands her child's medical needs and the regime the child needs to survive.
 - Cooperate with nutritional counseling.

¶4 A little more than a year later, on February 2, 2009, the State filed a petition to terminate Abigail's parental rights to Aaliyah. The petition alleged two grounds for termination: (1) that Aaliyah was a child in continuing need of protection and services pursuant to WIS. STAT. § 48.415(2); and (2) that Abigail failed to assume parental responsibility for Aaliyah pursuant to WIS. STAT. § 48.415(6).

¶5 Shortly after the petition was filed, Abigail filed a guardianship petition seeking to have a friend appointed as the guardian for Aaliyah. The trial court suspended the guardianship petition while the termination of parental rights proceeding was ongoing.^[3] After several adjournments, Abigail eventually waived her right to a jury trial and a court trial was held. At the court trial the

judge heard, on behalf of the State, the testimony of Dr. Robert Dries, Dr. Kenneth Sherry, and several case managers who provided Abigail with services. In addition, the State called Abigail adversely. Abigail also testified in her own behalf, as did one of the service providers who supervised Abigail.

¶6 Dr. Dries testified that, after administering tests to Abigail, he was of the opinion that Abigail had a full scale I.Q. of 62. Dr. Dries stated that at this level of intelligence a person would be surpassed intellectually by a child the age of six or seven. He informed the trial court that Abigail had difficulty telling time, and of most concern to him with respect to the parenting issue was the fact that Abigail does not recognize her limitations. Ultimately, it was the doctor's opinion that Abigail did not have the ability to parent and would not gain the necessary skills in the coming nine months.

¶7 Dr. Sherry also agreed that Abigail's IQ placed her in a category where "[i]ndividuals who score in this fashion typically have very nominal capacity to manage themselves independently and very limited ability to manage a family." Dr. Sherry stated that in his professional opinion, Abigail could not consistently and safely care for Aaliyah.

¶8 One of the case workers who had previously been employed by the Bureau of Milwaukee Child Welfare (Bureau) who supervised Abigail explained the progress and problems Abigail had. The witness stated that Abigail had made progress in many areas such as cooking and bathing Aaliyah, but that she still had difficulty in problem solving, multitasking and paying attention. She recounted how Aaliyah had once fallen off a chair because Abigail turned her attention elsewhere, how Abigail had once served Aaliyah undercooked food, and another time, food that was too hot.

¶9 Abigail was called adversely. She confirmed that when she was pregnant she stopped taking her medication that prevented the transmission of her HIV status to her daughter because she was under a lot of pressure and that she did not have adequate supplies for the baby, including having no crib or bassinet for her daughter. She also recounted a visitation with Aaliyah when she fell off the sofa, and another time when she thought that the baby had stopped breathing, and instead of calling

911, she called her case worker. With respect to many specific instances concerning the care of Aaliyah that were explored by the State's attorney, Abigail claimed not to remember them occurring.

¶10 The two case managers who testified explained that Abigail was not always cooperative with them, and based on their observations of Abigail, they did not think Abigail could care for Aaliyah on a full-time basis. They recounted that there were safety concerns that Abigail was unable to correct, and in their opinion, Abigail had failed to meet the conditions of return.

¶11 After Abigail testified on her own behalf and her witness testified, Abigail asked and was granted an adjournment to have a bonding study done. [\[4\]](#) After the bonding study was conducted and received by the trial court, the trial court issued a memorandum decision determining that Abigail “does not presently have, nor will she ever have, the capability to safely and appropriately meet the needs of this child on a day[-]to[-]day basis.” The trial court further found that it was in Aaliyah's best interest to have Abigail's parental rights terminated. This appeal follows.

II. ANALYSIS.

A. Abigail's substantive due process rights were not violated.

¶12 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. *See* WIS. STAT. §§ 48.415, 48.424; ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672-73, 599 N.W.2d 90, 97 (Ct. App. 1999). If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427.

¶13 Abigail contends that WIS. STAT. § 48.415(2) violates her right to substantive due process because it is unconstitutional as applied to her.

¶14 A substantive due process analysis considers whether state action is arbitrary to the

extent that it “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” *State v. Schulpius*, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495, *cert. denied*, 547 U.S. 1138 (2006) (citation and internal quotation marks omitted). Where there is a fundamental liberty interest at stake, substantive due process requires a statute to be narrowly tailored to achieve a compelling state interest. *See Monroe Cnty. DHS v. Kelli B.*, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. Because the termination of parental rights implicates a fundamental liberty interest, strict scrutiny is required. *Id.* In termination of parental rights cases, the compelling state interest is to protect children from unfit parents, and the statutory scheme in question must therefore be narrowly tailored to advance the State’s interest in protecting children from unfit parents. *Dane Cnty. DHS v. P.P.*, 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. The United States Supreme Court has recognized a parent’s fundamental right to the care and custody of his or her child and concluded that a state may not terminate this right without an individualized determination that the parent is unfit. *Stanley v. Illinois*, 405 U.S. 645, 649, 92 S.Ct. 1208 (1972).

¶15 Statutes enjoy a presumption of constitutionality and we construe them so as to preserve their constitutionality. *State v. Bertrand*, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991). A party challenging the constitutionality of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Thus, a party making an as-applied challenge to a statute must “prove, beyond a reasonable doubt, that as applied ... the statute is unconstitutional.” *State v. Joseph E.G.*, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶16 Whether a statute, as applied, violates the constitutional right to substantive due process presents a question of law subject to independent appellate review. *See Kelli B.*, 271 Wis. 2d 51, ¶16, 678 N.W.2d 831.

¶17 Abigail contends that WIS. STAT. § 48.415(2) is unconstitutional as applied to her because the finding of unfitness that was the basis for the termination of her parental rights was based

on an impossible condition of return. In so contending, Abigail relies heavily on our supreme court's decision in *Kenosha County DHS v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, which held that § 48.415(2) was unconstitutional as applied to Jodie W., who had been found to be an unfit parent because she failed to meet conditions of return that were impossible for her to meet due to her incarceration. *Id.*, 716 N.W.2d 845, ¶56.

¶18 This court first observes that the condition of return referenced in the appellant's briefs is not the same as the condition found in the CHIPS petition. Abigail argues on appeal that she was "required to demonstrate an ability to independently care for a small child." However, the CHIPS petition, in pertinent part, obligated her only to "show that you can care for and supervise your child properly and that you understand [her] special needs." It is this condition that Abigail was unable to fulfill. At the time that it was entered it was not an impossible condition, but the outcome was uncertain. It was hoped that after various services and programs were completed, Abigail could meet the conditions set for the return of her child. Eventually, it was one that Abigail could not satisfy. The trial court found that the State proved the ground found in WIS. STAT. § 48.415(2), entitled "continuing need of protection or services". This statute requires the State to prove any of the following:

[(2)(a)1.] ... That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

....

[(2)(a)2.b.] ... That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

[(2)(a)3.] That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.

....

[(2)(am)1.] That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).

[(2)(am)2.] That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

As to the Bureau's responsibilities, there can be no question that the Bureau made a reasonable effort to provide services to Abigail in the hope of reuniting her with her daughter. Abigail was able to visit with Aaliyah both in her home and earlier at La Causa Visitation Center. When visitations occurred in her home they were supervised by a worker who brought Aaliyah to the home. Another worker was provided who helped Abigail with her parenting skills and her daily life skills. She also had a financial agent. In addition, Abigail was given employment assistance that proved to be unsuccessful. The Bureau offered these services to Abigail for over a year.

¶19 In sum, Abigail made great strides in caring for her daughter, but her limitations prevented her from consistently providing a safe home for Aaliyah. The condition that she "show that you can care for and supervise your child properly and that you understand [her] special needs" was never met. As noted, Abigail would often lose focus when caring for her daughter. She also had trouble multitasking, problem-solving, and had little appreciation for the risks that her being HIV positive posed to Aaliyah. Numerous examples were relayed to the trial court about Abigail's shortcomings. The condition which was placed on her of which she complains was essential for the safety and well-being of Aaliyah. Here, the trial court fashioned a condition to protect Aaliyah, which Abigail was unable to meet. This was a proper state interest. Consequently, the statute was not unconstitutionally applied to Abigail.

¶20 Moreover, Abigail's circumstances are quite different from those found in *Kenosha County v. Jodie W.*, the case Abigail relies on. There, the termination of parental rights order was

overturned because it was based solely on Jodie W.'s incarceration without any consideration of other factors. *Id.*, 293 Wis. 2d 530, ¶52. When the condition was placed on Jodie W. that she maintain a suitable residence, the trial court knew she could never meet it because she was incarcerated. *Id.*, ¶¶7-10, 14. In contrast, when the condition was placed on Abigail to “show that you can care for and supervise your child,” it was unknown whether, with the aid of services, Abigail could meet the condition. As the facts adduced at trial clearly demonstrated, her cognitive limitations prevented her from doing so.

B. The trial court properly determined that it was in Aaliyah's best interests to terminate Abigail's parental rights.

¶21 As noted, once the determination is reached that grounds have been met for the termination of parental rights, the trial court is obligated, pursuant to WIS. STAT. § 48.426(2), to consider the best interests of the child, and, pursuant to § 48.426(3), to consider the following factors:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶22 Here, the trial court noted that Aaliyah will be adopted into the only home she has ever known. She is approximately two-and-one-half years old and in good health. The trial court found that her primary attachment is to her foster mother and she also has “very significant attachments to others in that home.” The trial court believed that severing those relationships would be harmful to Aaliyah.

¶23 Abigail argues that the trial court should only have considered the substantial relationship that Aaliyah had with Abigail and should not have engaged in a “balancing analysis” with her relationships with her foster family. This court disagrees. It would have been wrong for the trial court to not consider the bond that Aaliyah has with the family that has cared for her for her entire life. While it is true that Aaliyah had a relationship with Abigail, it was not of the same quality as the relationship she has with her foster family. The trial court properly exercised its discretion in finding it was in Aaliyah’s best interest to terminate Abigail’s parental rights. Accordingly, this court affirms.

By the Court.—Order affirmed.

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

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] CHIPS is an acronym for “child in need of protection or services.” Abigail failed to raise the substantive due process claim below. However, in the interests of justice, this court will address it.

[3] The trial court, in its memorandum decision terminating Abigail’s parental rights, also dismissed the guardianship.

[4] A bonding study is an examination in which a professional views a child with the significant people in his or her life and evaluates who the child is most bonded with.