State of Wisconsin
Court of Appeals
District 1

In the interest of Vanessa P., a person under the age of 18:

State of Wisconsin,
Petitioner-Respondent,
v.
Appeal No. 2008AP003084
Denice P.,
Respondent-Appellant,
Robert H.,
Respondent-Appellant

In the interest of Robert P., a person under the age of 18:

State of Wisconsin,

Petitioner-Respondent,
v.
Appeal No. 2008AP003085
Denice P.,
Respondent-Appellant,
Robert H.,
Respondent-Appellant

Appeal from a judgment terminating the parental rights of Robert H. to Amanda P. and Robert P., entered in the Milwaukee County Circuit Court, the Honorable William Pocan, presiding

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Respondent-Appellant's Brief

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Statement on Oral Argument and Publication

The issue presented by this appeal presents a substantial question of constitutional law that is unsettled in Wisconsin. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issue

I. Whether Sec. 48.415(7), Stats., which creates grounds to terminate parental rights where there is incestuous parenthood, denies the appellant, Robert, substantive due process where Robert and the mother of the children, Denise, are biological brother and sister but where each was adopted as a baby by a separate family, each parent has a different surname, and there are two sets of grandparents (maternal and paternal).

Answered by the trial court: No

Summary of the Argument

The petition filed in this case alleged that Robert's parental rights were subject to termination because his children, VP and RP, were of incestuous parenthood. Specifically, the petition alleged that Robert, and the mother of the children, Denise, were siblings. As will be set forth in more detail below, Sec. 48.415(7), Stats., denies Robert substantive due process. None of the compelling interests that the state may have in discouraging incestuous parenthood apply to Robert. Robert and Denise, although siblings, were separated as children, adopted, and were raised in separate households. Robert and Denise have different surnames. AP and

RP have two sets of grandparents and, by outward appearances, the children were not born into an incestuous family. Thus, the children will not suffer any emotional harm as a result of society's taboo against incest. As such, the state has no compelling interest in terminating Robert's parental rights merely because of the status of incestuous parenthood. At the dispositional phase, the trial court found that it was in the children's best interest to terminate Robert's parental rights because Robert, who has cognitive limitations, was attempting to parent children who, themselves, have special needs. Ultimately, Robert's parental rights may be subject to termination for this reason; however, the state employed a short-cut in this case. The State obtained summary judgment in the grounds phase merely because of Robert's status as an incestuous parent- even though Robert's situation invokes none of the state's legitimate interests in preventing incest. Then, at the dispositional hearing, the court found it was in the children's best interests to terminate Robert's parental rights for reasons that are wholly unrelated to his status as an incestuous parent. As such, Robert was denied substantive due process.

Statement of the Case

I. Procedural Background

This is an action to terminate the parental rights of the appellant, Robert H., to his children, Robert P. and Vanessa P.[1] The petition alleged that the children were of incestuous parenthood.

1 Because the father (appellant) is named Robert and so is the son; and because Sec. 809.19(2)(b), Stats., requires the parties to be referred to by their first name and last initial; for the sake of clarity, the appellant, Robert H., will referred to as "Robert"; however, the children will be referred to as "V.P." and "R.P."

The appellant-father, Robert, was alleged to be the full biological brother of the mother of the children, Denise P.

At the outset, the attorney for Denise requested that a competency evaluation be performed on Robert and the court so ordered. (R:89-4, 5) The doctor's report to the court found that Robert was in fact not competent. (R:90-7). The trial court appointed attorney James Rice as Robert's guardian ad litem. (R:90-19)

The parties then filed competing motions. Robert, as did Denise in a separate motion, moved to dismiss the petition on the grounds that Sec. 48.415(7), Stats.[2], as applied to him, was unconstitutional because it denied him substantive due process and equal protection (R:19)

The State, on the other hand, moved for summary judgment on the grounds phase. The State's motion argued that there was no material dispute of fact concerning the sibling relationship between Robert and Denise [i.e. the children who were the subject of the petition were of incestuous parenthood under Sec. 48.415(7), Stats] (R:34)

The court conducted substantial evidentiary hearings into the motions. At the conclusion of the hearings, the court made a factual finding that, at the time they conceived AP and RP, Robert and Denise knew that they were biologically related; and, even if they did not, Sec. 48.415(7), Stats., does not deny Robert substantive due process. (R:98-7) Thus, the court found that grounds existed to

2 Sec. 48.415(7), Stats., provides that the following is grounds for involuntary termination of parental rights: "**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."

terminate Robert's parental rights because of incestuous parentage and granted the State's summary judgment on the grounds phase. (R:98-12, 13)[3]

Following a series of hearings on the dispositional phase, the court found that it was in VP's and RP's best interest that Robert's parental rights be terminated. The court found that there was a strong likelihood of adoption (R:105-19) Likewise, the court recited the litany of physical, mental, and emotion problems that affect VP, RP, and Robert (R:105-21) but found, still, that this would not be a barrier to adoption. The court found that the incestuous relationship between Robert and Denise made it likely that any relationship that VP and RP had with their biological family was harmful; and, therefore, terminating that relationship would not only not be harmful, it would be helpful. (R:105-22)

Finally, the court noted, "At the end of the day, we have parents with extremely significant special needs, attempting to parent children with significant special needs." (R:105-33) Thus, the court continued:

> Unfortunately the Court concludes, based on all the testimony heard or many, many dates of testimony, that [Denise] and [Robert] do not have the ability to provide [VP] and [RP] with the stability and permanence the law requires that they be provided with. VP and RP will have more stability and permanence with the foster parents . . .

(R:105-34, 35)

II. Factual Background

A. Pretrial motions

In his motion to dismiss, Robert alleged that at the time VP

3 At the next hearing the district attorney informed the court that Robert's therapist was concerned about what Robert may do if his parental rights were terminated. According to the therapist, Robert's behavior is unpredictable. (R:99-28)

and RP were conceived he did not know that Denise was his sister. Denise made a similar allegation. Robert also alleged that he and Denise were adopted as children and that each was raised in a separate household by a separate family.

Patricia H. is Robert's adoptive mother. Robert is cognitively delayed and he has environmental social retardation. (R:97-13) Patricia testified that when she first got custody of Robert, who was a child at time, there was contact between Robert and his biological sister, Denise; however, that contact stopped once Denise moved to Beaver Dam. (R:97-11) Denise was approximately eight years old at the time of the last visit and she testified that she remembered nothing about it. (R:96- 53) Nonetheless, from time-to-time Robert would look at photographs of his biological family. (R:97-12) Sometimes Patricia H. would talk to Robert about Denise. (R:97-13)

Denise testified that she first met Robert in 2004 when she met him walking down the street. (R:96-21) Denise denied that she ever met Robert prior to that chance meeting on the street. (R:96-22) Robert recalled that the first meeting with Denise was in 2004 while he was riding his bike. (R:96-67) Denise claimed that she first learned that Robert was her brother when someone from the Bureau told her. (R:96-24) Denise said that this was after VP and RP had already been removed from her care in 2006. (R:96-26) Robert also testified that he never knew Denise was his sister until the courts informed him. (R:96-70) Robert adamantly told the court that at the time VP and RP were conceived that he did not know that Denise was his sister. (R:97-58)

Patricia H., on the other hand, testified that, as an adult, Robert became employed and ultimately asked her whether he could "move in with his sister" (Denise) to help her take care of her

child. (R:97-15) Robert was nineteen or twenty years old at the time. (R:97-17) Robert denied that he ever told Patricia H. that he planned to move in with his "sister". (R:97-55)

Jill Naber, a social worker, testified that in 2006 she had a conversation with Robert about Denise's children and, in that conversation, Robert admitted that he was the father of those children and he admitted that he knew Denise was his sister. (R:97-72)

B. Dispositional Phase

Dr. Veronica Sosa Agnoli is a psychologist. Dr. Sosa testified that she had treated V.P. (R:100-17) Dr. Sosa diagnosed V.P. with reactive attachment disorder because V.P. would show signs of extreme stranger anxiety, but then immediately latch on to the stranger and ask to be held or cuddled (R:100-27) Dr. Sosa could not identify what is was that V.P. was exposed to; however, according to Sosa, whatever it was had a profound effect on V.P. (R:100-39)

Robert testified that he visits his children once a week and that during the visits they play, sing, and dance. (R:030608-51) According to Robert, the children are not uncomfortable with him. (R:030608-52)

Dr. Kenneth Sherry, who did the competency evaluation of Robert, testified that Robert has limited cognition, limited capacity to manage himself, problems of anger control and impulsivity and that he has very limited parental capacity. (R:030608-75) Dr. Sherry diagnosed Robert with "Adjustment Disorder with Mixed Mood", which is treatable, but Robert also had "Mild Mental Retardation", which is not treatable. (R:030609-76). Dr. Sherry told the court that

if Robert were to be treated for his adjustment disorder he would still not be a suitable parent because the major debilitating factor for Robert was his cognitive ability. (R:030609-77)

A case manager testified that an issue arose about visitation in November, 2006 because Robert wanted to know where his children were and he started threatening the staff and indicated he would follow the van home following a visit. (R:103-13)

Argument

I. Sec. 48.415(7), Stats., as applied to Robert, denies him substantive due process.

The petition filed in this case alleged that Robert's parental rights were subject to termination because his children, VP and RP, were of incestuous parenthood. Specifically, the petition alleged that Robert, and the mother of the children, Denise, were siblings. As will be set forth in more detail below, Sec. 48.415(7), Stats., denies Robert substantive due process. None of the compelling interests that the state may have in discouraging incestuous parenthood apply to Robert. Robert and Denise, although siblings, were separated as children, adopted, and were raised in separate households. Robert and Denise have different surnames. AP and RP have two sets of grandparents and, by outward appearances, the children were not born into an incestuous family. Thus, the children will not suffer any emotional harm as a result of society's taboo against incest. As such, the state has no compelling interest in terminating Robert's parental rights merely because of the status of incestuous parenthood. At the dispositional phase, the trial court

found that it was in the children's best interest to terminate Robert's parental rights because Robert, who has cognitive limitations, was attempting to parent children who, themselves, have special needs. Ultimately, Robert's parental right may be subject to termination for this reason; however, the state employed a short-cut in this case. The State obtained summary judgment in the grounds phase merely because of Robert's status as an incestuous parent- even though Robert's situation invokes none of the state's legitimate interests in preventing incest. Then, at the dispositional hearing, the court found it was in the children's best interests to terminate Robert's parental rights for reasons that are wholly unrelated to his status as an incestuous parent. As such, Robert was denied substantive due process.

A. Standard of Appellate Review

Robert's substantive due process claim required factual findings by the trial court.[4] On appeal, those factual findings must be sustained unless they are clearly erroneous. *State v. Gollon*, 115 Wis.2d 592, 340 N.W.2d 912 (Ct. App. 1983). Whether, under those facts, Sec. 48.415(7), Stats., violates Robert's substantive due process is a question of constitutional law that is reviewed without deference to the conclusion of the lower court. *Dane County DHS v. Ponn P.*, 279 Wis. 2d 169, 694 N.W.2d 344 (2005).

On appeal, Robert cannot establish that the trial court's factual findings were clearly erroneous. Thus, the question here is whether Sec. 48.415(7), Stats., violates substantive due process where Robert and Denise are biological siblings, they knew they were

4 That is, Robert alleged that he did not know that Denise was his sister at the time VP and RP were conceived. This, of course, is relevant to whether Sec. 48.415, Stats., is unconstitutional as applied to Robert's situation.

siblings at the time the children were conceived, but where Robert and Denise were adopted and raised in separate homes.

B. Substantive Due Process

The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990)

In evaluating a substantive due process challenge to a statute, "[t]he threshold inquiry … is whether … a fundamental liberty interest [is] at stake." *Ponn P.*, 2005 WI 32, P20. The right to parent one's child implicates a fundamental liberty interest. *Monroe County Department of Human Services. v. Kelli B. (In re Zachary B.),* 2004 WI 48, P23 (Wis. 2004) Because a fundamental liberty interest is implicated, "any statute that impinges on [this] right must withstand strict scrutiny." *Ponn P.*, 279 Wis. 2d 169, P20. "In order to withstand strict scrutiny, a statute must be narrowly tailored to meet a compelling state interest." *Id.* The compelling state interest served by the termination of parental rights statute "is to protect children from unfit parents." *Ponn P.*, 279 Wis. 2d 169, P20. "Accordingly, the statutory scheme at issue must be narrowly tailored to advance the State's interest in protecting children from unfit parents." *Id.*

In, *State v. Allen M. (In the Interest of Tiffany Nicole M.)*, 214 Wis. 2d 302, (Wis. Ct. App. 1997) the Court of Appeals found Sec. 48.415(7), Stats. constitutional in the face of substantive constitutional claims similar to Robert's claims here. The facts in *Allen M.* are sparse. It was uncontested that the parents in *Allen M.*

were siblings and there was no indication that the parents were raised in separate homes or were unaware of their kinship. Thus, Jude Fine noted in a concurring opinion,

> I agree that Allen M. and Patricia M. have not shown that § 48.415(7), STATS., is unconstitutional as to them. As I understand it, we leave for another day other possible scenarios not implicated by this case. Thus, for example, § 48.415(7) provides that it is a ground for termination of parental rights if the child's parents are "closer than 2nd cousins" by "adoption." That is not the case here. There are also other scenarios that are not presented by this case.

Allen M. 214 Wis. 2d at 323. Thus, *Allen M* is persuasive, but it does not require the court to categorically reject Robert's substantive due process claim in this case. Robert's situation is different than in *Allen M.*

In another circumstance, where the parent (whose rights were terminated), "Kelli", was a continuous victim of incest perpetrated by her father (who was also the father of the child in question) the Wisconsin Supreme Court held that Sec. 48.415(7), Stats., was, in fact, unconstitutional as applied to Kelli. The Supreme Court wrote:

> As applied to Kelli, we conclude that the incestuous parenthood ground as set forth in Wis. Stat. § 48.415(7) is not narrowly tailored to advance the compelling state interest underlying the statute. The reason it is not narrowly tailored is that it renders people like Kelli per se unfit solely by virtue of their status as victims. While we recognize a correlation between perpetrators of incest and unfit parents, we fail to see how being victimized by one's parent or relative necessarily warrants the same conclusion. The fact of incestuous parenthood does not, in itself, demonstrate that victims like Kelli are unfit parents.

Kelli B, 2004 WI 48, P26

Robert's factual scenario, then, appears to fall squarely between that in *Allen M*, where the parents plainly knew they were siblings and *Kelli B.* where Kelli was the victim of the crime of incest perpetrated by her father. Here, Robert and Denise knew, at the time VP and RP were conceived, that he and Denise were siblings.

However, it is likewise undisputed that Robert and Denise were raised in a separate household as children. Robert and Denise have different surnames. Thus, VP and RP have two sets of grandparents- maternal and paternal.

Given the purpose of Sec. 48.415(7), Stats., should the fact that Robert and Denise were raised in separate households make a difference? Clearly it should.

Allen M and *Kelli B* discuss at length the purposes that Sec. 48.415(7), Stats., serves. These purposes include deterrence of incestuous relationships, the fundamentally disordered circumstance of a child being raised in an incestuous home and the emotional damage that such a situation would cause the child, and the avoidance of genetic abnormalities inherent in incestuous conception. *See, Allen M.,* 214 Wis. 2d at 320.

Deterrence of incestuous relationships is virtually inapplicable in this case. Firstly, incest is already a crime. Secondly, Robert and Denise are of such limited cognitive ability that they are unlikely to be aware of, much less be deterred by, the fact that the law permits their parental rights to be terminated on account of the incestuous relationship.

The concern of genetic abnormalities, likewise, has no application here. Firstly, once the child is born, any effort to avoid genetic abnormalities must, by necessity, come to an end. The child is in the word and, therefore, the only question ought to be whether the parents are able to adequately care for him or her. Before the trial court the state argued, and the court found, that VP and RP did, in fact, have genetic abnormalities that made them have special needs. This may be true; however, a fair question is whether the mental problems, and the physical problems, that VP and RP may

have are due to the incestuous parentage or are simply due to the fact that the children, like all children, resemble their parents. In other words, both Robert and Denise have profound cognitive deficits. Although it certainly is possible that such parents could produce a child who is of normal intelligence, it seems far more likely that the parents would produce a child who is of intelligence similar to the parents. The special needs of VP and RP, in conjunction with Robert's own limitations, may ultimately be grounds to terminate Robert's parental rights. However, such a situation was not alleged in the petition nor was it proved by the state's summary judgment motion.

Thus, we are left with only the concern that VP and RP may be raised in a fundamentally disordered, incestuous home; and the consequent emotional harm that this is likely to cause the children. Undoubtedly, the "emotional harm" suffered by children raised in an incestuous home is caused, not necessarily by any failings on the part of the parents, but by the ridicule heaped on the children by the society's taboo concerning incest. In the situation presented by this case, though, society would have no way of knowing the true relationship between Robert and Denise. Each parent has a different surname. There are two sets of grandparents- maternal and paternal. By all outward appearances, VP and RP were not born into an incestuous family. As such, the ridicule of taboo will not affect VP and RP.

What, then, is society's point in terminating Robert's parental rights? This question was answered by the trial court's own findings at the dispositional hearing. The judge said, "At the end of the day, we have parents with extremely significant special needs, attempting to parent children with significant special needs." (R:105-

33)

As compelling as the trial court's reasoning might be, there is a problem with the court's conclusion to terminate Robert's parental rights. The problem, of course, is that the petition did not allege as grounds, nor did the state prove as grounds, that Robert's cognitive limitations made him unable to parent VP and RP[5]. Much less was there "no material issue of fact" on this point during the summary judgment motion in the grounds phase.

At the end of the day, then, grounds were found to terminate Robert's parental rights merely because of his status as a biological sibling of Denise, the mother of the children. The court then found that it was in the children's best interest to terminate Robert's parental rights because the children have special needs and Robert, himself, has special needs. This sounds very much like a "grounds" finding rather than a "best interests" finding.

Under the facts of this case, the state has no compelling interest in terminating Robert's parental rights merely because of incestuous parenthood. Neither Robert, nor men who are similar to Robert, will be deterred from an incestuous relationship merely because their parental rights are subject to termination. Likewise, VP and RP have been born and any interest the state may have in preventing genetic abnormalities has lapsed. Finally, by all outward appearances, Robert and Denise are not siblings. Thus, VP and RP will not be harmed by society's taboo against incestuous families.

5 During the dispositional phase, which is heard by the judge only, there was testimony by Dr. Sherry that Robert's cognitive disabilities would make him an unfit parent. There was no such testimony during the grounds phase. Parents have a significant constitutional liberty interest in parenting their children. For this reason, Chapter 48 provides parents with the right to a jury trial on the grounds phase. Here, Robert was denied his statutory right to a jury trial on the question of whether his cognitive disabilities are grounds under Sec. 48.415, Stats. to terminate his parental rights.

Ultimately, it may be true that Robert's parental rights should be terminated because his cognitive limitations prevent him from being an adequate parent. However, the state ought not be allowed to accomplish this goal by the short-cut employed here- a shortcut that denied Robert his statutory right to a jury trial on the grounds phase[6]. If Robert's ability to parent is not what it should be then the state should allege this as a ground under some subsection of Sec. 48.415, Stats., and then the State should prove those allegations at a jury trial.

Conclusion

For these reasons it is respectfully requested that the court reverse the trial court's judgment terminating Robert's parental rights and enter an order dismissing the petition for the reason that Sec.

6 Appellate counsel struggled with whether the denial of a jury trial on Robert's cognitive disabilities as they relate to his ability to parent his children ought to be raised as an issue on appeal. Ultimately, counsel decided that the issue could not be raised on appeal. Firstly, the issue was not raised in the trial court and, therefore, it may be subject to the well-worn waiver rule. More importantly, though, if Robert succeeds in convincing the Court of Appeals that Sec. 48.415, Stats., is unconstitutional as applied to him, the remedy is that the TPR petition will be dismissed. If, on the other hand, the Court of Appeals affirms the trial court's denial of Robert's motion to dismiss, then the trial court's grant of summary judgment on incestuous parenthood is unassailable. It is an interesting question, though, of whether a trial court at a dispositional hearing may consider, under the guise of "best interests", factors that are more appropriately understood to be "grounds" to terminate parental rights. There does not seem to be any clear appellate guidance on this issue.

48.415(7), Stats. denies Robert substantive due process.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2009.

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Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3,609 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2009:

_____

Jeffrey W. Jensen

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Court of Appeals
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Respondent-Appellant's Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions

of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009

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