

COMMENTS

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MAX G.W.: BEGINNING TO PAVE THE WAY FOR WISCONSIN'S INCARCERATED MOTHERS TO RETAIN THEIR PARENTAL RIGHTS AND SERVE THE BEST INTEREST OF THEIR CHILDREN

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I. INTRODUCTION

“[T]he paramount goal of [the Wisconsin Children’s Code] is to protect children and unborn children, to preserve the unity of the family, whenever appropriate, by strengthening family life through assisting parents and the expectant mothers of unborn children, whenever appropriate, in fulfilling their responsibilities as parents or expectant mothers.”¹ The Wisconsin Children’s Code, Chapter 48 of the Wisconsin Statutes, governs child protection in Wisconsin.²

On July 11, 2006, the Wisconsin Supreme Court directed the state’s courts to abide by the purpose of preserving family unity when it released its decision, *In Re the Termination of Parental Rights to Max G.W.*, commonly referred to as *Jodie W.*³ The court held that Jodie’s parental rights to her son could not be terminated based solely on her inability to meet a court-ordered condition of return due to her incarceration.⁴ The holding has the potential to change the way termination of parental rights (TPR) cases for incarcerated parents are handled in Wisconsin under Wisconsin Statutes section 48.415(2), the

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1. WIS. STAT. § 48.01(1)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version, unless otherwise noted.

2. *See generally*, Wis. Stat. Chapter 48.

3. Kenosha County Dep’t of Human Services. v. Jodie W. (*In re* the Termination of Parental Rights to Max G.W.), 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845.

4. *Id.* ¶ 56.

provision that allows for a TPR if the child is determined to be in continuing need of protection or services.

The process and conditions for TPRs are spelled out in the Wisconsin Children's Code, Chapter 48 of the Wisconsin Statutes. According to the Code, a TPR occurs when "all rights, powers, privileges, immunities, duties, and obligations existing between parent and child are permanently severed."⁵ TPRs in Wisconsin may be voluntary or involuntary.⁶

The circuit court involuntarily terminated Jodie W.'s rights to Max, her son, pursuant to Wisconsin Statute section 48.415(2).⁷

The court determined that Max had been adjudged to be a child in continuing need of protection or services and had been outside the home for at least six months, that Jodie failed to meet the court-ordered conditions of return, that the department made reasonable efforts to assist Jodie in meeting those conditions, and that it was not likely that Jodie would meet the conditions of return within 12 months of the hearing. Upon finding that grounds had been established, the circuit court made a finding of parental unfitness and terminated Jodie's parental rights over Max.⁸

The Wisconsin Supreme Court reversed the TPR and reinstated Jodie's parental rights.⁹ In the process, the court changed the way that TPRs in Wisconsin are conducted with regard to section 48.415(2), TPRs pursuant to the continuing need of the child, as it relates to incarcerated parents.

Since *Jodie W.* was decided in July of 2006, subsequent cases are in the process of trial and appeal. These cases clarify and either expand or narrow the scope and impact of the *Jodie W.* decision.¹⁰ Defense attorneys are attempting to expand the holding in *Jodie W.* by applying it to the other TPR grounds in section 48.415. Prosecuting attorneys are asking the courts to read the *Jodie W.*

5. WIS. STAT. § 48.40(2).

6. Voluntary TPRs are described in WIS. STAT. § 48.41. Since *Jodie W.* only focused on involuntary TPRs, this article will be limited to involuntary TPRs, described in WIS. STAT. § 48.415.

7. *In re Max G.W.*, 2006 WI 93, ¶ 5.

8. *Id.* ¶ 6.

9. *Id.* ¶ 56.

10. There have not been any cases recommended for publication and available to the public that have made this observation directly. This comment comes from interviews of court officials, prosecuting attorneys, and defense attorneys conducted by the author. The individuals interviewed asked to remain anonymous because this is a heavily litigated area of family and juvenile law. In addition, records are not readily available because TPR proceedings involving minor children are closed to the public and confidential. Therefore, no circuit court briefs, records, or decisions are available for the author's use in publication. As the Wisconsin Supreme Court and the Courts of Appeal continue to hear cases aimed at narrowing or expanding the holding in *Jodie W.*, there will be more explicit clarification on the scope of the *Jodie W.* decision.

holding narrowly and apply it only in the limited situation where incarceration prevents a parent from fulfilling a condition of return.¹¹

Wisconsin's TPR proceedings are bifurcated.¹² At the fact-finding hearing, the trier of fact, either a jury or the judge, determines whether grounds exist for termination and at the dispositional stage, the court decides whether to terminate the parent's rights.¹³ First, during the grounds phase of a TPR, the parent's rights are paramount.¹⁴ The State bears the burden to prove unfitness and the parent enjoys all of his or her procedural rights.¹⁵ Parents are entitled to a jury trial to determine if grounds exist to terminate their parental rights.¹⁶ If the jury finds that grounds exist to terminate the parent's rights, then the court must find the parent unfit.¹⁷ The jury does not make the final decision about termination.¹⁸ At the second phase, known as the disposition phase, the focus shifts to what is in the best interest of the child.¹⁹ The judge is the ultimate decision maker and determines whether to complete the TPR.²⁰

General opinion over whether it is in the best interest of the child to preserve families or permanently remove children from their biological parents has varied since child welfare became one of the State's concerns.²¹ Most recently, federal policy has pushed for permanent placement of children, leading to an increase in TPRs.²² State legislatures and county family service divisions have had to adjust their policies to meet the federal mandate.

Termination of parental rights policy is at a crossroads in Wisconsin. *Jodie W.* held that the State could not terminate an incarcerated mother's parental rights based on her inability to meet a condition of return if that condition was impossible for her to meet due to her incarceration.²³ The holding appears to conflict with the stated goals of Wisconsin law and the federal Adoption and Safe Families Act (ASFA), which is to find permanent

11. *Id.*

12. *Waukesha County Dep't of Soc. Servs. v. C.E.W.*, 124 Wis. 2d 47, 60, 368 N.W.2d 47 (1985).

13. *Id.*

14. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 22, 246 Wis. 2d 1, 629 N.W.2d 768.

15. *Sheboygan County Dep't of Health & Family Servs. v. Julie A.B. (In re the Termination of Parental Rights to Prestin T.B.)*, 2002 WI 95, ¶ 24, 255 Wis. 2d 170, 648 N.W.2d 170.

16. WIS. STAT. § 48.424(4).

17. *Id.*

18. *Id.*

19. WIS. STAT. § 48.426(2).

20. *Id.* § 48.424(3).

21. See generally Deborah L. Sanders, *Toward Creating Policy of Permanence for America's Disposable Children: The Evolution of Federal Funding Statutes for Foster Care from 1961 to Present*, 17 INT'L J.L. & POL'Y & FAM 211 (2003) (discussing permanence policy and its ties to states accessing federal funds for child welfare systems since 1961).

22. See generally Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 629 (2006)).

23. *In re Max G.W.*, 2006 WI 93, ¶ 55.

homes for children following strict statutory time limits.²⁴ However, *Jodie W.*, Wisconsin statutes, and ASFA all ultimately seek to encourage what is in the best interest of the child, which, may be terminating parental rights, but is often allowing children to maintain a relationship with their mothers.

AFSA provides that one exception to terminating a parent's rights is a finding that doing so is not in the best interest of the child.²⁵ Wisconsin courts need to explicitly embrace ASFA's exception to the strict TPR time limits by finding that certain TPRs, especially of mothers who were primary caregivers before they were incarcerated for non-violent offenses, are not in the best interest of the child. This article asserts that, where a mother is incarcerated, the State, county, and parents should do all that they can to prevent terminations and facilitate a meaningful relationship between the child and the parent. The underlying premise of *Jodie W.* is that there needs to be specific case-by-case determinations of what a mother must do to keep her parental rights. Section II will explain the process for termination of parental rights in Wisconsin. Section III will explain the specifics of the *Jodie W.* decision. Section IV will analyze the impact of the *Jodie W.* case on the TPR process in Wisconsin. Finally, Section V will focus, specifically, on the impact of the case on the growing population of incarcerated mothers and their children in the state.

II. INVOLUNTARY TERMINATION OF PARENTAL RIGHTS IN WISCONSIN²⁶

A. Policy Guiding Wisconsin's TPR Practice

At common law, the State had authority to intervene in families and take custody of children, but could not terminate parental rights.²⁷ The legal system, reflecting the social norms of the time, stressed that biological parents should provide the care and support for their children.²⁸ Early Wisconsin case law stressed the importance of the rights and responsibilities of parents:

The unit of the state is the individual, its foundation the family. To protect the unit in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established...The normal man and woman who have exercised their inherent right to form the family relationship and have brought children into the world and who have not by willful omission

24. See WIS. STAT. § 48.417(1)(a); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 629 (2006)); Strengthening Abuse and Neglect Courts Act of 2000, 42 U.S.C. § 670 (2006).

25. 42 U.S.C. § 675(5)(E)(ii) (2006).

26. This section gives a brief overview of involuntary TPR procedures in Wisconsin. The actual process is much more involved than what is outlined here. A complete discussion of TPR procedures is found in WIS. STAT. § 48.

27. Stephen W. Hayes & Michael J. Morse, *Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon*, 66 MARQ. L. REV. 439, 442 (1983).

28. *Id.* at 441.

or commission on their part renounced that relationship, cannot and ought not to have such relationship destroyed, even by attempted action in the name of the state, save and except through due process of law.²⁹

Wisconsin did not statutorily recognize the State's ability to terminate parental rights until 1929 when written consent or abandonment were established as grounds for TPRs.³⁰ At this time, legislation in Wisconsin dictated that parents had an absolute right to their children unless they chose to give them up, either by abandoning them or by consenting to a termination of their rights to that child.³¹ Abuse, neglect and parental unfitness were recognized as grounds for terminating parental rights in 1933.³² Consideration for the amount of time a child was out of the home was adopted by the legislature in 1955.³³ If a court order had deprived the parent of legal custody of the child for at least a year, parental rights could be terminated.³⁴ In 1979, Wisconsin statutes were changed again as part of a national trend to increase the protection of birth parent rights in voluntary and involuntary TPRs.³⁵ These changes established the two stage TPR proceedings that are used today.³⁶

Federal policies drive state laws for termination of parental rights.³⁷ The Adoption and Safe Families Act (ASFA) was signed into law in 1997.³⁸ ASFA amended previous child welfare legislation to make child safety and permanency the primary focus of the law.³⁹ This signified a major shift in the nation's welfare philosophy from an emphasis on reuniting children in foster care with their biological families to one where states and counties prioritize finding children permanent adoptive placements.⁴⁰

29. *Lacher v. Venus*, 177 Wis. 588, 569-70, 188 N.W. 613 (1922).

30. *Hayes & Morse*, *supra* note 27, at 476.

31. *Id.*

32. *Id.*

33. *Id.* at 477.

34. *Id.* at 477-78.

35. *Id.* at 479.

36. *Id.* at 480-82.

37. This is not a new phenomenon. Since 1961, federal laws addressing child welfare policy have been tied to funding offered by the federal government to state agencies in charge of administering these programs. *Sanders*, *supra* note 21, at 212.

38. 42 U.S.C. §§ 620-679 (2006).

39. DEBRA RATTERMAN BAKER ET AL., *MAKING SENSE OF THE ASFA REGULATIONS* 3 (Diane Boyd Rauber ed., American Bar Association 2001). Permanency focuses on creating permanent placements for children. ASFA focuses on creating permanency, not just through family preservation, as was done in the past, but by creating stable homes for children, no matter where that home may be. It does this, in part, by mandating time limits for filing TPRs and providing fiscal incentives to states for permanently placing children. *Sanders*, *supra* note 21, at 225-26.

40. Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 112 (1999).

Prior to the adoption of ASFA, the Adoption Assistance and Child Welfare Act of 1980 (AACWA) guided federal policy.⁴¹ While some of AACWA has been incorporated into ASFA, the underlying purpose and motivation behind the legislation has changed.⁴² The AACWA made state receipt of federal welfare funding contingent on reasonable efforts to “preserve and reunify families.”⁴³ States were encouraged to do all they could to make it possible for a child to safely return home before putting a child in foster care.⁴⁴ The state had to attempt “to prevent or eliminate the need for removing the child from the child’s home” and if a child was removed, to do all it could to ensure that the child was safely returned home.⁴⁵

Passage of ASFA recognized a shift in national child welfare policies.⁴⁶ This shift was meant to remedy what the legislature viewed as some of the key failures of AACWA.⁴⁷ One of the major failures of AACWA was that some foster care systems focused solely on family reunification when in reality, there were situations where this was no longer a realistic goal and no amount of reasonable efforts would “fix” some families.⁴⁸ ASFA continues to require that state or county family service agencies make reasonable efforts to reunify parents and families,⁴⁹ but also concurrently encourages placing children with adoptive resources that could eventually lead to permanent placement.⁵⁰

These federal policies drive Wisconsin’s view of child welfare, in part, because they are tied to financial support from the federal government.⁵¹ ASFA provides significant funding incentives for states who comply with its specific requirements.⁵² Wisconsin receives \$4,000 from the federal government for every finalized adoption beyond a certain base number.⁵³ In addition, Wisconsin will receive bonus payments of an extra \$2,000 for each finalized adoption of a child with special needs and an additional \$4,000 for each finalized adoption of an older child.⁵⁴

Wisconsin codified most of ASFA’s provisions in Wisconsin Statute section 48.417. A consequence of the codification is expedition of the TPR

41. 42 U.S.C. §§ 612, 627, 628, 670 - 676, 1320b-2, 1320b-3 (2006); Pub. L. No. 96-272, 94 Stat. 500 (1980).

42. Sanders, *supra* note 21, at 212.

43. *Id.* at 215.

44. 42 U.S.C. § 671(a)(15)(B) (2000).

45. *Id.*

46. Sanders, *supra* note 21, at 224.

47. *Id.* at 225.

48. *Id.*

49. *See* 42 U.S.C. § 671(a)(15)(B) (2006).

50. *Id.* § 675(5)(E) (2006); WIS. STAT. § 48.417(3) (2006-07).

51. *See* BAKER ET AL., *supra* note 39, at 170-71.

52. *See* 42 U.S.C. § 673b (2000).

53. *Id.* § 673b(d)(1)(A).

54. *Id.* §§ 673b(d)(1)(B), (C).

process.⁵⁵ In Wisconsin, TPR proceedings must be initiated when a child has been outside of his or her home for fifteen of the last twenty-two months.⁵⁶

B. How Wisconsin's TPR Process Works

The overall procedure for TPRs has not changed as a result of the *Jodie W.* case.⁵⁷ However, the strategies and legal arguments prosecutors use to pursue TPRs, the requirements for a parent to regain custody, the services offered by counties and family social service agencies to assist parents in meeting the conditions of return, and the way judges weigh the facts in a case to determine the best interest of the child may be affected as a result of the decision. Therefore the statutory procedures for TPRs are worth exploring.

TPR cases are civil, not criminal, in nature.⁵⁸ “[P]arents are constitutionally entitled to a hearing on their fitness before children are removed from their custody.”⁵⁹ In Wisconsin, parents also have a statutory right to counsel at these hearings.⁶⁰ If a parent is indigent, counsel will be appointed to those who qualify under Wisconsin Statutes section 977.07(1).⁶¹

Requirements are also in place to ensure parents are afforded due process before their parental rights are terminated.⁶² “Before a State may sever completely and irrevocably the rights of the parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”⁶³ These statutorily protected due process rights include the right to a jury trial,⁶⁴ the right to examine witnesses,⁶⁵ the right to present and subpoena witnesses,⁶⁶ and the right to remain silent.⁶⁷

55. Roberts, *supra* note 40, at 112.

56. WIS. STAT. § 48.417(1)(a); Strengthening Abuse and Neglect Courts Act of 2000, 42 U.S.C. § 670 (2000).

57. It is still too soon after the release of this decision to know exactly how, if at all, *Jodie W.* may affect TPR procedure in Wisconsin. One possibility is that this decision may prompt the Wisconsin legislature to alter Wisconsin statute section 48.415, perhaps adding incarceration as an additional ground for a TPR. This could raise questions of the constitutionality of imposing additional penalties on incarcerated parents. There is also the possibility that this will not change the statutes at all and the legislature will just let the courts define the scope and impact of *Jodie W.*

58. *In re M.A.M. v. Monroe County Dep't of Human Services.*, 116 Wis. 2d 432, 442, 342 N.W.2d 410, 415 (1984).

59. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

60. WIS. STAT. § 48.23(2).

61. *Id.* § 48.23(4).

62. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

63. *Id.*

64. WIS. STAT. § 48.422(4); *See also* § 48.243(1)(g).

65. *Id.* § 48.243(1)(d).

66. *Id.* § 48.243(1)(f).

67. *Id.* § 48.243(1)(c).

Termination of parental rights is a two-step process.⁶⁸ First, a petition is filed alleging one or more of the grounds mentioned below, or that the parent voluntarily consents to a TPR.⁶⁹ The petition must be filed by a district attorney, corporation counsel, other appropriate officials, counsel, or guardian ad litem for the parent, relative, guardian, or child.⁷⁰ The official who signs the petition must have knowledge of the alleged facts and believe them to be true.⁷¹ Once the petition is filed, a parent may decide to contest the petition or may plead no contest to the grounds.⁷² If the parent decides to contest the petition, there is a fact-finding hearing to establish whether grounds exist to proceed with the TPR.⁷³ At the fact-finding hearing either the court, acting as the fact-finder, or a jury, must find that the petitioner has proven the grounds for termination of parental rights by clear and convincing evidence.⁷⁴

In Wisconsin, twelve grounds exist for involuntary TPRs.⁷⁵ These TPR grounds are abandonment,⁷⁶ relinquishment,⁷⁷ continuing need of protection or services,⁷⁸ continuing parental disability,⁷⁹ continuing denial of periods of

68. *See generally id.* §§ 48.42, 48.422, 48.423, 48.424.

69. *Id.* §§ 48.42(1)(c)(1), (2).

70. *Id.* § 48.25(1).

71. *Id.*

72. *Id.* § 48.422(1).

73. *Id.* § 48.424(1).

74. *Id.* §§ 48.31(1), 48.424(4).

75. *Id.* § 48.415.

76. *Id.* § 48.415 (stating abandonment may be proven in several different ways. First, if the "child has been left without provision for the child's care or support" and if, upon investigation, the petitioner cannot find either parent after 60 days. Second, abandonment may be considered if a court order placed the child outside the parent's home or continued the child in a placement outside the parent's home, if the court order contained notice of the possible grounds for termination and of conditions for the return of the child, and if the parent has failed to visit or communicate with the child for a period of three months or longer. Third, abandonment may be proved if the parent leaves the child with any person and fails to visit or communicate with the child for a period of six months or longer. Fourth, abandonment may occur if a parent leaves his or her child without provision for the child's care and support and in a manner that exposes the child to substantial risk of great bodily harm or death. Finally, abandonment may be considered if the child was abandoned when he or she was under one year of age or if a court has found that the parent violated 948.20 by abandoning the child when he or she was under one year of age).

77. *Id.* § 48.415(1m) (noting relinquishment is when a parent relinquished custody pursuant to section 48.195(1) of the Wisconsin Statutes when the child was 72 hours old or younger).

78. *Id.* § 48.415(2) (stating that a continuing need of protection or services is established by showing one of three things. First that the child has been adjudged to be in need of protection or services and has been placed, or continued in a placement outside the home pursuant to one or more court orders. Second, the agency in charge of the care of the child has made reasonable efforts to provide the court ordered services for return. Finally, the child has been outside the home for a cumulative six months or longer pursuant to an order based on the child's continuing need of protection and services, the parent has failed to meet the conditions for safe return of the child to the home, and there is a substantial likelihood that those conditions will not be met in the next nine months).

physical placement,⁸⁰ child abuse,⁸¹ failure to assume parental responsibility,⁸² incestuous parenthood,⁸³ homicide or solicitation to commit homicide of a parent,⁸⁴ parenthood as a result of sexual assault,⁸⁵ commission of a serious felony against one of the person's children,⁸⁶ and prior involuntary termination

79. *Id.* § 48.415(3) (stating that the parent must have been inpatient in one or more hospitals, licensed treatment facilities, or state treatment facilities for a cumulative total period of at least two years within the five years immediately before filing the petition, because of mental illness or developmental disability).

80. *Id.* § 48.415(4) (stating that there are two conditions necessary for a petitioner to establish continuing denial of periods of physical placement or visitation. First, a court order must have denied the parent periods of physical placement in an action affecting the family, or the parent must have been denied visitation. Second, at least one year must have elapsed since the court issued the order denying periods of physical placement or visitation, and the court must not have subsequently modified its order so as to permit periods of physical placement or visitation).

81. *Id.* § 48.415(5) (stating that the petitioner must prove by clear and convincing evidence that the parent has exhibited a pattern of abusive behavior that substantially threatens the health of the child and that: (1) the parent has caused death or injury to a child or children resulting in a felony conviction; or (2) the child has previously been removed from the parent's home pursuant to a CHIPS (children in need of protection and services) dispositional order after and adjudication that the child was in need of protection or services because of abuse or substantial risk of abuse).

82. *Id.* § 48.415(6) (stating that failure to assume parental responsibility can be established by proof that the parent, or person or persons who may be parents of the child has never had a "substantial parental relationship" with that child, namely "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child").

83. *Id.* § 48.415(7) (stating that incestuous parenthood is established if the petitioner can prove the parent's relationship either by blood or by adoption, to the child's other parent in a degree of kinship closer than second cousins).

84. *Id.* § 48.415(8) (noting that petitioner must prove that the person whose parental rights are sought to be terminated was convicted of first or second degree intentional homicide, first degree reckless homicide or solicitation to commit first degree intentional homicide, or a crime under federal law or the law of any other state that is comparable to that crime, and the victim of that crime was the child's parent).

85. *Id.* § 48.415(9) (stating that parenthood as a result of sexual assault is established when a petitioner proves, by conviction or other evidence at a fact finding hearing under Wisconsin statute section 48.424, that the person who might be the father of the child committed sexual assault on the mother of the child during the conceptive period). *See also* La Crosse County Dep't of Human Servs. v. Stacey A.M., No. 01-1723, 2001 WL 1046974 (Wis. Ct. App. Sept. 13, 2001) (holding the victim of the assault's rights may not be terminated under this section).

86. *Id.* § 48.415(9m) (stating that commission of a serious felony against any of the person's children may be established if the petitioner proves that the parent was convicted of committing a serious felony against one of his/her children. Serious felonies for purposes of this section include first or second degree intentional homicide, first degree reckless homicide, felony murder, felony battery, first or second degree sexual assault, first or second degree sexual assault of a child, intentional or reckless child abuse, sexual exploitation of a child incest with a child, soliciting a child for prostitution, or child neglect resulting in death).

of parental rights to another child.⁸⁷ Significantly, there is no ground based on incarceration.⁸⁸

If the court or jury find grounds exist to terminate a parent's rights, the court shall find the parent unfit.⁸⁹ In the second phase, the court decides what disposition serves the best interest of the child.⁹⁰ The court may terminate parental rights only after all alternatives have been explored and is determined that termination is in the best interest of the child.⁹¹

The court considers all of the following: (1) "the likelihood of the child's adoption after termination;"⁹² (2) "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;"⁹³ (3) "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;"⁹⁴ (4) "the wishes of the child;"⁹⁵ (5) "the duration of the separation of the parent from the child;"⁹⁶ (6) "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."⁹⁷ At this point, the court may either dismiss the petition "if it finds the evidence does not warrant the termination of parental rights"⁹⁸ or "enter an order terminating the parental rights of one or both parents."⁹⁹

In *Jodie W.*, Jodie stipulated to the grounds phase of the TPR proceedings and then a judge terminated her parental rights after the court found that she would not be able to meet the conditions necessary to have her son returned to her due to her incarceration.¹⁰⁰

87. *Id.* § 48.415(10) (stating that prior involuntary termination of parental rights to one child can be the basis for seeking termination of the parent's rights to another child, but only if the petition proves all of the following: (1) that the child who is subject to the petition has been adjudged to be in need of protection or services based on abandonment, abuse, or neglect and (2) that the court has ordered termination of the person's parental rights as to another child in the past year based on one of the grounds in Wisconsin Statute section 48.415).

88. Some states have chosen to include incarceration as a ground for TPRs, but so far the Wisconsin legislature has declined to do so.

89. WIS. STAT. § 48.424(4).

90. *Id.* § 48.242(3).

91. *A.B. v. P.B.*, 151 Wis. 2d 312, 322, 444 N.W.2d 415 (Wis. Ct. App. 1989).

92. WIS. STAT. § 48.426(3)(a).

93. *Id.* § 48.426(3)(b).

94. *Id.* § 48.426(3)(c).

95. *Id.* § 48.426(3)(d).

96. *Id.* § 48.426(3)(e).

97. *Id.* § 48.426(3)(f).

98. *Id.* § 48.427(2).

99. *Id.* § 48.427(3).

100. *In re Max G.W.*, 2006 WI 93, ¶ 10.

III. THE STATE COULD NOT TERMINATE JODIE'S PARENTAL RIGHTS BECAUSE ONE OF THE IMPOSED CONDITIONS FOR RETURN OF HER CHILD WAS IMPOSSIBLE FOR HER TO MEET

Max, Jodie's son, was born on July 10, 2000.¹⁰¹ He lived with his mother until July 2002 when she was convicted of operating a motor vehicle while intoxicated, fourth offense, and fleeing an officer.¹⁰² Jodie was sentenced to four years in prison.¹⁰³ She was released from prison on March 6, 2006.¹⁰⁴ Jodie's mother cared for Max at the beginning of Jodie's incarceration.¹⁰⁵ However, shortly after Jodie's imprisonment, her mother was no longer able to care for Max and contacted social services.¹⁰⁶ On September 11, 2002, Kenosha County filed a petition for protection and services and, on November 25, 2002, Max was found to be a child in need of protection or services.¹⁰⁷ He was placed with a foster family.¹⁰⁸

At the fact-finding hearing, the court established required conditions for Jodie to meet in order for Max to be returned, pursuant to Wisconsin's TPR procedure.¹⁰⁹ The conditions were

- (1) obtain, maintain and manage a suitable residence;
- (2) cooperate with the Division of Children and Family Services;
- (3) maintain regular contact with Max;
- (4) actively participate in services;
- (5) provide for the financial needs of Max;
- (6) participate in a counseling program specifically designed to address issues of domestic violence;
- and (7) successfully complete any conditions of probation.¹¹⁰

The Kenosha County Department of Human Services filed a petition to terminate Jodie's rights to Max on April 22, 2004.¹¹¹ The basis of their petition was that

- (1) the Department made a reasonable effort to provide the services ordered by the court;
- (2) Jodie failed to meet the conditions for the safe return of Max to her home, specifically noting that Jodie remained incarcerated and therefore had not obtained a suitable residence; and
- (3) there was a substantial likelihood that Jodie would not meet these court-ordered conditions for safe return within the

101. *Id.* ¶ 4.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* ¶ 5.

108. *Id.*.

109. *Id.*

110. *Id.* ¶ 7.

111. *Id.* ¶ 8.

next twelve months, specifically noting that Jodie remained incarcerated.¹¹²

Because Jodie could not present any evidence indicating that she may be released from incarceration within the next twelve months, she pled no contest to the grounds phase of the TPR proceedings.¹¹³

Though she intended to plead no contest only in the grounds phase, the form Jodie signed was for someone who was contesting neither the grounds nor the final disposition phase of the TPR proceedings.¹¹⁴ By doing so, Jodie waived her right to contest the disposition stage of the TPR and agreed that, if she could not meet the conditions of return, she would not contest the final disposition terminating her rights.¹¹⁵ Jodie modified the plea form, indicating that, "she disagreed that alternatives to termination of her parental rights were available and explicitly contesting disposition."¹¹⁶

The circuit court accepted Jodie's plea and determined that she was unable to meet the conditions of return established in the protection order and, therefore, the court found her unfit.¹¹⁷ Jodie's social worker and the district attorney testified that Jodie had tried to meet the conditions of return, but was unable to provide suitable housing for Max and would not be able to do so within the next twelve months due to her continued incarceration.¹¹⁸ Jodie's trial counsel attempted to raise the issue that suitable housing was an impossible condition of return due to Jodie's incarceration.¹¹⁹ The circuit court found that, because the parties had stipulated to the grounds of parental unfitness, Jodie was not allowed to make the argument that there were impossible conditions imposed by the protection order.¹²⁰

At the dispositional phase, the court found that it was in Max's best interest to terminate Jodie's rights.¹²¹ Furthermore, the court noted that while the conditions were impossible for Jodie to meet due to her incarceration, this was a consequence of her own voluntary actions.¹²²

On appeal, Jodie's attorney filed a no-merit report noting that since her plea was knowing and voluntary, there were no grounds for an appeal.¹²³ Jodie filed a response to the no-merit report contending that it was impossible for her to meet the conditions for return within twelve months because her prison

112. *Id.*

113. *Id.* ¶ 10.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* ¶ 11.

118. *Id.* ¶ 13.

119. *Id.*

120. *Id.* ¶ 14.

121. *Id.* ¶ 15.

122. *Id.*

123. *Id.* ¶ 17.

sentence exceeded twelve months.¹²⁴ The appellate court affirmed the circuit court's decision terminating Jodie's rights and she filed a pro se petition for review with the Wisconsin Supreme Court.¹²⁵ The Wisconsin Supreme Court granted certiorari and heard oral arguments for the case.¹²⁶ It reversed the circuit court decision terminating Jodie's parental rights.¹²⁷

The Wisconsin Supreme Court held that, since Jodie made comments and notations on her plea form indicating that she did not fully understand the ramifications of her no contest plea at the grounds phase of the TPR proceedings, she had not knowingly, intelligently, and voluntarily entered into the plea.¹²⁸ She, therefore, had not waived her right to challenge whether grounds existed to support a TPR.¹²⁹ After holding that Jodie's plea was inadequate, the court considered whether the "circuit court's application of Wisconsin Statute section 48.415(2) to Jodie violated her substantive due process rights."¹³⁰

In *Jodie W.*, the Wisconsin Supreme Court relied on long-standing national law to determine how to protect parental due process rights during TPRs. In 1972, in *Stanley v. Illinois*, the United States Supreme Court held that the termination of a parent's rights must be based on an individualized determination of parental unfitness.¹³¹ The Court reasoned that this individualized interpretation is essential to protecting a parent's due process rights because the right of a parent to retain custody of their children is fundamental.¹³²

Accordingly, the Wisconsin Supreme Court found that "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit."¹³³ A petition based on a continuing need of protection and services¹³⁴ "requires the court to evaluate the particular facts and circumstances relevant to the parent and child involved in the proceeding."¹³⁵ The court held that a parent's incarceration is relevant to TPR proceedings, but relying on incarceration alone is not sufficient and does

124. *Id.*

125. Mary Zahn, *Ruling Restores Parental Rights: State High Court's Decision May Affect Other Jailed Parents*, MILWAUKEE J. SENTINEL, July 25, 2006, at 1A (stating that this "petition" was in the form of a hand written letter to the court, asking them to reconsider the lower courts' ruling and reiterating how much she loved her son); *In re Max G.W.*, 2006 WI 93, ¶ 18.

126. *In re Max G.W.*, 2006 WI 93, ¶ 18.

127. *Id.* ¶ 56.

128. *Id.* ¶¶ 35-38.

129. *Id.* ¶ 38.

130. *Id.* ¶ 39.

131. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

132. *See id.* at 650-52.

133. *In re Max G.W.*, 2006 WI 93, ¶ 49.

134. Defined in WIS. STAT. § 48.415(2).

135. *In re Max G.W.*, 2006 WI 93, ¶ 50.

not constitute the individualized determination of parental unfitness required by *Stanley*.¹³⁶ The court continued, holding that:

...in cases where a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent's incarceration, Wis. Stat. § 48.415(2) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child. A contrary interpretation would render the statute unconstitutional.¹³⁷

The circuit court had found Jodie to be an unfit parent without establishing conditions of return specifically tailored to her circumstances.¹³⁸

The Wisconsin Supreme Court held that, when considering TPRs of incarcerated parents, courts must consider other factors beyond incarceration, including the parent's relationship with the child before and during the parent's incarceration, the nature of the crime committed by the parent, the length of the parent's sentence and anticipated time in prison, the parent's cooperation with the county's child welfare agency as well as the Department of Corrections, and what result would serve the best interest of the child.¹³⁹ In Jodie's particular case, the court noted that she was Max's primary caregiver prior to her incarceration and that her incarceration was for a non-violent offense with a relatively short sentence of four years.¹⁴⁰ Furthermore, she had made attempts to meet many of the requirements for Max's return despite her incarceration.¹⁴¹ Since the circuit court did not make an individualized determination of Jodie's unfitness, as required by *Stanley v. Illinois*, the order was not narrowly tailored to meet the State's compelling interest of protecting Max from an unfit parent, and therefore violated Jodie's substantive due process rights.¹⁴²

This holding has implications beyond restoring Jodie's parental rights. It creates new law and challenges Wisconsin's legal system to sort out the specific details of how the holding will actually affect TPRs when the parent is incarcerated.

IV. THE IMPACT OF *JODIE W.*

There are two competing theories of how *Jodie W.* will affect TPR cases in Wisconsin. One view is that this is a very narrow decision involving unique facts, easily distinguishable from future cases.¹⁴³ The other interpretation is that

136. *Id.*

137. *Id.* ¶ 51.

138. *Id.* ¶ 52.

139. *Id.* ¶ 50.

140. *Id.* ¶ 53.

141. *Id.* ¶ 54.

142. *Id.* ¶ 56.

143. This has been the case so far. When parents' defense counsel has attempted to use a *Jodie W.* analysis to fight against a TPR, the Wisconsin Court of Appeals has, for the most

this case will signify a fundamental shift in the way circuit courts treat TPRs of incarcerated parents, which may then expand the holding to include other parental conditions (like mental incapacity) or TPR grounds.¹⁴⁴

A. Reconciling Jodie W. with Wisconsin's Laws and Policies

Traditionally, Wisconsin courts have concluded that although an incarcerated parent may not have control over meeting the required conditions of return while in prison, the incarceration resulted from the parent's voluntary actions, so those circumstances cannot be considered out of the parent's control.¹⁴⁵ The court reiterated this position in other contexts, consistently asserting that "there is some element of voluntariness involved with incarceration."¹⁴⁶ Attorney John Talis, Assistant Corporation Counsel for Dane County, highlighted the voluntariness of parental incarceration in an *amicus* brief supporting the termination of Jodie's parental rights.¹⁴⁷ Talis stated "A critical factor, then, is that Jodie W. had a child she knew needed to be cared for on a full-time basis and nonetheless chose to engage in criminal activity. Incarceration was a foreseeable result."¹⁴⁸

part, distinguished the cases at bar and asserted that *Jodie W.*'s holding does not apply in that instance. See e.g., *In re Rachael B.*, No. 2006AP2819, 2007 WL 1468808, ¶¶ 5, 9 (Wis. Ct. App. May 22, 2007); *In re Paige C.S.*, No. 2006AP1965, 2007 WL 755003, ¶¶ 24, 26, 34 (Wis. Ct. App. Mar. 14, 2007); *In re Geneva C.*, No. 2006AP1866, 2007 WL 1147367, ¶¶ 4-6 (Wis. Ct. App. Feb. 20, 2007); *In re Crystal A.L.*, Nos. 2006AP2525, 2006AP2526, 2007 WL 430053, ¶ 14 (Wis. Ct. App. Feb. 8, 2007); *In re Rodney H.*, No. 2006AP2120, 2006 WL 3359692, ¶ 22 (Wis. Ct. App. Nov. 21, 2006); *In re Dyllan M.S.*, No. 2006AP2010, 2006 WL 3025722, ¶¶ 22, 29 (Wis. Ct. App. Oct. 26, 2006).

144. Again, this is a theory based on discussions with individuals familiar with TPRs. Currently, there are no decisions that have been released expanding the scope of the *Jodie W.* decision. The Wisconsin Supreme Court has heard one case already questioning whether a *Jodie W.* analysis should be applied to another TPR ground. Without any clarifying decisions from the Wisconsin Supreme Court, it is difficult to see how this concept will evolve.

145. See, e.g., *In re Baby Girl K.*, 113 Wis. 2d 429, 446-48, 335 N.W.2d 846, 855-56 (Wis. 1983); *In re SueAnn A.M.*, 176 Wis. 2d 673, 685-87, 500 N.W.2d 649, 655-56 (Wis. 1993). In both cases the parents, against whom termination is sought, argued that they were unable to meet a specific condition of return. However, the reason they could not meet that condition was due to their continued incarceration and the court concluded that this justification was not sufficiently compelling to justify reversal of the TPR decision.

146. *In re Marriage of Rottscheit v. Dumler*, 2003 WI 62, ¶ 38, 262 Wis.2d 292, 664 N.W.2d 525 (stating that incarceration did not preclude a reduction in child support, though it was one of the factors the court could consider); See also *Modrow v. Modrow*, 2001 WI App. 200, ¶ 18, 247 Wis.2d 889, 634 N.W. 2d 852; *Parker v. Parker*, 152 Wis.2d 1, 5-6, 446 N.W.2d 64 (Ct. App. 1989).

147. Brief for Dane County Department of Human Services as Amici Curiae Supporting Respondent, *In re the Termination of Parental Rights to Max G.W.* 2006 WI 93, ¶ 55, 293 Wis. 2d 530, 716 N.W.2d 845.

148. Brief for Dane County Department of Human Services as Amici Curiae Supporting Respondent, *In re Max G.W.* 2006 WI 93, ¶ 55, 293 Wis. 2d 530, 716 N.W.2d 845.

Reversing Jodie's TPR signifies a shift in the Wisconsin Supreme Court and establishes a new position in Wisconsin that incarceration is not completely voluntary. In addition, incarceration potentially creates impossible conditions of return. Terminating a parent's rights based on those impossible conditions may violate that parent's due process rights. For example, requiring a parent to meet a condition, such as maintaining a suitable home may be impossible if the parent is incarcerated. Under the framework of *Jodie W.*, courts now have to view a termination, based solely on a condition that is impossible for a parent to meet, as unconstitutional and a violation of the parent's due process rights.

The practical impact is that social service agencies are required to abide by the fundamental holding in *Stanley v. Illinois* and look at each parent to set specific conditions tailored to include those that are possible for a parent to meet. Since Wisconsin policy dictates that the goal of any court or agency is to keep families together unless it is clearly in the best interest of the child not to do so, TPRs should not become routine practices of district attorneys and similarly situated prosecutors. Each individual case should be treated as unique. Those filing TPRs should not look at timelines alone when making determinations if a parent should retain his or her rights. Instead, they should examine each case individually and determine if, in that specific instance, a TPR is appropriate.

Jodie W. creates tension between federal and state legislation - specifically ASFA, codified in Wisconsin by Wisconsin Statute section 48.417.¹⁴⁹ The key area of potential conflict is the time limits established in ASFA¹⁵⁰ and Wisconsin Statute section 48.417(1). Both of these statutes require an agency, district attorney, corporation counsel, or other appropriate official to file to terminate parental rights if a child has been placed outside of the home for fifteen of the preceding twenty-two months.¹⁵¹ However, there are three exceptions to the mandated TPR petition filing: (1) the child is being cared for by a relative;¹⁵² (2) the state has a documented compelling reason why filing the TPR petition is not in the best interest of the child;¹⁵³ and (3) the agency or group required to make reasonable efforts to help the parent meet the conditions of return has not made those efforts.¹⁵⁴ The overall goals of *Jodie W.* and the legislation are not inconsistent. While the requirement to file a TPR may be strictly regulated when children have been out of the home for fifteen of the most recent twenty-two months, the second exception provided in the law creates the opportunity to bypass the mandatory TPR requirement in any instance where it is in the child's best interest to maintain the relationship with his or her parent as may be the case with an incarcerated mother. This exception could be used by courts to keep families together.

149. 42 U.S.C. §§ 620-79 (2006).

150. *Id.* § 675(5)(E).

151. *Id.*; WIS. STAT. § 48.417(1)(a).

152. 42 U.S.C. § 675(5)(E)(i) (2006); WIS. STAT. § 48.417(2)(a).

153. 42 U.S.C. § 675(5)(E)(ii) (2006); WIS. STAT. § 48.417(2)(b).

154. 42 U.S.C. § 675(5)(E)(iii)(2006); WIS. STAT. § 48.417(2)(c).

B. Terminating Parental Rights is Not Always in the Best Interest of the Child

The paramount goal of the Wisconsin Children's Code is to protect children and preserve family unity.¹⁵⁵ The Code also states that "instability and impermanence in family relationships is contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family."¹⁵⁶

Jodie W. ultimately holds that, while in certain cases it may take longer to reunite a family than ASFA mandates, the underlying goal should still be to reunite families, or at a minimum, to give parents realistic opportunities to meet the conditions necessary to get their children back. The best interest of the child is the common policy that runs through the decision, the Wisconsin Children's Code, and federal legislation like ASFA.¹⁵⁷ Ultimately, requiring specific determinations of parental unfitness based on conditions that are possible for a parent to meet will better serve children's best interest.

There are distinct reasons why it is, and should continue to be, difficult to terminate parental rights.

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.¹⁵⁸

In addition, there have been studies that examine the effect on children of severing ties with a biological parent, especially one with whom the child once had a relationship.¹⁵⁹ In general these have found that maintenance of parental contact, even when the child is in foster care, has a positive influence on the child.¹⁶⁰ If children do not have contact with their parent, they may have distorted views of this relationship. For example, the child may fantasize about family reunification, which impedes the child from forming bonds in his or her current relationship or exaggerates the faults of the non-present parent.¹⁶¹

155. WIS. STAT. § 48.01(1)(a).

156. *Id.*

157. *See generally* WIS. STAT. § 48.01(1).

158. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

159. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 463 (1983).

160. *Id.*

161. *Id.* at 465-66 ("Without parental contact, the child will tend to base his impressions of the lost parent solely on fantasy; some children may therefore idealize their absent parents and dream about a future reunion. This can impede the child's ability to form realistic current relationships. Conversely, the child may exaggerate the parent's faults. This can hurt the child's own self-esteem, since children tend to identify with the image they hold of their parents").

The mandatory TPR provision of ASFA regarding a child who has been out of his or her parent's care for fifteen of the most recent twenty-two months may not provide enough time to determine what is in the best interest of that child. As Justice Blackmun noted in his dissent in *Lassiter v. Department of Social Services*,¹⁶² “[a] termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even know about, any important decision affecting the child's religious, educational, emotional, or physical development.”¹⁶³ With all that is at stake when parental rights are terminated, courts should have as much time as needed to determine what is best for the child, even if it takes more than twenty-two months to make that determination.

C. Wisconsin Courts have Already Begun to Hear and Decide Cases using a Jodie W. Analysis

Since the release of the *Jodie W.* decision, several Wisconsin Courts of Appeal have cited to *Jodie W.* in their TPR decisions.¹⁶⁴ Currently, none of these decisions have been chosen for publication and, therefore, will not have precedential implications for future decisions. However, these cases demonstrate the way that *Jodie W.* is being viewed by Wisconsin appellate courts.

The cases that have cited to *Jodie W.* have used different portions of the Wisconsin Supreme Court's opinion. In most of the cases, parents have, in one way or another, attempted to expand the *Jodie W.* holding to apply to their specific case. Thus far, the Wisconsin Courts of Appeal have declined to apply *Jodie W.* to grounds for TPR other than those based on children in continuing need of protection and services. They have not applied it to other conditions that would be impossible for parents to meet. In general, in cases citing *Jodie W.*, courts have chosen to view the *Jodie W.* holding as requiring a specific

162. In *Lassiter v. Department of Social Services*, a mother's parental rights were terminated after she was convicted of second-degree murder and sentenced to twenty-five to forty years of imprisonment. During the TPR proceedings, she was not appointed an attorney and could not afford one for herself. The Supreme Court of the United States determined there was no constitutional right to counsel for TPR proceedings. The Court did acknowledge that the right to appointed counsel is a balancing act between the parent's interest, the state's interest, and the risk of error. The risk of error is at its height when the parent's interests are strongest and the State's interests are relatively low. This is a circumstance that could overcome the presumption against appointed counsel in TPR proceedings. In addition, the Court recognized that it is good public policy for states to statutorily provide counsel for indigent parents. 452 U.S. 18 (1981).

163. *Id.* at 39.

164. See *In re Marquette S.*, 2007 WI 77, ¶¶ 3, 5, 6, 734 N.W.2d 81, 84, 85; *In re Rachael B.*, No. 2006AP2819, 2007 WL 1468808 ¶¶ 5, 9 (Wis. Ct. App. May 22, 2007); *In re Rodney H. Jr.*, No. 2006AP2120, 2006 WL 3359692 ¶ 22 (Wis. Ct. App. Nov. 21, 2006).

determination for each parent's circumstances. In this limited sample,¹⁶⁵ it does not appear that courts are widely applying the *Jodie W.* holding.¹⁶⁶

On June 22, 2007, the Wisconsin Supreme Court released another decision regarding parental due process and the termination of parental rights.¹⁶⁷ This case involved a termination of parental rights based on a father's failure to assume parental responsibility under Wisconsin Statute section 48.415(6).¹⁶⁸ The court held that the parent in this case, a father, was denied his due process rights because he was not allowed to present specific evidence of his efforts to assume responsibility after he received notice that his rights were going to be terminated.¹⁶⁹ This case, coupled with *Jodie W.*, demonstrates a recent trend by the Wisconsin Supreme Court to focus on parental due process rights in TPR cases.¹⁷⁰

V. IMPACT OF THIS DECISION ON INCARCERATED MOTHERS AND THEIR CHILDREN

A. *Imprisoned Mothers in the United States*

For a mother, the collateral consequences of criminal conviction can be extensive, including losing her job, losing state assistance benefits, and potentially even losing her children. Women comprised 7.0% of inmates in the nation's prisons in 2004, representing an increase from 6.1% in 1995.¹⁷¹ Wisconsin has seen its female prison population jump from 502 in 1995 to 1352 in 2005.¹⁷² Women now represent 10.4% of the total prison population in Wisconsin.¹⁷³ As the number of women in the United States penal system

165. There are a very few cases that have cited to *Jodie W.* Part of the reason might be because it is unlikely that parents would appeal circuit court decisions that allowed them to retain their parental rights. It is also possible that suits would not be brought to terminate a parent's rights if prosecutors believed that they would not prevail in light of the *Jodie W.* decision.

166. See generally, *In re Rachael B.*, 2007 WL 1468808, at ¶ 9; *In re Paige C.S.*, No. 2006AP1965, 2007 WL 755003, ¶¶ 23-4 (Wis. Ct. App. Mar. 14, 2007); *In re Geneva C.*, Nos. 2006AP1866, 2006AP1867, 2007 WL 114367, *1 (Wis. Ct. App. Feb. 20, 2007); *In re Crystal A.L.*, Nos. 2006AP2525, 2006AP2526, 2007 WL 430053, *4 (Wis. Ct. App. Feb. 8, 2007); *In re Rodney H., Jr.*, 2006 WL 3359692, at *5; *In re Dakota J.*, Nos. 2006AP1657, 2006AP1658, 2006 WL 3359598, ¶¶ 5-6, 8 (Wis. Ct. App. Nov. 21, 2006); *In re Dyllan M.S.*, No. 2006AP2010, 2006 WL 3025722, ¶ 22, 29 (Wis. Ct. App. Oct. 26, 2006).

167. *In re Marquette S.*, 2007 WI 77, 734 N.W.2d 81 (2007).

168. *Id.* ¶ 3.

169. *Id.* ¶ 109.

170. The *Bobby G.* decision is not directly on point because it did not involve an incarcerated mother nor rely on or even cite to *Jodie W.*

171. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 215092, PRISONERS IN 2005 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

172. HARRISON, *supra* note 171, at 5 table 6.

173. *Id.*

continues to increase,¹⁷⁴ maternal incarceration becomes a bigger problem for society and affects more children.

A majority of state and federal prisoners reported having a child under eighteen.¹⁷⁵ More than 721,500 parents of an estimated 1,498,000 minor children, representing more than 2.1% of the nation's total minor child population, were imprisoned in the United States in 1999.¹⁷⁶ This was an increase of more than 500,000 children since 1991.¹⁷⁷

Many incarcerated parents have relationships with their children before their incarceration. Forty-six percent of those parents reported living with their children prior to their incarceration.¹⁷⁸ This number is greater for incarcerated mothers. "Of that general population, 65.3 percent (or 26,600 inmates) of females in state prisons and 58.8 percent (or 2,900 inmates) of females in federal prison reported having children under 18."¹⁷⁹

Mothers in both State (58%) and Federal (73%) prisons were more likely than fathers (36% and 47% respectively) to report living with their children prior to arrest. Mothers (46% in State, 51% in Federal) were also more likely than fathers (15% and 14% respectively) to have been the only parent living with the children in the month before the arrest.¹⁸⁰

174. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (indicating that between 1990 and 1997 female prison population increased 106%. This may be even more pronounced in Wisconsin. From December 31, 1991 to December 31, 1999, according to the Bureau of Justice Statistics, the female felon population of Wisconsin rose from 265 inmates to 757 inmates representing an increase of 166%); COLIECE RICE & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SENTENCED FEMALE PRISONERS ADMITTED STATE OR FEDERAL JURISDICTION (Aug. 2, 2000), *available at* <http://www.ojp.usdoj.gov/bjs/dtdata.htm#ncrp>.

175. *Id.* at 1.

176. *Id.* While this data is several years old, it is the most current data available that analyzes prison populations on this level. In addition, this data is specifically relevant to this analysis because it deals with parents in state and federal prisons. This means that these parents are serving sentences of more than one year. Since TPRs in Wisconsin require that parents must not be able to meet the conditions of return in the next nine months, parents serving sentences of lesser time are not generally subject to TPR proceedings based on their children being in continuing need of protection and services pursuant to Wisconsin Statute section 48.415(2). The Wisconsin Department of Corrections has not tracked these statistics, so this article relies on the most accurate national statistics available. However, nothing indicates that trends in Wisconsin deviate substantially from the national data.

177. *Id.*

178. *Id.*

179. *Id.* at 2.

180. *Id.* at 4.

Women are more likely to have committed non-violent, as compared to violent, crimes.¹⁸¹ In state prisons, parents were 44% less likely than non-parents to be incarcerated for violent offenses.¹⁸² More specifically, only 26% of incarcerated mothers were imprisoned for violent offenses.¹⁸³ Overwhelmingly, mothers were imprisoned for property or drug offenses (28.3% and 35.1% respectively).¹⁸⁴ This means that the majority of women are serving moderate sentences. “Forty-eight percent of the mothers in State prison reported sentences of less than five years . . . Mothers in Federal prison (48%) were also about twice as likely as fathers (25%) to report sentences of less than 5 years.”¹⁸⁵

Imprisonment makes it difficult for mothers to maintain contact with their children. “[T]he strategic plans of social services agencies and corrections departments have seldom included services and activities that assist prisoners in carrying out family roles and responsibilities.”¹⁸⁶ One barrier is that prisons are often located in rural areas far from where the women’s children live. “These rural sites are far from the urban centers from which most prisoners come and in which most of the families of prisoners continue to live. The practical difficulties of maintaining regular contact between parents and children separated by several hundred miles become insurmountable for many families.”¹⁸⁷ Additionally, visits are often short and mothers have to share the visitation space with other inmates and their visitors.¹⁸⁸ “Mothers reported that children were most satisfied with visits when physical contact was allowed and visits were longer than ten minutes. When there was no contact and visits were brief, children exhibited their distress by crying and resisting leaving.”¹⁸⁹

181. LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 175688, WOMEN OFFENDERS 1 (Dec. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>.

182. MUMOLA, *supra* note 174, at 5.

183. *Id.* at 6 (stating violent offenses include, among others, homicide, sexual assault, robbery and assault).

184. *Id.* at 6 table 7 (noting property offenses include burglary, larceny, motor vehicle theft, fraud, stolen property and other. Drug offenses include possession, trafficking, and other).

185. *Id.* at 6 table 8.

186. Creasia Finney Hairston, *Prisoners and Their Families: Parenting Issues during Incarceration*, in PRISONERS ONCE REMOVED 259 (Jeremy Travis & Michelle Waul eds., Urban Institute Press 2003).

187. Phillip M. Gentry, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1680 (2003). For example, Taycheedah Correctional Institution (where most of Wisconsin’s imprisoned women are located) is more than 70 miles from downtown Milwaukee.

188. ANN M. STANTON, WHEN MOTHERS GO TO JAIL, 65 (Lexington Books 1980).

189. *Id.*

B. Imprisoned Women in Wisconsin Will Benefit from Jodie W.

In *Jodie W.* the Wisconsin Supreme Court stated

[o]ur conclusions do not render a parent's incarceration irrelevant. We simply conclude that a parent's incarceration is not itself a sufficient basis to terminate parental rights. Other factors must also be considered, such as the parent's relationship with the child and any other child both prior to and while the parent is incarcerated, the nature of the crime committed by the parent, the length and type of sentence imposed, the parent's level of cooperation with the responsible agency and the Department of Corrections, and the best interests of the child.¹⁹⁰

The statistics regarding incarcerated parents suggest that a higher percentage of incarcerated mothers than fathers will benefit from courts considering all of these factors when determining TPRs.

Prior to *Jodie W.*, incarcerated mothers were at the mercy of their sentencing court and ASFA to determine if and when their parental rights were going to be terminated, as most of their sentences were for longer than fifteen months.¹⁹¹ Since ASFA's adoption, reported cases concerning termination of parental rights have increased about 250%.¹⁹² Female inmates are affected disproportionately because there is a greater probability that they were the primary caregiver before incarceration and so their children are more likely to be in foster care.¹⁹³

Based on this new decision, judges and county health and family services departments will have to make personalized determinations of conditions of return for mothers, and, hopefully, they will properly take into account all of the factors outlined in the decision. Because the majority of imprisoned mothers were living with their children before their incarceration, committed non-violent offenses, and are not serving prohibitively long sentences in terms of ASFA's strict timelines,¹⁹⁴ judges should not base the grounds to terminate parental rights solely on incarceration or, solely, on a condition that a parent may not meet due to incarceration.

190. *In re Max G. W.*, 2006 WI 93, ¶ 50.

191. Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 699-700 (2006).

192. Genty, *supra* note 187, at 1678.

193. Raeder, *supra* note 191, at 700-01.

194. *See generally* GREENFELD & SNELL, *supra* note 181, at 1; MUMOLA, *supra* note 174, at 1, 6.

C. In General, Allowing Parents to Maintain their Parental Rights despite Imprisonment is Better for Children and Society

Allowing parents to maintain their parental rights, despite periods of incarceration, benefits their children. According to the Women in Prison Project of the Correctional Association of New York “[r]esearch on children in foster care reveals that family visits are vital to maintaining ties, bolstering children’s well-being and healthy development, reducing the trauma of separation, and assisting families after a parent’s release.”¹⁹⁵ Additionally maintenance of family ties between parents and children benefit the prisons and the community as a whole by motivating prisoners to participate in programs and behave well while in prison, while reducing the rate of recidivism.¹⁹⁶ These connections can make a difference when an inmate is released back into the community. “Families provide an important anchor to life in the community while inmates are in prison and offer a source of stability, support and encouragement during the difficult transition from prison to home. These connections can in fact mean the difference between success and recidivism.”¹⁹⁷

Programs in Wisconsin, like St. Rose Youth and Family Center in Milwaukee, help facilitate visits and communication between incarcerated parents and their children. This continued contact is less traumatic than totally severing all ties between the parent and child. Rather than spending resources on TPRs, the State should be working to expand these programs and give children access to their parents, even while incarcerated.

These bonds and benefits do not mean that parents should automatically be reunited with their children after their release from prison. There are concerns about the care and responsibility for children during parental incarceration. A parent’s incarceration presents obvious obstacles to providing for the needs of the child, including providing for the child’s physical and financial needs as well as maintaining the emotional bonds between parent and child.¹⁹⁸ In order to maximize the connection and the benefits of reunification, additional resources would have to be used during the parent’s prison time to ensure that the child’s needs are met. However, it is likely that in the long-run, getting mothers and children back together will benefit the parent, child, and society as a whole.

195. PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CTR. FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS 6 (2006), available at http://www.brennancenter.org/dynamic/subpages/download_file_37203.pdf (citing WOMEN IN PRISON PROJECT, CORR. ASS’N OF N.Y., WHEN “FREE” MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 19 (2006), available at http://www.correctionalassociation.org/WIPP/publications/Incarcerated_Mothers_report.pdf).

196. ALLARD & LU, *supra* note 195, at 19.

197. JEREMY TRAVIS & MICHELLE WAUL, PRISONERS ONCE REMOVED 10 (The Urban Institute Press) (2003).

198. ALLARD & LU, *supra* note 195, at 17.

While *Jodie W.* does not provide all the answers to the problems of incarcerated parents, it gives mothers in Wisconsin hope that their parental rights will not be terminated based solely on their incarceration. This is especially true if a mother had a relationship with the child prior to incarceration, is imprisoned for a short amount of time for a non-violent offense, and takes advantage of services provided by the Wisconsin Department of Corrections. This combination of factors may allow these mothers to maintain contact with their child during their time in prison and help the mothers make a strong case for maintaining their parental rights.

VI. CONCLUSION

The issue of TPRs for incarcerated parents is far from concluded. *Jodie W.* is just the first in what will likely be a long line of cases as Wisconsin courts attempt to reconcile federal and state policies with what truly is in the best interest of children. However, as the law currently stands, incarcerated mothers are in a position to benefit from the Wisconsin Supreme Court's holding in *Jodie W.*

ASFA and the corresponding state law, Wisconsin Statute section 48.417, require TPR petitions to be filed if a child has been out of home care for fifteen of the twenty-two most recent months unless, among other things, the agency has some documentation that the best interest of the child is served by maintaining the parental rights.¹⁹⁹ Based on this decision, if the entire basis for the TPR petition rests on the incarceration of the parent, thus making conditions of return impossible to meet, then the court's application of the law is unconstitutional. Courts must consider many different factors before granting a TPR.

More than any other group, incarcerated mothers stand to gain the most from the requirement of an individualized determination of parental unfitness. Like *Jodie W.*, many incarcerated women are mothers who had sole or joint custody of their children before their incarceration and have developed a significant bond with the child.²⁰⁰ Furthermore, since many women are incarcerated for non-violent crimes, such as drug or property offenses, and are serving medium-length sentences, they are able to meet many of the factors that *Jodie W.* urges circuit courts to consider in TPRs. *Jodie W.* only enforces the purpose of the Wisconsin Children's Code, which is to serve the best interest of the child by keeping families intact.

199. 42 U.S.C. § 675(5)(E)(ii) (2006); WIS. STAT. § 48.417(2)(b).

200. MUMOLA, *supra* note 174, at 4.