Appeal No. 2005AP77 **Cir. Ct. No. 2004PA59**

WISCONSIN COURT OF APPEALS
DISTRICT IV

IN RE THE PATERNITY OF C.A.V.M.:

SHANNON E. T.,

PETITIONER-APPELLANT,

BYE AND GOFF & ROHDE, LTD.,

APPELLANTS,

V.

ALICIA M. V.M. AN INDIVIDUAL, BY HER GUARDIANS AND PATRICIA N. AND BRIAN V.M.,

RESPONDENTS-RESPONDENTS.

FILED

JUL 14, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

This appeal raises an issue of first impression regarding the ability of a putative father to pursue a paternity action following a stillbirth. The putative father initiated this paternity action after a ruling that he could not pursue a wrongful death action for the stillbirth unless he first obtained a determination of paternity. The central issue is whether the term "birth of a child" in the paternity

statute, WIS. STAT. § 767.45 (2003-04),[1] requires a live birth. Because this issue of statutory interpretation is one of statewide importance, we certify this appeal to the Wisconsin Supreme Court.

BACKGROUND

Alicia M.V.M. was twenty-seven weeks pregnant when she was involved in an automobile accident resulting in the "still birth" of Camden V.M. Shannon E.T. commenced a wrongful death action in Wood County, alleging that he was Camden's father, that Camden had been a viable fetus, and that Camden had been killed due to the negligence of Alicia and/or the other driver. The Wood County Circuit Court ruled that Shannon could not proceed with his wrongful death action unless he first obtained a paternity determination, and it stayed that case. Shannon then filed this paternity action in Monroe County. The Monroe County Circuit Court dismissed the action for failure to state a claim, reasoning that the paternity statute only applies to a child who was born alive. The court also disqualified the law firm of Bye, Golf & Rhode, Ltd. from further representation of Shannon in the paternity suit because the firm had previously been retained on Alicia's behalf to determine whether she had a personal injury claim arising from the accident.

DISCUSSION

As a threshold matter, Bye, Golf & Rhode appeals the disqualification ruling. That was a discretionary determination, however, that we

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

believe can be resolved according to existing precedent, either by the Supreme Court or this court on remand. The issue we believe warrants certification is whether the circuit court properly dismissed Shannon's paternity action for failure to state a claim upon which relief may be granted.

Wisconsin's paternity statute, WIS. STAT. § 767.45, provides in relevant part:

> (1) The following persons may bring an action or motion, including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41(1):
>
> ….
>
> (d) A man alleged or alleging himself to be the father of the child.
>
> ….
>
> (3) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except that service of process, service and filing of pleadings, the first appearance and the taking of depositions to preserve testimony may be done before the birth of the child.

The issue, then, is whether the term "birth of the child" in the paternity statute applies to a stillborn infant or requires a live birth. We believe the "birth of the child" language in the paternity statute is ambiguous because the conflicting arguments offered by the parties as to its proper interpretation are both reasonable.

Alicia contends, and the trial court held, that the paternity statute requires a live birth under reasoning analogous to that employed in ***State ex rel. Angela M.W. v. Kruzicki***, 209 Wis. 2d 112, 561 N.W.2d 729 (1997). In ***Angela***

M.W., the court held that the term "child" did not include a viable fetus for the purpose of a CHIPS[2] proceeding under WIS. STAT. ch. 48, in large part because the provisions of the children's code regarding taking a child into custody, providing parental notification, and releasing a child from custody would be rendered absurd by such a construction. ***Id.*** at 127-28. Alicia argues that statutory provisions requiring a paternity order to address child custody, placement, and dependency for tax purposes would similarly be rendered absurd as applied to a stillborn infant. *See* WIS. STAT. §§ 767.51(3)(b)-(d).

Shannon counters that a court could address custody, placement, and tax issues in a paternity order by simply explaining that those provisions are inapplicable. He claims that is what the court would have to do anyway if the child had been born alive but died shortly thereafter, citing ***Jerdee v. State***, 36 Wis. 170, 171 (1874), for the proposition that a paternity action may be commenced after the death of a child in order to determine past maintenance and birthing expenses due to the mother.[3] Shannon further argues that it would be absurd to prevent a paternity finding for a stillborn child, when the wrongful death statute permits recovery for the wrongful death of a viable fetus who is subsequently stillborn. *See* ***Kwaterski v. State Farm Mut. Auto. Ins. Co.***, 34 Wis. 2d 14, 148 N.W.2d 107 (1967); WIS. STAT. § 895.03.

[2] CHIPS is the acronym for the phrase child alleged to be in need of protection or services as referred to in WIS. STAT. ch. 48 of the Children's Code.

[3] Shannon also claims that WIS. STAT. § 895.01(a) explicitly permits a paternity action to survive death. However, that statute is referring to the death of the plaintiff, not the subject child, and has no relevance here.

It is unclear what effect, if any, a putative father's alleged need for a paternity determination should have on the interpretation of the paternity statute. As a practical concern, we note that the Wood County Circuit Court's determination that Shannon needed a formal paternity determination in order to proceed with his wrongful death action has not yet been subjected to appellate review.[4] If it were to be subsequently determined on appeal that a putative father could establish paternity over a stillborn child as an element of a wrongful death suit, Shannon might have no need for a paternity determination under WIS. STAT. ch. 767. Assuming for the sake of argument that a putative father does in fact need a formal paternity determination in order to proceed with a wrongful death action, it is also unclear how that fact should figure into the analysis of the paternity statute. Should it be part of the intrinsic context in which the statute is placed, used to determine whether the language of the statute is ambiguous? Or should it be treated as part of the examination of extrinsic sources used to determine legislative intent only if the language of the statute is otherwise determined to be ambiguous?

Finally, with regard to legislative intent, it may well be that the legislature simply never contemplated a situation such as this. Defining the term "birth of a child" broadly to include stillborn infants could go well beyond the financial and custodial issues the legislature likely had in mind when enacting the paternity statute and even open the door to paternity actions following miscarriages. On the other hand, defining the term "birth of a child" to mean a child who lives outside of the mother's womb for some length of time could result

[4] Shannon states in his brief that the Wood County Circuit Court stayed the wrongful death action to allow Shannon to file this paternity action.

in married putative fathers who enjoy a presumption of paternity being allowed to sue for wrongful death following accidents that result in the stillbirth of a infant while unmarried putative fathers could not. In sum, due to the policy concerns implicated by this appeal, as well as the meritorious arguments raised on both sides, we believe the Supreme Court is in the best position to decide the case.