Appeal No. 2009AP2973 **Cir. Ct. No. 2009TP6**

WISCONSIN COURT OF APPEALS
DISTRICT IV

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

TAMMY W-G.,

PETITIONER-RESPONDENT,

V.

JACOB T.,

RESPONDENT-APPELLANT.

FILED

APR 22, 2010

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, P.J., Vergeront and Lundsten, JJ.

This case concerns the proper interpretation of statutes governing the termination of parental rights. WISCONSIN STAT. § 48.415 (2007-08)[1] sets out grounds for terminating parental rights. The statute is seemingly structured such that any one of these grounds provides a statutory basis for terminating parental rights. At issue here is subsection (6) of § 48.415, addressing whether a parent has established a "substantial parental relationship" with the child.

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

We certify this case because we believe that ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, prevents us from interpreting WIS. STAT. § 48.415(6) in a manner that is consistent both with the language of the statute and constitutional protections accorded parental rights. As explained below, we believe that ***Quinsanna D.*** misinterprets § 48.415(6) as a stand-alone test for unfitness, rather than as a threshold question addressing whether a person has a constitutionally protected parental right requiring a finding of unfitness before parental rights may be terminated.

The use of WIS. STAT. § 48.415(6) as a ground for termination of parental rights where there has, at least arguably, been a substantial parental relationship early in the child's life is a recurring issue, and we have pending at least two appeals that present the issue. Accordingly, we believe it is appropriate for certification.

BACKGROUND

Tammy and Jacob lived together throughout Tammy's pregnancy and for several months after Gwenevere's birth in January 2005. According to Tammy, Jacob attended most of her medical appointments during the pregnancy and was present at Gwenevere's birth. After Gwenevere's birth, Tammy described Jacob as a "stay at home dad" who provided primary care to Gwenevere for approximately four months, both before and after Tammy returned to work. Jacob gave similar testimony concerning his role in caring for Gwenevere for the first four months of her life. In May 2005, however, Tammy separated from Jacob and took Gwenevere with her. Jacob had very limited contact with Gwenevere after the separation, consisting of a few phone calls and no more than three brief visits, until Tammy filed the termination petition in April 2009.

The only ground for termination litigated at the fact-finding hearing in August 2009 was Jacob's alleged failure to assume parental responsibility. At the close of evidence, Tammy moved for a directed verdict based on the evidence that Jacob had played virtually no role in the child's life for more than four years. Jacob also moved for a directed verdict on the undisputed evidence that he had assumed daily responsibility for Gwenevere during the first four months of her life. The circuit court denied both motions, declaring that the jury should decide which time period was more important in determining "substantial involvement of the father with his daughter." Without objection, the court instructed the jury as follows:

> Now the petition in this case alleges that Jacob [T.] has failed to assume parental responsibility which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict. Has Jacob [T.] failed to assume parental responsibility for Gwenevere E. [T.]? Answer, yes or no.
>
> To establish a failure to assume parental responsibility, Tammy [G.], the Petitioner must prove by evidence that's clear, satisfactory, and convincing to a reasonable certainty that the parent father has not had a substantial relationship with Gwenevere [T.].
>
> The term substantial parental relationship means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child.
>
> In evaluating whether Jacob [T.] has had a substantial relationship with the child, you may consider factors including, but not limited to, whether Jacob has expressed concern for or interest in the support, care, or well being of Gwenevere, whether Jacob has neglected or refused to provide care or support for the child, and whether he has expressed concern for or interest in the support, care, or well being of the mother during her pregnancy.

> A lack—a parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.
>
> Before you may answer this special verdict question yes, you must be convinced by evidence that's clear, satisfactory, and convincing to a reasonable certain[ty] that the question should be answered yes. If you are not so convinced, you must answer the question no.

The jury answered "yes" to the verdict question, resulting in an order for termination on the ground that Jacob had failed to assume parental responsibility for Gwenevere. Jacob then commenced this appeal.

DISCUSSION

WISCONSIN STAT. § 48.415 lists grounds for involuntarily terminating parental rights. The statutory ground at issue here is found in § 48.415(6): "failure to assume parental responsibility." This ground requires proof that "the parent ... ha[s] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). "Substantial parental relationship" is defined as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b).

The statute goes on to provide the following guidance in determining whether there has been a "substantial parental relationship":

> In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

WIS. STAT. § 48.415(6)(b).

There are two aspects of establishing a "substantial parental relationship" at issue in this case—the quality of parenting and the relevant time period.

As to quality, neither party directly addresses what we believe is an important issue; namely, whether a fact-finder may determine that, despite significant parenting, poor quality parenting is a reason to find that a "substantial parental relationship" has not been established. On this topic, Jacob argues that it was undisputed that he was an attentive father who cared for Gwenevere during the first few months of her life. It follows, according to Jacob, that the circuit court erred when it denied his motion for a directed verdict.

Tammy disagrees. Before the jury, Tammy essentially conceded that, if the jury considered only the time Jacob cared for Gwenevere, then Jacob did have a substantial parental relationship. On appeal, however, Tammy asserts that there was a factual dispute about the quality of care Jacob provided. Tammy points to her own testimony asserting that, when Jacob was the primary parent, their home was a "mess" with "mildew and mold" and "beer cans in the living room that were unsafe." Tammy argues, in effect, that a "substantial parental relationship" was not established because of the poor quality of Jacob's parenting.

As to time period, Jacob argues that once a "substantial parental relationship" is established, the relevant time period ends and subsequent events are not relevant to the issue of a substantial parental relationship. Thus, Jacob argues that juries in such cases should receive the following instruction:

> If you determine that [name of party] has at some time established a substantial relationship with [name of child],

> your inquiry ends there. You are not to decide whether [he or she] maintained that relationship, once it was established.

Applied here, Jacob argues that undisputed evidence that for the first four months after Gwenevere's birth Jacob was an attentive stay-at-home father establishes that he had a "substantial parental relationship" with Gwenevere within the meaning of WIS. STAT. § 48.415(6). Moreover, it was error for the court to permit evidence and argument that such a relationship had not been established because of events after that time period.

The parties' discussion of the quality of care and the relevant time period causes us to question our holdings in ***Quinsanna D.*** We begin with a discussion of ***Quinsanna D.***, and then explain why we believe it may be inconsistent with both the language of WIS. STAT. § 48.415(6) and constitutional due process rights that must be accorded parents before parental rights may be terminated.

In ***Quinsanna D.***, the State petitioned for termination of Quinsanna's parental rights to her twin sons alleging that Quinsanna had failed to establish a "substantial parental relationship" under WIS. STAT. § 48.415(6). Quinsanna cared daily for her twins for just over two years after their birth. ***Quinsanna D.***, 259 Wis. 2d 429, ¶29. During that time, she exposed her children to her own drug use and to the "drug house" run out of her home. ***Id.***, ¶32. After this two-year period, there was a police raid at Quinsanna's residence and the twins were removed from Quinsanna's care. ***Id.***, ¶4. Between the time the children were removed and the termination trial, Quinsanna was convicted of offenses stemming from the raid and was placed on probation, and then committed new crimes which led to her being incarcerated. ***Id.***, ¶¶5-10. In particular, she

was convicted of theft, resulting in a thirty-day jail sentence, and obstruction, resulting in revocation of her probation and a sixty-day jail sentence. ***Id.***, ¶¶7-8. Approximately seven years after the twins were removed, the State petitioned for termination of Quinsanna's parental rights and, following a trial to a jury, her rights were terminated. ***Id.***, ¶9.

In deciding Quinsanna's appeal, we reached two conclusions that are pertinent here. First, we agreed with the circuit court that evidence of two crimes Quinsanna committed after the children were removed from her residence were relevant to whether Quinsanna had a "substantial parental relationship." ***Id.***, ¶18-27. Second, we concluded that, despite undisputed evidence that Quinsanna engaged in the daily supervision of her children, a reasonable jury could nonetheless have found that Quinsanna did not ever have a "substantial parental relationship" with her children because of the poor quality of her parenting. ***Id.***, ¶¶29-32.

We believe that both of these holdings are problematic. First, ***Quinsanna D.*** endorses the proposition that a parent can in fact engage in substantial parenting, but not establish a "substantial parental relationship" if that parenting also involves an undefined element of bad parenting. Second, ***Quinsanna D.*** seemingly holds that events occurring after a time period during which a parent engages in substantial parenting are relevant as to whether the parent *had* a "substantial parental relationship." In both instances, we now believe that our opinion did not properly take into account the language of WIS. STAT. § 48.415(6) or the constitutional underpinnings of that statutory subsection.

It seems clear that Quinsanna's parenting revealed her to be an unfit parent, but there is a difference between the issue of "unfitness" and the threshold

issue of whether unfitness must be proved. The "substantial parental relationship" test was established by the United States Supreme Court as a means of determining when parental rights may be terminated without a showing of unfitness. In ***Quilloin v. Walcott***, 434 U.S. 246 (1978), the Court held that termination of parental rights without a determination of unfitness was permitted only because the parent there had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." ***Id.*** at 256. Conversely, where the parent had exercised "significant responsibility," termination was barred absent a finding of unfitness. *See* ***id.***

WISCONSIN STAT. § 48.415(6) was enacted in 1979, and provided that the parental rights of the father of a child born out of wedlock could be terminated if the father did not establish a substantial parental relationship with the child before adjudication of paternity. 1979 Wis. Laws, ch. 330, § 6. The statute defined "substantial parental relationship" in terms almost identical to the ***Quilloin*** "significant responsibility" test.[2] *See* § 48.415(6)(b) (1979-80). Thus, it seems apparent that § 48.415(6) was enacted in response to ***Quilloin***, with the intent to incorporate the ***Quilloin*** test as a threshold test for determining when a father's rights could be terminated. If that threshold test is not met, then termination of parental rights under § 48.415(6) is permitted without a finding of unfitness. *Cf.*, ***In Interest of Baby Girl K.***, 113 Wis. 2d 429, 443, 335 N.W.2d 846 (1983) (termination under § 48.415(6) is constitutionally permissible without a finding of

[2] Compare the United States Supreme Court's phrase "significant responsibility with respect to the daily supervision, education, protection, or care of the child," ***Quilloin v. Walcott***, 434 U.S. 246, 256 (1978), with the phrase "significant responsibility for the daily supervision, education, protection and care of the child" used in WIS. STAT. § 48.415(6)(b) (1979-80).

unfitness where the father completely failed to participate in the raising of the child); *see also* ***In Interest of J.L.W.***, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981) (where mother had physical custody during most of the first four months of the child's life, due process requires a finding of unfitness).

Accordingly, it appears that the "substantial parental relationship" standard in WIS. STAT. § 48.415(6) must be viewed as a threshold question. If a parent has had a "substantial parental relationship," then his or her parental rights may not be terminated without a showing of unfitness. When properly viewed as a threshold issue, it becomes apparent why the § 48.415(6) standard should not be treated as a test for unfitness. In keeping with this view, the ***Baby Girl K.*** court observed: "[C]ommentators have suggested that the failure of a parent to participate *at all* in raising of the child may eliminate the constitutional requirements for a finding of unfitness." ***Baby Girl K.***, 113 Wis. 2d at 443 (emphasis added).

We now turn our attention to the statutory language indicating once a "substantial parental relationship" has been established, subsequent events are not relevant. The statute requires proof that "the parent ... *ha[s] not had* a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a) (emphasis added). Thus, the statute does not speak in terms of viewing a parent's

relationship as a whole, but rather in terms of whether the parent has, at some time, established a "substantial parental relationship."[3]

Turning to the facts in this case, but for ***Quinsanna D.***, we would reject Tammy's argument that evidence that Jacob kept a sloppy and somewhat unsafe house provides a basis to find that Jacob did not establish a "substantial parental relationship." It appears to us that, under a proper interpretation of WIS. STAT. § 48.415(6), the undisputed evidence of Jacob's parenting during the months following Gwenevere's birth easily meets a correct interpretation of the "substantial parental relationship" test. However, Tammy's quality of care argument appears viable under ***Quinsanna D.*** At a minimum, there is a need for clarification of ***Quinsanna D.*** on this topic.

Similarly, but for ***Quinsanna D.***, we would conclude that the events after Tammy left with Gwenevere are not relevant. The question for the jury in this case should have been whether, prior to the time Tammy and Gwenevere left, Jacob had a substantial parental relationship with Gwenevere. If he did, subsequent neglect does not undo the fact that Jacob "had" a substantial parental relationship and, therefore, due process required a showing of unfitness before his parental rights could be terminated.

We believe that ***Quinsanna D.*** not only wrongly interpreted WIS. STAT. § 48.415(6), but that it conflicts with the constitutional rights attached to

[3] WISCONSIN STAT. § 48.415(6) has been amended several times. The test for termination has evolved from a father who "[has] never had a substantial parental relationship," to parents who "have never had a substantial parental relationship," to, presently, parents who "have not had a substantial parental relationship" with the child. *See* ***State v. Bobby G.***, 2007 WI 77, ¶¶66-88 & n.38, 301 Wis. 2d 531, 734 N.W.2d 81 (providing an extended and detailed description of the legislative history of § 48.415(6) through its 2005 amendment).

termination proceedings. Treating the quality of Jacob's parenting and his subsequent absence from Gwenevere's life as relevant to a finding under § 48.415(6) would mean that the "substantial relationship" test is more than a threshold determination of whether there is a constitutionally protected parental right. Instead, this interpretation treats the ground as a stand-alone unfitness test without the defenses to unfitness provided in other provisions of § 48.415. For example, here the most obvious issue was whether Jacob was unfit because he had abandoned Gwenevere within the meaning of § 48.415(1). Under that subsection, Jacob would have the defenses listed in § 48.415(1)(c). Similarly, if the quality of the parent's care is at issue, the ground that the child is in need of protection or services requires, among other things, that the parent has had the opportunity to meet the conditions for a safe return of the child, with a reasonable effort made by the county to provide court-ordered services. *See* § 48.415(2).

We believe the supreme court should accept this certification and resolve the ambiguities and uncertainties regarding the use of WIS. STAT. § 48.415(6) as a ground to terminate parental rights. If the supreme court believes that the legislative intent was to permit termination based on either the proximity in time or the duration of the parent-child relationship, or its quality, then we believe the supreme court should consider whether that interpretation of the statute comports with the constitutional protections afforded parents.