COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 6, 1996

No. 96-0264

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MOONEEN M. WAITE AND BERNARD W. WAITE,

Petitioners-Appellants,

v.

KATHERIN J. WEMMER, WAYNE ASPSETER AND GARY LOCKBURNER,

Respondents-Respondents.

APPEAL from an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Mooneen and Bernard Waite appeal a trial court order dismissing their petition for grandparent visitation with their daughter's three children. The Waites argue the trial court erred by dismissing their petition for visitation because the children are not part of an intact family.

Additionally, they argue either this court, or the trial court on remand, should invoke its equitable powers to order visitation. We affirm in part, reverse in part and remand the case for further proceedings consistent with this opinion.

The Waites seek visitation with their daughter Katherin Wemmer's three children.[1] Tyler and Thomas are the two oldest children of Wemmer and Wayne Aspseter, who divorced approximately two years after Thomas was born. Several years after the divorce, Wemmer had a third child, Heather. Heather's father is alleged to be Gary Lockburner, although the record suggests he has never been married to Wemmer and has not been adjudicated Heather's father.

Wemmer and Lockburner filed a motion to dismiss the Waites' petition pursuant to § 802.06(2)(a)6, STATS., alleging the petition failed to state a claim upon which relief can be granted.[2] The trial court heard oral argument on the motion, but did not hear testimony from the parties. Ultimately, the trial court dismissed the petition. On appeal, we must determine whether the petition was properly dismissed.

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311, 529 N.W.2d 245, 249 (Ct. App. 1995). Because pleadings are to be liberally construed, a claim will be dismissed only if it is quite clear that under no conditions can the plaintiff recover. ***Id***. When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, this court accepts the alleged facts and all reasonable inferences as true but decides the legal conclusions independently. ***Id***. at 311-12, 529 N.W.2d at 249.

The legal issue raised by Wemmer's and Lockburner's motion to dismiss concerns the Waites' standing to seek visitation under § 767.245(1),

[1] The record indicates Bernard may not be Katherin's natural or adopted father, but that issue does not affect our decision at this point in the case. However, on remand, the parties may raise the issue of Bernard's standing based on the lack of a biological or adoptive relationship with Katherin.

[2] It appears Aspseter had little or no participation at the trial court level and did not file an appeal in this case.

STATS., which provides: "Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child." A person has standing to seek visitation pursuant to § 767.245(1) when two circumstances are present: (1) an underlying action affecting the family has previously been filed; and (2) the child's family is non-intact. ***Cox v. Williams***, 177 Wis.2d 433, 439, 502 N.W.2d 128, 130 (1993). Once a court determines that a person has standing to seek visitation, the court can consider, pursuant to § 767.245(1), whether granting the petition is in the child's best interests.

Even if a person lacks standing to seek visitation under § 767.245(1), STATS., a person may ask a court to invoke its equitable power to protect a child's best interests by ordering visitation under circumstances not included in the statute. *See* ***In re H.S.H.-K.***, 193 Wis.2d 649, 658, 533 N.W.2d 419, 421 (1995). In ***H.S.H.-K.***, our supreme court held that a circuit court has equitable power to determine if visitation is in a child's best interests if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. ***Id***. We will address separately whether the Waites can petition for visitation pursuant to § 767.245(1), STATS., or by asking the court to invoke its equitable powers.

STANDING UNDER § 767.245(1), STATS.

We begin by considering whether the trial court properly dismissed the petition on grounds that the Waites lacked standing under § 767.245(1), STATS. Because the children have different fathers, we will consider first the petition as it relates to Tyler and Thomas, and secondly, to Heather.

A. Tyler and Thomas

The trial court concluded that there was an underlying action affecting the family because Wemmer and Aspseter had divorced and there had been ongoing support and custody issues between them. Neither party argues this conclusion was erroneous and we agree with the trial court's conclusion.

Next, the trial court concluded that the boys lived in an intact family with Lockburner and Wemmer. We disagree with the trial court's conclusion that the petition failed to state a claim. Whether a family is intact is generally a fact-specific issue that is difficult to resolve based solely on the pleadings. Here, the petition alleges that Tyler and Thomas' biological father does not live with them. Whether a child lives apart from his biological parent can be an influential factor in deciding whether a family is intact, *see* ***In re Nastassja L.H.-J.***, 181 Wis.2d 666, 671, 512 N.W.2d 189, 191 (Ct. App. 1993) (child's family was non-intact where biological father did not live with mother), although living apart from one's biological parent does not always mean the child's family is non-intact. *See* ***In re Hegemann***, 190 Wis.2d 447, 526 N.W.2d 834 (Ct. App. 1994) (children lived in intact family that consisted of their mother and stepfather).

To determine whether a child's family is intact, the court must consider a variety of factors, such as the child's relationships with parents, stepparents and others. Unless the petition is unable to allege any facts that suggest a child's family is non-intact, it should not be dismissed. Because the Waites' petition alleges facts that could support the conclusion that Tyler and Thomas' family is non-intact and that there is an action affecting their family, the petition states a claim upon which relief can be granted. Specifically, accepting the facts in the petition as true, the Waites have standing to petition for visitation. Therefore, we reverse the trial court's dismissal of the petition for visitation with Tyler and Thomas and remand the case for further proceedings.[3]

[3] We note that on remand, after further evidence is presented, the trial court may ultimately conclude that the grandparents lack standing because the family is intact. This opinion is not meant to preclude such a conclusion. Instead, we reverse the order dismissing the petition for failure to state a claim because the petition is to be liberally construed and we cannot conclude that it is quite

B. Heather

In the case of Heather, the trial court concluded that there was not an action affecting the family. The petition does not allege that both of Heather's parents have been involved in an action affecting the family, such as a paternity action or a divorce. The only argument the Waites make is that because Tyler and Thomas have been involved in an action affecting the family, "Arguably Heather is also affected by the custody, child support and placement issues raised as to the two older boys." Although the Waites may be correct in their assertion that Heather will be affected by the action affecting Tyler and Thomas, we are unconvinced that the effects of another action on Heather satisfy the ***Cox*** requirement that there be an action affecting the subject child's family.

Because we agree there is no action affecting the family, we need not consider the Waites' argument that Heather's family is non-intact. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed). We agree with the trial court that the petition seeking visitation based on § 767.245(1), STATS., was properly dismissed as it relates to Heather. Therefore, we affirm that portion of the trial court's order.

THE COURT'S EQUITABLE POWER TO ORDER VISITATION

Next, we consider whether the Waites can seek visitation by asking the court to invoke its equitable powers. We note that at the time the Waites' petition was filed, ***H.S.H.-K.*** had not yet been released. However, the petition did seek "other and further relief as may be just and equitable." Furthermore, although ***H.S.H.-K.*** was released two days before the trial court heard oral argument on the motion to dismiss, the parties and the court were evidently unaware of the case and, therefore, did not discuss whether the Waites satisfied the requirements outlined in ***H.S.H.-K*** that allow the court to order visitation pursuant to its equitable powers. The Waites ask this court to

(..continued)
clear that under no conditions can the grandparents establish standing. *See* ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311, 529 N.W.2d 245, 249 (Ct. App. 1995).

invoke its equitable powers and order visitation. Alternatively, the Waites ask this court to remand the case to the trial court so the trial court can examine whether to order visitation based on its equitable powers.

In ***H.S.H.-K.***, our supreme court held that a circuit court has equitable power to determine if visitation is in a child's best interests if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. ***Id.*** at 658, 533 N.W.2d at 421. To meet these two requirements, a petitioner must prove the component elements of each one. ***Id***. at 694, 533 N.W.2d at 435. The court detailed how each requirement must be proven:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
>
> To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference. The petitioner must prove all these

> elements before a circuit court may consider whether visitation is in the best interest of the child.

Id. at 694-95, 533 N.W.2d at 435-36 (footnote omitted).

Because the parties did not have the opportunity to address whether these requirements had been established in this case, we conclude it is appropriate to remand the case to the trial court so it can determine whether it has equitable power to determine whether visitation is in Tyler's, Thomas' and Heather's best interests, and, if so, whether visitation is in each child's best interests. As ***H.S.H.-K*** explained, the trial court has equitable power to determine whether visitation is in a child's best interests if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. ***Id***. at 658, 533 N.W.2d at 421.

Wemmer and Lockburner argue that the Waites' petition sought relief solely pursuant to § 767.245(1), STATS., and did not ask the trial court to exercise its equitable powers. Thus, they argue, the Waites should not be allowed to complain that the trial court failed to invoke its equitable powers. First, we conclude the Waites' petition did seek equitable relief when it requested "other and further relief as may be just and equitable." Second, we think it unreasonable that the parties could have guessed the requirements ***H.S.H.-K.*** outlined before the case was released. Thus, it is appropriate that we remand the case so the court can consider whether the petition, or an amended petition if a new one is filed, alleges facts that would allow the court to conclude that it has equitable power to determine whether visitation is in a child's best interests. Because the trial court made no determinations consistent with ***H.S.H.-K.*** for any of the children, we remand the case for determination with respect to all three children.

In summary, with respect to Tyler and Thomas, we reverse the trial court's dismissal of the petition for failure to state a claim based on § 767.245(1), STATS., and the equitable powers of the court. With respect to Heather, we affirm the trial court's dismissal of the petition based on § 767.245(1), but reverse the dismissal of that portion of the petition seeking equitable relief. We remand the case so that the trial court can determine whether it can and should award visitation with Tyler and Thomas based on

either § 767.245(1) or the court's equitable powers, and whether it can and should award visitation with Heather based on the court's equitable powers.

By the Court.—Order affirmed in part; reversed in part and cause remanded. No costs on appeal.

Not recommended for publication in the official reports.