COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2885-FT **Cir. Ct. No. 2003FA123**

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

IN RE THE MARRIAGE OF:

TIMOTHY S.,

PETITIONER-RESPONDENT,

V.

LISA S.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM.[1] Lisa S. appeals a judgment and orders that (1) it is in the best interest of her son, Riley S., to maintain the presumption that her ex-husband, Timothy S., is Riley's father, (2) she be permanently enjoined from submitting herself or Riley to further genetic testing, and (3) she be estopped from asserting Riley is not a marital child.

¶2 Lisa argues the trial court should not have stayed a termination of parental rights proceeding[2] until her divorce from Timothy was completed because the jurisdiction of the court administering the children's code is "paramount" when there are simultaneous actions in juvenile and family court. *See* WIS. STAT. § 48.15. Lisa argues alternatively that the court erred when it held a hearing, under WIS. STAT. § 767.458(1m),[3] to decide whether a paternity determination was in Riley's best interest. Finally, Lisa contends that the trial court's failure to admit DNA test results or credit her testimony that Timothy was not Riley's father created an irrefutable presumption of fatherhood contrary to WIS. STAT. § 891.41(2) and the public policies it serves.

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[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] All four Wisconsin actions involving Riley and Lisa, a divorce and custody determination, a termination proceeding, an adoption, and a CHIPS action, were before the same trial judge.

[3] This statute is entitled "First appearance" and generally refers to actions that may be taken in response to the first appearance. The supreme court has concluded that WIS. STAT. § 767.463, which allows a court to refuse to order genetic tests of any "man" and which can be employed at "any time" applies to both marital and nonmarital children. ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶23, 270 Wis. 2d 384, 677 N.W.2d 630. It might therefore be the statute that more properly governs Timothy's motion. In this case, however, the distinction does not matter because the critical language in both statutes is virtually identical.

¶3 Timothy responds that genetic tests excluding him as Riley's father do not rebut the marital presumption of paternity because only a genetic test of an alleged, rather than presumptive, father satisfies the statutory requirements. Timothy argues alternatively that, while Scott T., Riley's alleged father, underwent DNA testing, the testing was incomplete because Scott's results were not certified.[4] Under those circumstances, he claims, the trial court had the authority to determine it was not in Riley's best interest to allow any further testing that might upset the marital presumption. Lastly, Timothy argues that even if the tests were completed, Lisa is equitably estopped from using them to defeat the marital presumption.[5]

¶4 We agree with Lisa that because the genetic tests had been completed the trial court had no authority to conduct a best interest hearing. We also agree that Lisa was not equitably estopped from attempting to rebut the presumption that Riley was a marital child. We therefore reject Timothy's arguments, reverse the judgment and orders, and remand for further proceedings consistent with this opinion.

[4] Timothy asks us to strike any references to the Colorado DNA test report because it was not part of the record and was never offered to the trial court. However, the trial court incorporated all memorandums of counsel at a motion hearing on August 25, 2004, and both genetic test results were attached to Lisa's memorandum, making them part of the record before us.

[5] Timothy contends that Lisa waived her right to appeal by participating in the divorce and signing a marital settlement agreement. Lisa does not, however, appeal the divorce judgment or the placement order. Rather, she appeals the trial court's decision to stay the termination action and order a best interest hearing, a decision that preceded the divorce judgment and the custody and placement determination.

Background

¶5 Lisa and Timothy first married in 1994 and had a son, Zachary S., in 1996.[6] After they divorced in 1997, Timothy was awarded sole custody of Zachary and has raised him since that time. In November 2000, Lisa and Timothy remarried. Sometime in June 2001, Lisa left Wisconsin for Colorado and did not return to Wisconsin until January 2003. Lisa testified that she lived with Scott during those months away from Wisconsin and became pregnant by him.

¶6 According to her testimony, Lisa is a long time substance abuser who regularly uses crack cocaine. When she returned to Wisconsin, she checked into a treatment center in Green Bay. Before she finished treatment, however, the Dunn County Sheriff arrested her for a probation violation,[7] and she spent several months in jail. Lisa eventually completed a twenty-one-day residential inpatient treatment program, but continued using crack during and after her pregnancy.

¶7 The procedural history of this case is at least as complex as its factual history. On June 19, 2003, Timothy filed for divorce. In his petition, Timothy asserted that Lisa was pregnant and the baby was not his child. Lisa gave birth to Riley on June 30, 2003. In August 2003, a CHIPS order was entered and Lisa and Riley were placed in the Smith-Turville foster home. Christina Meyer was appointed guardian ad litem for Riley in the CHIPS matter. Meyer was later appointed Zachary's guardian ad litem in Timothy and Lisa's divorce proceeding.

[6] At the time of her first marriage to Timothy, Lisa was a single mother of three children. Lisa testified that she and her parents were originally "co-guardians" of those three children, but that after some disagreements with Lisa and Timothy, her parents assumed placement of the children.

[7] Lisa was on probation for a possession of THC conviction.

¶8 On February 18, 2004, during a motion hearing in the divorce action, Timothy's attorney told the court that Lisa and Timothy would stipulate that Riley was not a marital child. After the trial court concluded a guardian ad litem should be appointed for Riley, Timothy agreed to delay any motion for DNA testing until after that appointment, suggesting that testing might not be necessary because it was a "geographical impossibility" for him to be Riley's father.

¶9 At a status conference on March 16, the court ordered the guardian ad litem to begin an action to determine paternity and the child support agency to cooperate with testing. Because of confusion over who was to draft the order, it was not signed until the first week in May. By this point, the same trial judge had jurisdiction over a juvenile court proceeding, the CHIPS action, and two family court proceedings, the divorce and the paternity action.[8]

¶10 On May 18, at another status conference, Timothy affirmed he would pay for the DNA tests. The guardian ad litem told the court she could not begin the Wisconsin paternity action until the tests were done and could not begin the action in Colorado unless the authorities agreed to help her because she had no "jurisdiction" in that state.

¶11 On June 8, 2004, a genetic test report was filed with the court. The report, which included Riley's, Lisa's, and Timothy's DNA profiles, was certified. It concluded that Timothy could not be Riley's father, identifying the probability of his paternity as zero percent. A chain of custody form was also filed. There were no objections to the test report.

[8] The trial court's order to commence a paternity action references Dunn County Case No. 2003FA1233, identifying it as a family court action.

¶12 In July 2004, Lisa began a separate action, under WIS. STAT. ch. 48, to terminate her parental rights to Riley. During the months she lived in the Smith-Turville foster home, Lisa had discussed adoption with Mandy and Melissa Smith-Turville and she eventually decided to combine the termination action with an agreement to allow the Smith-Turvilles to adopt Riley.[9] Shortly after the petition for termination of parental rights was filed, Timothy notified the court that he intended to seek visitation with Riley.

¶13 On August 5, 2004, the trial court held a hearing on Lisa's and Scott's termination petitions. The Smith-Turvilles argued that the termination action was paramount over the family court proceeding and that the evidence of paternity showed that Timothy had no rights in the matter. Although the trial court had recently received a genetic report on Scott from Colorado, the guardian ad litem was unaware of the test results and requested a continuance. Timothy then notified the court, for the first time, that he would contest Lisa's and Scott's termination petitions. The trial court adjourned the termination proceeding until August 13 and enjoined Lisa from submitting herself or Riley for further testing.

¶14 On August 11, Timothy moved the court to dismiss the paternity action, to determine it was in Riley's best interest that no more testing to determine paternity be done, and for custody of both Zachary and Riley. After the August 15 hearing on Timothy's motion,[10] the court orally determined it was in Riley's best interest to maintain the marital presumption and ordered the

[9] Scott agreed to both proceedings.

[10] The trial court was acting in its capacity as family court, under WIS. STAT. § 767.458(1m), when it held the best interest hearing.

termination action stayed for good cause. In October, a judgment of divorce awarded Lisa and Timothy joint legal custody of Zachary and Riley. Timothy was given primary physical placement. Lisa now appeals.

Discussion

Standard of Review

¶15 Statutory interpretation presents questions of law we review without deference to the trial court. *See e.g.,* ***State ex rel. Angela M.W. v. Kruzicki***, 209 Wis. 2d 112, 121, 561 N.W.2d 729 (1997). When we construe a statute, we seek to determine the intent of the legislature. *See* ***id.*** We thus begin with the statutory language and give that language its plain, ordinary meaning. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶22, 270 Wis. 2d 384, 677 N.W.2d 630. If the language is clear on its face, we simply apply the law to the facts. *See* ***Kelley Co. v. Marquardt***, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992). We do not look beyond the statute for other meanings. *See, e.g.,* ***Bushelman v. Bushelman***, 2001 WI App 124, ¶11, 246 Wis. 2d 317, 629 N.W.2d 795.

¶16 When we interpret two or more statutes dealing with the same subject matter, we seek to harmonize them to give full force and effect to each. *See, e.g.,* ***Ahrens v. Town of Fulton***, 2002 WI 29, ¶28, 251 Wis. 2d 135, 641 N.W.2d 423. In the absence of contrary evidence, language used in related statutes is intended to have the same meaning. *See* ***State v. Kirch***, 222 Wis. 2d 598, 604-05, 587 N.W.2d 919 (Ct. App. 1998). Similarly, the language of one subsection of a statute should be construed in a way that is consistent with other subsections of the same statute. *See* ***State v. Williams***, 198 Wis. 2d 479, 491, 544 N.W.2d 400 (1996). Finally, all parts of a statute should be construed to support

the statute's overall purpose. *See*, *e.g.*, ***Lukaszewicz v. Concrete Research, Inc.***, 43 Wis. 2d 335, 342, 168 N.W.2d 581 (1969).

WISCONSIN STAT. § 48.15 and Paramount Jurisdiction

¶17 Lisa first argues that the trial court should not have stayed the termination of parental rights action under WIS. STAT. ch. 48 to complete her divorce from Timothy because the jurisdiction of the juvenile court is "paramount" when there are simultaneous actions in juvenile and family court.[11] Lisa is correct that the juvenile court has exclusive jurisdiction over terminations of parental rights to minors[12] and that, as a matter of "comity, the burden is on the divorce court to avoid taking legal action which is or is likely to be in conflict with action taken by the juvenile court." ***State ex rel. Rickli v. County Court of Dane County***, 21 Wis. 2d 89, 97, 123 N.W.2d 908 (1963) (interpreting WIS. STAT. § 48.15). But the marital presumption applies to all courts in any appropriate context.[13] When Timothy sought to assert that presumption and contest the

[11] WISCONSIN STAT. § 48.15 reads in full:

> Nothing contained in ss 48.13, 48.13, and 48.14 deprives other courts of the right to determine the legal custody of children by habeas corpus or to determine the legal custody or guardianship of children if the legal custody or guardianship is incidental to the determination of causes pending in the other courts. But the jurisdiction of the court assigned to exercise jurisdiction under this chapter and ch. 938 is paramount in all cases involving children alleged to come within the provisions of ss 48.13 and 48.14 and unborn children and their expectant mothers alleged to come within the provisions of ss. 48.133 and 48.14 (5).

[12] *See* WIS. STAT. § 48.14(1) ("The court has exclusive jurisdiction over … [t]he termination of parental right to a minor in accordance with subch. VIII.").

[13] WISCONSIN STAT. § 891.41, "Presumption of paternity based on marriage of the parties," is one of several similar presumptions in a chapter devoted to provisions "common to actions and proceedings in all courts."

termination proceeding, the juvenile court was thus entitled to stay the proceeding to determine whether Timothy had rights to be considered. At that point, Timothy properly moved to have the trial court, acting in its role as family court, find it was not in Riley's best interest to determine paternity.

¶18 While WIS. STAT. § 48.15 clearly contemplates several different courts managing the jurisdictional relationships it governs, it just as clearly applies to one trial court performing multiple functions. However, the divorce court's jurisdiction is broader than that of the juvenile court[14] and it "retains the authority to do anything which does not conflict with the orders and findings of the juvenile court." ***Rickli***, 21 Wis. 2d at 97. After granting a stay in the termination of parental rights proceeding, based on Timothy's assertion of the marital

[14] The legislative history of WIS. STAT. § 48.15 suggests its intended scope is limited. In ***State ex rel. Rickli v. County Court of Dane County***, 21 Wis. 2d 89, 95, 123 N.W.2d 908 (1963), the supreme court cited this informative1955 revision committee note:

> The first sentence of this section is now the last sentence of s. 48.01 (5) (am). It clearly preserves the jurisdiction of other courts over the awarding of legal custody in habeas corpus proceedings or in other proceedings before them, as for example, the right of the divorce court to award legal custody of a child of divorced parents. The second sentence is necessary, however, because problems have arisen regarding the extent of the right of other courts to determine the legal custody of children. Problems have arisen principally in relation to the divorce court since that court has continuing jurisdiction over the legal custody of the children of divorced couples [s. 247.24]. For example, some persons have questioned the right of the juvenile court to take jurisdiction over a child alleged to be delinquent when that child is under the continuing jurisdiction of the divorce court because his parents are divorced. This section makes it clear that the jurisdiction of other courts over the legal custody of children does not interfere when facts have arisen which support the exclusive jurisdiction of the juvenile court as spelled out in ss. 48.12, 48.13, and 48.14.

presumption, the trial court exercised its authority as family court to decide it would not be in Riley's best interest to complete the DNA testing. Once that determination was made, Timothy, as the presumptive father, had the right to request that the termination of parental rights not go forward. The trial court had the authority to stay the proceedings under WIS. STAT. ch. 48. The family court thus avoided, though perhaps only technically, doing anything to conflict "with an order or finding of the juvenile court." ***Id.*** Whether the court's handling of the termination and divorce proceedings can be sustained therefore depends on whether it had the authority to order a best interest hearing when it did.

¶19 We conclude it did not. That question turns on the meaning of, and relation among, three statutes: WIS. STAT. § 891.41, the martial presumption statute; WIS. STAT. § 767.48, outlining the procedures for genetic testing in paternity cases; and WIS. STAT. § 767.458(1)(1m), allowing a court to dismiss an action to establish paternity of a marital child when such an action is not in the child's best interest.

Rebutting the Marital Presumption under WIS. STAT. § 891.41

¶20 In Wisconsin, a man is "presumed to be the natural father of a child" if he and the child's mother are or have been married and the child is conceived or born after marriage and before a decree of annulment, legal separation or divorce. *See* WIS. STAT. § 891.41(1)(a). The marital presumption statute also establishes how that presumption can be rebutted.

> In a legal action or proceeding, a presumption under sub.(1) is rebutted by results of a genetic test, as defined in s. 767.001 (1m), that shows that a man other than the man presumed to be the father under sub (1) is not excluded as the father of the child and that the statistical probability of the man's parentage is 99.0% or higher, even if the man

> presumed to be the father under sub (1) is unavailable to submit to genetic tests, as defined in s. 767.001(1m).

WIS. STAT. § 891.41(2). Timothy argues that the plain meaning of this subsection is that a marital presumption can be rebutted in only one way—a man other than the presumptive father must be tested and the test must establish a 99.0% probability the other man is the father of the child in question. Such a test must, he further argues, be completed and certified under WIS. STAT. § 767.48(1)(b). Timothy thus concludes that neither the certified test report excluding him as Riley's father nor the uncertified DNA report from Colorado can be used to rebut the marital presumption. We are not persuaded.

¶21 We need not address Timothy's argument that a presumptive father's DNA test is insufficient to rebut the marital presumption because the two genetic tests, when considered together, were sufficient to satisfy the requirements of WIS. STAT. § 891.41(2) and WIS. STAT. § 767.48(1)(b). Neither party questions the admissibility of the test report received by the court in June 2004. That report, certified by the laboratory director, shows the DNA profiles for Lisa, Riley, and Timothy with nine loci of comparison. It concludes that Timothy cannot be Riley's father because they do not share "necessary paternal markers."[15] The

[15] DNA is packaged into chromosomes, which come in pairs. *See* LAURA GAHN, § 4.1 *Genetic Marker Testing*, PLPI MA-CLE (2002). Humans have twenty-three pairs of chromosomes; in each pair, one chromosome has been inherited from the biological mother and one from the biological father. ***Id.*** In any particular region or locus of DNA, an individual will have two copies (or alleles). ***Id.*** One allele will be identical to one of the mother's alleles; the other, the obligate paternal allele, will be identical to one of the father's alleles. ***Id.*** Paternity testing is based on this pattern. At any particular DNA locus, we will find a "a copy of a piece of DNA that matches the mother and a copy that matches the father." ***Id.*** If a match is not found at every locus examined, therefore, a tested man is excluded from paternity.

(continued)

Colorado report is not certified because the Colorado lab neither collected nor tested the samples taken from Riley and Lisa. For that reason, the Colorado lab also could not confirm the identity of the test subjects. The report affirms, however, that if the specimens are "from the persons indicated and were properly tested," there is a 99.99% probability that Scott is Riley's father.

¶22 Together, that statement and the DNA profiles of Lisa and Riley that had been certified and admitted into evidence by trial court[16] create the functional equivalent of certification for the Colorado report. The only reason the Colorado lab could not formally certify its results was it could not guarantee the procedures under which Riley's and Lisa's tests had been done or confirm the

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If the man tested has DNA matching the obligate paternal allele of the child at all loci, that man is not excluded as the biological father. ***Id.***, § 4.3.1. However, matching does not definitively demonstrate paternity because matches can also be the result of chance. To determine the probability that matching is random, the tester employs a statistical calculation that compares the relative likelihood that the child's type will be observed under the two scenarios—of biological fatherhood and random chance. ***Id.***, § 4.3.2. That calculation is performed with a standardized database. ***Id.***

[16] We recognize that the admissibility, and validity, of particular DNA test results can be challenged on a variety of grounds, ranging from inadequate laboratory protocols to insufficient data on genetic variation among ethnic subgroups. *See*, *e.g.,* CHRISTOPHER BLAKESLEY, *Scientific Testing & Proof of Paternity: Some Controversy & Key Issues for Family Law Counsel*, 57 LA. L. REV. 379, 394-401 (1997). Here, however, the only challenge to either test arises from the Colorado laboratory's adherence to standard scientific methods. The lab could not certify work it did not do, testing Riley and Lisa and properly identifying the test subjects. It could, however, test Scott and could compare Scott's results to those of Riley and Lisa to see if Scott could be excluded as the father. When he was not excluded, the lab could then, as it did, compare his DNA with a database containing samples from a number of men of the same or similar race to calculate the frequency with which his genetic fingerprint would be found in that population.

identities of the tested.[17] But the trial court had already admitted a report certifying exactly those points. Under those circumstances, the evidence of Scott's paternity was statutorily sufficient to rebut the marital presumption.

Best Interest Hearings and DNA Testing

¶23 Because the DNA tests were the functional equivalent of certifiable and therefore complete, we conclude that the trial court had no authority, under ***Randy A.J.***, to order a best interest hearing when it did. Under WIS. STAT. § 767.458(1m),[18] a party may allege that "a judicial determination of whether a man other than the husband is the father is not in the best interest of the child …." If the court agrees, "no genetic tests may be ordered and the action shall be dismissed." *See* ***id.*** Interpreting virtually identical language in the broader statute allowing dismissals of paternity proceedings in the best interests of the child, ***Randy A.J.*** held that dismissals "may not be ordered after genetic tests have been completed." ***Randy A.J.***, 270 Wis. 2d 384, ¶25.

[17] As the statute governing motions for postconviction DNA testing, WIS. STAT. § 974.07(7)(a)4., indicates, the peculiar nature of DNA evidence can provide guarantees that make it admissible even in the absence of a perfect chain of custody. Test results are admissible if "[t]he chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the *testing itself* can establish the integrity of the evidence." WIS. STAT. § 974.07(7)(a)4. (emphasis added).

[18] WISCONSIN STAT. § 767.458(1), entitled "First appearance," generally refers to actions that may be taken in response to the first appearance. The supreme court has concluded that WIS. STAT. § 767.463, which allows a court to refuse to order genetic tests of any "man" and which can be employed at "any time" applies to both marital and nonmarital children. ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶23, 270 Wis. 2d 384, 677 N.W.2d 630. It might therefore be the statute that more properly governs Timothy's motion. In this case, however, the distinction does not matter because the critical language in WIS. STAT. § 767.458(1m) and WIS. STAT. § 767.463 is virtually identical.

¶24 Timothy contends the tests in this instance were not complete because they were not certified. We disagree for the reasons discussed in ¶¶20-21. As ***Randy A.J.*** notes, the legislature intended best interest hearings to take place before genetic tests were completed to ensure the child would be the focus of the hearing without any competing pressure from a biological father's potentially constitutional claim. ***Id.*** Once those interests are implicated by completion of genetic tests, the trial court has no statutory authority to order a best interest hearing.

Equitable Estoppel

¶25 Finally, Lisa challenges the trial court's decision that she is equitably estopped from asserting that Riley is not a marital child. She argues that equitable estoppel is inapplicable because she never told Timothy he was Riley's father, and Timothy's behavior for the first fourteen months of Riley's life does not indicate that he wanted to be or thought of himself in that role. We agree.

¶26 Equitable estoppel requires proof of three elements: (1) an action or inaction that induces (2) reliance by another to (3) the detriment of the one who relies. *See* ***Randy A.J.*** 270 Wis. 2d 384, ¶26. It has been applied in various family court contexts. *See*, *e.g.*, ***In re Marriage of D.L.J.***, 162 Wis. 2d 420, 427, 469 N.W.2d 877 (Ct. App. 1991). Most recently, our supreme court has applied the doctrine to prevent a mother from rebutting the marital presumption with genetic evidence of another man's paternity. ***Randy A.J.***, 270 Wis. 2d 384, ¶31. The critical question in that case was whether the actions and inactions of the mother and the biological father were "so unfair as to preclude them from overcoming the public's interest in the marital presumption … based on the genetic tests" the biological father took. ***Id.***, ¶29. The court agreed that a fifteen-

month deception and the presumptive father's financial and emotional commitment added to the state's interest in preserving the marital presumption to "outbalance the public's interest in a purely biological approach to parenthood." ***Id.***, ¶31.

¶27 The facts here are very different. Timothy knew he was not Riley's biological parent, both because of what he called "the geographical impossibility" of his involvement in conception and because Lisa told him who fathered Riley. He denied legal paternity in June 2003, before Riley's birth, and for the next fourteen months sought to end any legal relationship with his presumptive child. The fact that Timothy decided in August 2004 that he did not want Lisa to approve Riley's adoption or that he was shocked by her choice is not enough to establish equitable estoppel.

¶28 Timothy suggests that his reliance on Lisa's assurances that he would be part of Riley's life led him to undergo genetic testing to his detriment. But he does not explain why, if he wished to remain in Riley's life as a father, he did not assert the marital presumption from the beginning rather than taking actions to end any legal claim to Riley. Given Timothy's knowledge of Lisa's unreliability and his understanding that, absent a legal claim of paternity, his access to Riley was provisional, we see nothing in Lisa's actions "so unfair" as to equitably estop her from attempting to rebut the martial presumption.

¶29 We thus reverse the judgment and orders and remand to the trial court for further proceedings under WIS. STAT. ch. 48.

By the Court.—Judgment and orders reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.