COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1835 **Cir. Ct. No. 2004TP33**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SHELBY L.B., A PERSON UNDER THE AGE OF 18:

DEBRA S. F.,

PETITIONER-RESPONDENT,

V.

RICHARD F. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Reversed.*

¶1 DYKMAN, J.[1] Richard F.B. appeals from an order terminating his parental rights to his daughter, Shelby L.B. The circuit court found that the evidence at a fact-finding hearing established grounds for termination under WIS. STAT. § 48.415(9m), conviction for committing a serious felony against one of the parent's children, and § 48.415(6), failure to assume parental responsibility.[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] WISCONSIN STAT. § 48.415 provides in relevant part:

> Grounds for termination of parental rights shall be one of the following:
>
> ....
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.
>
> (b) In this subsection, "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 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 ever 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 ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.
>
> ....
>
> **(9m)** COMMISSION OF A SERIOUS FELONY AGAINST ONE OF THE PERSON'S CHILDREN. (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction.

(continued)

Because we conclude that neither subsections (9m) nor (6) of § 48.415 provide grounds for termination of parental rights in this case, we reverse.

Background

¶2 Richard F.B. and Debra S.F. are the parents of Shelby L.B. Richard is presently incarcerated following his conviction on multiple counts of sexual assault of a child and possession of child pornography. Richard's child victim was Tabetha F., Debra's daughter by another man.

¶3 Following Richard's conviction, Debra petitioned to terminate his parental rights to Shelby. The petition alleged that Richard had established a "parent-like relationship" with Tabetha. It also alleged that Richard sexually assaulted Shelby, though Richard was not convicted of this crime. The petition also alleged that Richard possessed child pornography on the family computer.

¶4 The court held a fact-finding hearing pursuant to WIS. STAT. § 48.424. Debra testified that she was living with Richard when Shelby was born in 1997. She averred that Richard would change Shelby's diapers, feed her, put her to bed, hold her, play with her and bathe her. Debra moved out in 1999 after she learned that Richard had molested Tabetha. By stipulation, Richard was given primary placement of Shelby, and for nine months, Richard lived alone with her.

> (b) In this subsection, "serious felony" means any of the following:
>
> ....
>
> 2. The commission of a violation of … [s.] 948.02(1) or (2) [first degree or second degree sexual assault of a child] ….

During this time, Richard would take Shelby to his grandmother's or his sister's when he needed a sitter.

¶5 Tabetha testified that she witnessed Richard sexually abuse Shelby when Shelby was about three years old. Tabetha further testified that she asked Richard "why he was doing it and he said it's okay, she's used to it …." Richard asserted his Fifth Amendment right against self-incrimination when asked if it were true that he had sexually abused Shelby.

¶6 The court concluded that Debra had proven grounds for termination under both WIS. STAT. § 48.415(6) and (9m). The court found credible Tabetha's testimony that she had observed Richard abusing Shelby. Based on this finding, as well as the presence of child pornography on the home computer and Richard's sexual assaults of Tabetha, the court determined Richard had failed to assume parental responsibility. The court also determined that Richard had been convicted of a serious felony against one of his children because it found him to be a person who was "in [the] position [of] a parent" to Tabetha when he sexually assaulted her. The court entered a termination order, and Richard appeals.

Discussion

Grounds for termination under WIS. STAT. § 48.415(9m)

¶7 Richard asserts that his parental rights to Shelby may not be terminated under § 48.415(9m) because the child against whom he committed a serious felony, Tabetha, is not one of his children. We agree.

¶8 The circuit court's interpretation of WIS. STAT. § 48.415(9m) is a matter of statutory construction subject to de novo review. ***State v. Meeks***, 2003 WI 104, ¶19, 263 Wis. 2d 794, 666 N.W.2d 859. "[S]tatutory interpretation

begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." ***Id.***, ¶46. Because it is undisputed that Tabetha was not Richard's biological or adoptive daughter, we apply de novo review to the order to terminate. *See* ***In re Commitment of Brown***, 2005 WI 29, ¶34, 279 Wis. 2d 102, 693 N.W.2d 715.

¶9 Under WIS. STAT. § 48.415(9m), a person's parental rights may be terminated for

> [c]ommission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction.

Section 48.415 does not define who is included in "one of the person's children."

¶10 Thus, we turn to related statutes to ascertain the phrase's meaning. *See* ***Kalal***, 271 Wis. 2d 633, ¶45 (explaining that statutory language should be interpreted in relation to the language of surrounding or closely related statutes). We find that the legislature has repeatedly defined "child" to mean a child by birth or by some legal process, such as adoption. WISCONSIN STAT. § 48.02(13) limits the definition of a "parent" of a nonmarital child to one who is a biological parent, a parent by adoption, or a parent by voluntary legal declaration of paternity:

> If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under s. 767.62(1) [providing for voluntary acknowledgment of paternity by statement filed with the state registrar] … or adjudicated to be the biological father.

¶11 Similarly, other chapters of the Wisconsin statutes define a child as a person to whom one is a biological or adoptive parent, or, in some cases, a stepparent or foster parent. *See, e.g.* WIS. STAT. § 40.02(12) ("'Child' means natural children and legally adopted children."); WIS. STAT. § 45.348(1) ("'[C]hild' means any natural child, any legally adopted child, any stepchild … or any nonmarital child if the veteran acknowledges paternity or paternity has been otherwise established."); WIS. STAT. § 103.10(1)(a) ("'Child' means a natural, adopted, foster or treatment foster child, a stepchild or a legal ward ...."); WIS. STAT. § 108.02(6m) ("'Child' means a natural child, adopted child, or stepchild."). In each of these examples, the legislature defined the parent-child relationship in clear and limited terms.[3]

¶12 Other statutes define "child" to include a biological child or a child to whom the parent owes a legal duty. WISCONSIN STAT. § 769.101(1) states that "'[c]hild' means an individual … who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent." Under WIS. STAT. § 767.45(5m), a man has no legal obligations towards a child unless he is adjudicated the father or acknowledges that he is the father. *See* Section 767.45(5m).

[3] Further, in ***Randy A.J. v. Norma I.J.***, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, the supreme court indicated its preference for clear and limited definitions of parenthood by refusing to adopt the "equitable parent" doctrine. (The "equitable parent" doctrine, recognized by some states, permits an individual to assume the rights and responsibilities of a natural parent through a judicial determination. ***Id.***, ¶32.) The court explained: "We do not employ the equitable parent doctrine because its parameters are too indistinct, permitting its use to create uncertainties in the law." ***Id.***, ¶33. Reading WIS. STAT. § 48.415(9m) to include children such as Tabetha in cases like the present case would likewise foster uncertainty in this area of the law.

¶13 We conclude that the legislature intended "one of the person's children" to have the same limited, well-established meaning here. *See* ***Gottsaker v. Monnier***, 2005 WI 69, ¶30, 281 Wis. 2d 361, 697 N.W.2d 436 ("[S]tatutes relating to the same subject matter should be read together and harmonized when possible.") (citation omitted). This definition would not include Tabetha, who is not Richard's biological, adoptive, step- or foster child. We therefore conclude that the trial court erred by terminating Richard's parental rights because it relied on a mistaken view of subsection (9m).

¶14 Debra asks us to "extend[]" the definition of "one of the person's children" to include children living with the person whose parental rights are sought to be terminated with whom the person had an "ongoing parental relationship." Debra notes that Chapter 48 begins with the following statement of legislative purpose: "In construing this chapter, the best interests of the child … shall always be of paramount consideration." WIS. STAT. § 48.01(1). Citing no additional textual or common law evidence to support her argument, Debra appears to suggest that the legislative purpose statement is an adequate basis on which base a proposed "extension" of WIS. STAT. § 48.415(9m). It is not. *See* ***Zink v. Khwaja***, 2000 WI App 58, ¶16, 233 Wis. 2d 691, 608 N.W.2d 394 ("[O]nly if an ambiguity presents itself do we then consult other indications of legislative intent, such as a statement of legislative purpose.").

Grounds for termination under WIS. STAT. § 48.415(6)

¶15 Richard also contends that the trial court erred in finding that Debra had established grounds for termination under WIS. STAT. § 48.415(6), which provides that parental rights may be terminated for failure to assume parental responsibility. Richard notes that under § 48.415(6) Debra was required to prove

that he had "never had a substantial parental relationship" with Shelby, and, he argues, the uncontroverted evidence showed that he had such a relationship with her for a period of years.

¶16 Here, the facts upon which the trial court concluded that Richard had never assumed parental responsibility are largely undisputed. The question for us is whether a court could have concluded on the undisputed facts that Richard never assumed parental responsibility of Shelby. Whether on the undisputed facts a trial court could reasonably infer Richard never assumed parental responsibility is a question of law subject to de novo review. *See* ***Groom v. Professionals Ins. Co.***, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

¶17 This issue also requires us to examine WIS. STAT. § 48.415(6). Again, statutory construction begins with the language of the statute. ***Kalal***, 271 Wis. 2d 633, ¶45. If the meaning of the statute is plain, we must apply that meaning. ***Id.***

¶18 WISCONSIN STAT. § 48.415(6) provides that parental rights may be terminated for failure to assume parental responsibility if the petitioner proves that the respondent "*never* had a substantial parental relationship with the child" (emphasis added). "Substantial parental relationship" is defined in § 48.415(6)(b) as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." The remainder of paragraph (b) lists a nonexclusive set of factors that courts may apply when determining if a "substantial parental relationship" ever existed:

> 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 ever 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 ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶19 The plain language of WIS. STAT. § 48.415(6) provides narrow and specific grounds for termination. The statute mandates that to terminate under this subsection the petitioner "shall" prove that the parent "never" assumed responsibility. When considering termination on these grounds, the court may consider "whether the person has *ever* expressed concern for or interest in the support, care or well-being of the child" and "whether, with respect to a person who is or may be the father of the child, the person has *ever* expressed concern for or interest in the support, care or well-being of the mother during her pregnancy." Section 48.415(6)(b) (emphasis added). The plain language indicates that the statute is applicable in cases where a parent has been absent or neglectful of parental obligations from birth (or from pregnancy in a father's case).

¶20 Turning to the present case, we conclude that Debra failed to prove grounds for termination under WIS. STAT. § 48.415(6). The uncontroverted facts show that Richard did many things for Shelby associated with fatherhood. Debra testified that Richard changed Shelby's diapers, fed her, put her to bed, held her, played with her and bathed her. Richard also had sole custody of Shelby for nine months, during which time he took her to his grandmother's or his sister's for day care when he needed someone to watch her. On this evidence, we conclude the trial court could not have reasonably found that Richard had *never* assumed parental responsibility.

¶21 Debra contends that ***State v. Quinsanna D.***, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752, the primary case on which the circuit court relied,

supports termination under WIS. STAT. § 48.415(6). In ***Quinsanna***, a jury found grounds to terminate under § 48.415(6) where the mother was using drugs and running a drug house out of the home. ***Id.***, ¶¶4-8. We upheld the jury's verdict where the hearing produced evidence of daily exposure to drug use and to strangers coming into the home to buy drugs; guns in the house; and the mother's multiple arrests for drug-related crimes. ***Id.***, ¶13, ¶¶31-33. On these facts, we concluded the jury could have reasonably inferred that Quinsanna had never established a "substantial parental relationship" with the children. ***Id.***, ¶¶32-33. We wrote:

> WIS[CONSIN] STAT. § 48.415(6)(b) provides that a "substantial parental relationship" consists of "the acceptance and exercise of significant responsibility" for not only the "daily supervision" of a child, but also "the acceptance and exercise of significant responsibility" for, among other things, the "protection and care of the child." Here, the jury reasonably could have inferred that, because Quinsanna's "daily supervision" of Keyon and Teyon included her daily exposure of them to her own drug use and drug house, she had not exercised "significant responsibility" for their "protection and care."

Id., ¶32.

¶22 ***Quinsanna*** is inapplicable here. Like Richard, Quinsanna exposed her children to criminal activity. However, in ***Quinsanna***, evidence was offered of "daily exposure … to [Quinsanna's] drug use and drug house." ***Id.***, ¶32. Quinsanna's daily drug use and daily use of the home as a drug house prevented her from ever assuming parental responsibility. Here, while Richard's crimes were far more serious and harmful to the children, Debra produced no evidence that Richard's criminal activity was daily or even frequent. Only Tabetha's testimony that Richard told her Shelby was "used to it" provides a basis upon which the court could have reasonably found Richard abused Shelby more than

once. However, this testimony is insufficient to support a reasonable inference that Richard's criminal activity was so pervasive that he never had a substantial parental relationship with Shelby, particularly in the face of uncontroverted testimony demonstrating otherwise.

¶23 We doubt that there are many fathers who would seem to be better candidates for termination proceedings than Richard. The problem is that this case is a square peg that will not fit into the round hole created by the legislature, the statutory grounds for termination provided in WIS. STAT. § 48.415. The language of these provisions is specific and purposeful; in its wisdom, the legislature did not intend to make it easy for the State to terminate parental rights. Debra cannot establish grounds for termination under either § 48.415(9m) or (6) because the language of these statutes will not permit it in this case. We therefore must reverse.

By the Court.—Order reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.