COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0473 **Cir. Ct. No. 98-PA-52**

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

IN RE THE PATERNITY OF DEREK S.H.:

STATE OF WISCONSIN

PETITIONER-RESPONDENT-CROSS-APPELLANT,

JENNIFER L.D.H.,

PETITIONER-RESPONDENT,

V.

DANIEL G.H.,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Daniel G.H. appeals orders establishing child support and amending a paternity judgment. Daniel argues that the jury's finding that he did not consent to sexual intercourse should bar or reduce his child support obligation. The State cross-appeals and argues that because Daniel did not have a right to a jury trial, its decision was not binding. We agree with the State and also conclude that the trial court properly exercised its discretion by setting child support. Therefore, we affirm the orders.

BACKGROUND

¶2 Derek S.H. was born on March 3, 1998, to Jennifer L.D.H. Jennifer and the State later brought a paternity action against Daniel. Daniel initially denied paternity based on his allegation that Jennifer put a date rape drug in his drink on the night of Derek's conception and then had nonconsensual sex with him, leading to Derek's conception.

¶3 The trial court barred Daniel from introducing evidence of his nonconsent as a defense to paternity. The court stated that Daniel's allegation was not a defense to paternity, but that the issue could be considered for purposes of establishing child support. It stated that "if there are equities to be weighed, they are to be weighed later in making decisions regarding child support …."

¶4 Daniel eventually admitted that he was Derek's father. The trial court accepted Daniel's admission and found that he was Derek's father. However, Daniel asserted that he still possessed a statutory right to a jury determination on whether Derek's conception resulted from nonconsensual sex engineered by Jennifer. Daniel argued that if the jury found Derek's conception was a result of nonconsensual sex, Daniel's obligation to support Derek should be

reduced or barred. The trial court allowed the issue to go to the jury to be decided as an issue of fact.

¶5 The issue of consent was tried before a jury. The trial court placed the burden on Daniel to prove all factual issues by clear, satisfactory, and convincing evidence. The jury found that Daniel's sexual intercourse with Jennifer was involuntary. However, the jury found that Jennifer did not give him a drug causing him to have involuntary sex with her.[1]

¶6 A hearing was conducted on the issue of child support. Daniel argued that the jury's verdict should reduce or bar his child support obligation. The trial court disagreed and following the statutory guidelines, set child support at the rate of 17% of Daniel's gross income. WIS. STAT. § 767.25(1j).[2] The child support order was later revised to require child support at a fixed rate of $100 per week.

---

[1] The special verdict consisted of two questions:

> 1. On June 6th or 7th, 1997, did Daniel G.[H.] have sexual intercourse with Jennifer [L.H.] involuntarily?
>
> Answer: Yes.
>
> If you have answered No. 1 'Yes', then answer the following question:
>
> 2. Was such involuntariness on the part of Daniel G.[H.] caused by Jennifer [L.H.] giving him a drug?
>
> Answer: No.

[2] WISCONSIN STAT. § 767.25(1j) reads as follows: "Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22 (9)."

DISCUSSION

¶7 Daniel argues that the jury's finding of lack of consent should bar or reduce his child support obligation.[3] The State and Derek's guardian ad litem argue that the trial court erred by allowing the issue of non-consent to be tried before a jury.[4]

I. DETERMINING AMOUNT OF CHILD SUPPORT

¶8 Daniel argues that the jury's finding of lack of consent should bar or reduce his child support obligation. He contends that under ***Krause v. Krause***, 58 Wis. 2d 499, 507, 206 N.W.2d 589 (1973), public policy bars him from paying child support because a parent's duty to support his or her child rests upon the voluntary status of parenthood. We disagree.

¶9 The determination of appropriate child support is committed to the trial court's sound discretion. ***In re B.W.S.***, 131 Wis. 2d 301, 315, 388 N.W.2d 615 (1986). Whether the trial court properly exercised its discretion is a question of law. ***Seep v. Personnel Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a

[3] Daniel also argues that the trial court erred by requiring him to prove the issue of non-consent at trial by clear, satisfactory, and convincing evidence. Because our resolution of the other issues is dispositive of the appeal, we need not address this issue. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d (Ct. App. 1983).

[4] Derek's guardian ad litem also submitted a brief.

reasonable judge could reach." ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

¶10 A trial court calculates child support by using the Department of Health and Social Services standards unless a party requests a deviation and the court finds by the greater weight of the credible evidence, that the standards are unfair to the child or any party. *See* WIS. STAT. § 767.25(1j) and (1m). When a party challenges the application of the standards, the court exercises its discretion by considering the statutory factors enumerated in § 767.25(1m) and articulating the basis for its decision to either remain within the guidelines or allow a modification. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996).

¶11 One of the factors a court is required to consider when there is a request to deviate from the child support percentage of income standards is the best interests of the child. WIS. STAT. § 767.25(1m)(hm). The paramount goal of any child support decision is to secure the best interests of the child. ***Luciani***, 199 Wis. 2d at 309.

¶12 The trial court analyzed the relevant facts under the appropriate statutory framework under WIS. STAT. § 767.25(1m). The court noted the testimony concerning Daniel's employment in the construction industry and Jennifer's income. It considered the evidence received at the jury trial and the jury's verdict concerning the involuntary nature of Derek's conception. It determined that Derek was not at fault and that it would not be fair to reduce or remove Daniel's child support obligation. The court also stated that Derek was entitled to have two parents, if possible, and was entitled to receive child support from both parents. The court found no reason to deviate from the percentage of

income standard. The court analyzed these facts under the proper statutory framework and reached a reasonable conclusion. Therefore, we conclude that the court's failure to reduce child support due to a lack of consent was not an erroneous exercise of discretion.

II. JURY TRIAL

¶13 The State and guardian ad litem argue that once Daniel's paternity was adjudicated, he had no further right to a jury trial. Daniel, on the other hand, argues that how the conception occurred is part of the determination of paternity. He contends that even though WIS. STAT. § 767.50(1) states that the main issue is whether the alleged father is the actual father, the statute does not limit that as the only issue.

¶14 We conclude that the trial court erred by submitting the issue of involuntary sex to the jury. Daniel did not have a right to a jury trial on this issue. The trial court's decision that Daniel had a statutory right to a jury trial on the issue of involuntary sex was based on WIS. STAT. § 767.50(1). The construction of a statute presents a question of law, which we review independently. ***In re J.S.C.***, 135 Wis. 2d 280, 287, 400 N.W.2d 48 (Ct. App. 1986). Paternity proceedings, being of statutory origin "must be tried in the manner fixed by the legislature." ***State ex. rel. Sowle v. Brittich***, 7 Wis. 2d 353, 358, 96 N.W.2d 337 (1959).

¶15 WISCONSIN STAT. § 767.50(1) states in relevant part:

> The trial shall be divided into 2 parts. The first part shall deal with the determination of paternity. … At the first part of the trial, the main issue shall be whether the alleged or presumed father is or is not the father of the mother's child …. The first part of the trial shall be by jury only if the defendant verbally requests a jury trial either at the initial

> appearance or pretrial hearing or requests a jury trial in writing prior to the pretrial hearing.

In deciding that Daniel was entitled to a jury trial on the involuntary sex issue, the trial court relied on the portion of the statute that states: "[t]he court may direct, and if requested by either party … shall direct the jury … to find a special verdict as to any of the issues specified in this section …." WIS. STAT. § 767.50(1).

¶16 WISCONSIN STAT. §§ 767.50 and 767.51(3) state the specific issues to be heard at a paternity proceeding. Section 767.455(5g) states the specific defenses available to the father and the procedural means to raise those defenses. Whether conception was voluntary is not listed. Therefore, the court's reliance on the statutory language was misplaced.

¶17 Paternity actions are bifurcated. The first phase deals with the paternity determination and may be tried to a jury. WIS. STAT. § 767.50(1). The second phase deals with child support and related issues. ***Id.*** The issues of child support and related issues shall be determined by the court either immediately after the first part of the trial or at a later hearing. ***Id.*** Section 767.50(1) has been construed as assigning to the trial court the responsibility to make all determinations pertaining to child support. ***J.S.C.***, 135 Wis. 2d at 293-95.

¶18 Daniel had a right to have a jury decide whether he is Derek's father. WIS. STAT. § 767.50(1). However, Daniel admitted he was Derek's father. As a result, a judgment of paternity was entered. When the court determined that Daniel was Derek's father, Daniel's right to a jury trial was extinguished.[5]

[5] Daniel argued to the trial court that he had a statutory and constitutional right to a jury trial. However, on appeal, Daniel only argues that he has a statutory right to a jury trial.

¶19 Because Daniel had no statutory right to a trial on the issue of how the conception occurred, the jury's verdict was advisory. *See* ***Hartung v. Milwaukee County***, 2 Wis. 2d 269, 279, 86 N.W.2d 475 (1957). A trial court is free to reject an advisory verdict and make its own findings. ***Paterson v. Paterson***, 73 Wis. 2d 150, 154, 242 N.W.2d 907 (1976). Despite the trial court's error, we affirm the orders setting child support because the court properly exercised its discretion and did not deviate from the child support percentage of income standard.

By the Court.—Orders affirmed.

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