COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1705 **Cir. Ct. No. 2010FA51**

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

IN THE MATTER OF THE GRANDPARENTAL AND OTHER VISITATION OF S.J., O.J. & A.J.:

MELISSA DIERKS,

PETITIONER-APPELLANT,

AMANDA BRYAN AND TERRI KEOPPLE,

PETITIONERS,

V.

PAUL JENSEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Melissa Dierks appeals from an order dismissing for lack of standing her petition for visitation with her deceased sister's children. We conclude that the circuit court appropriately declined to exercise its equitable powers to determine visitation. We therefore affirm the order.

¶2 Paul and Monica J. had three children together before Monica's death in 2007. In 2009, Paul terminated contact between his children and Terri Keopple, their maternal grandmother; Amanda Bryan, Monica's cousin; and Melissa, their maternal aunt. All of these women had extensive involvement with the children prior to that time.

¶3 Terri, Amanda and Melissa petitioned for visitation pursuant to WIS. STAT. § 767.43(1).[1] Paul conceded that Terri had standing as a grandmother to seek visitation pursuant to WIS. STAT. § 54.56(2),[2] but challenged Amanda's and Melissa's standing. The parties agreed that the issue of standing would be decided by the circuit court based upon the parties' affidavits and other written submissions.[3] The circuit court concluded that Amanda had alleged sufficient facts to invoke the court's equitable power to determine visitation, but that Melissa had not. Melissa now appeals.

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[1] The primary concern of the legislature in enacting WIS. STAT. § 767.43(1) was visitation in the context of the dissolution of a marriage. *See* ***Holtzman v. Knott***, 193 Wis. 2d 649, 670-74, 533 N.W.2d 419 (1995). However, the statute does not preempt the consideration of visitation in circumstances not subject to the statute. ***Id.*** at 674.

References to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] WISCONSIN STAT. § 54.56(2) concerns visitation by a minor's grandparents and stepparents after the death of one or both of the parents.

[3] Paul stipulated to the truth of the allegations for purposes of standing.

¶4 A determination to grant or deny visitation is committed to the circuit court's sound discretion. ***Martin L. v. Julie R.L.***, 2007 WI App 37, ¶4, 299 Wis. 2d 768, 731 N.W.2d 288. The question of whether a party has standing is a question of law. ***Le Fevre v. Schrieber***, 167 Wis. 2d 733, 736, 482 N.W.2d 904 (1992).

¶5 In the present case, the circuit court relied upon ***Holtzman v. Knott***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), which reaffirmed "the courts' use of their equitable power to order visitation in the best interest of a child in circumstances not described in any visitation statute." ***Id.*** at 685.[4] A circuit court may determine whether visitation is in the best interests of the children 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 …." ***Id.*** at 658. To meet these two requirements, a petitioner must prove the elements of each one. ***Id.*** at 694.

[4] Paul insists the present case is controlled by ***Cox v. Williams***, 177 Wis. 2d 433, 502 N.W.2d 128 (1993). Paul argues that WIS. STAT. § 54.56(2) is the exclusive means by which a person may petition for visitation after the death of a parent. Paul asserts that § 54.56(2) grants a specific statutory right to either a "grandparent" or a "stepparent," and "[Melissa] simply is not a member of the class of persons who may request it."

However, as the circuit court correctly observed, ***Cox*** is distinguishable on its facts. In ***Cox***, a former step-parent sought visitation of her deceased husband's child. ***Cox***, 177 Wis. 2d at 437-38. The circuit court concluded that the visitation statutes did not apply, and it appears no equitable issue was raised or decided in that case. *See* ***id.*** at 437-41. In any event, ***Cox*** was decided before ***Holtzman***, which explicitly rejected the notion that standing can only be conferred by statute. *See* ***Holtzman***, 193 Wis. 2d at 683. The court recognized that the visitation statutes were not the exclusive means of obtaining court ordered visitation, nor did the statutes "supplant or preempt" the courts' long recognized equitable power to protect the best interests of the child by ordering visitation "in circumstances not described in any visitation statute." ***Id.*** at 658, 685. We therefore reject Paul's contention that WIS. STAT. § 54.56(2) was the exclusive means to petition for visitation.

¶6 The central dispute in the present case is whether Melissa proved the elements of a "parent-like relationship."

> To demonstrate the existence of [a] parent-like relationship with [a] 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.

Id. at 694-95 (footnote omitted).

¶7 The circuit court concluded that Melissa failed to prove the second element, finding that Melissa had not lived in the same household with the children, except for approximately three and one-half months in 2002. The court considered this evidence "too remote in time to be applicable to the ***Holtzman*** factors[, and] not a sufficient amount of time for the court to accept jurisdiction applying the ***Holtzman*** factors …."

¶8 Melissa argues the circuit court erred "when it focused on the sole element of whether Melissa had lived in the same household as the children." Melissa concedes a "technical failure" to live in the same household, but insists this "does nothing to undermine the parent-like relationship she developed." Melissa contends that "[w]hile the ***Holtzman*** elements are helpful for defining what a 'parent-like' relationship is, they will not cover every circumstance." Alternatively, Melissa argues we are not bound by a literal application of the

Holtzman criteria, and we therefore may "craft a solution" for persons and circumstances not covered by the visitation statutes.

¶9 However, we are bound by the prior decisions of our supreme court, ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979), including the four elements ***Holtzman*** deemed necessary to prove a parent-like relationship. We are not persuaded that a "broader purpose behind ***Holtzman***" justifies the avoidance of a literal application of the specific requirement "that the petitioner and the child lived together in the same household[.]" *See* ***Holtzman***, 193 Wis. 2d at 658.

¶10 We acknowledge, as did the circuit court, the close relationship that developed between Melissa and the children. However, we conclude that the circuit court appropriately found that residing for three and one-half months in the family's home five years prior to Monica's death, and before two of the children were born, was not comparable to the facts found in ***Holtzman***.

¶11 In ***Holtzman***, the child's biological mother and her former partner had lived together in the same household for nearly a decade, half of which was after the child was born. ***Id.*** at 659-61. We do not imply that a ***Holtzman***-like amount of time living together in the same household is the only circumstance under which an equitable determination may be made under the second element. However, the circuit court appropriately determined under the facts of the present case that the relationship Melissa developed with the children did not overcome the lack of time living in the same household, or the remoteness in time. Accordingly, Melissa did not satisfy the four elements demonstrating the existence

of a parent-like relationship with the children.[5] The court did not err in declining to exercise its equitable powers to determine visitation.

¶12 Because we conclude the court appropriately determined that Melissa failed to prove a parent-like relationship, we need not reach the issue of whether cutting off contact between Melissa and the children constituted a "triggering event." *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Order affirmed.

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

[5] "The petitioner must prove all these elements before a circuit court may consider whether visitation is in the best interest of the child." ***Holtzman***, 193 Wis. 2d at 659.