COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3025 **Cir. Ct. No. 02TP000124**

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

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

SHANNON S.,

PETITIONER-RESPONDENT,

V.

JACKSON C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Jackson C. appeals the order terminating his parental rights to Codi J.L. under WIS. STAT. § 48.415(9)(a), which provides:

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of a sexual assault in violation of s. 940.225 (1), (2) or (3), 948.02 (1) or (2) or 948.025. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under s. 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

After a fact-finding hearing the trial court determined that Jackson committed a sexual assault in violation of WIS. STAT. § 948.02(2) on Codi's mother, Shannon S., during the period of conception as found by the court. The trial court therefore determined that the grounds for termination under § 48.415(9) were met. After a hearing on disposition, the court ordered that Jackson's parental rights to Codi be terminated.

¶2 Jackson argues the court erred in determining that grounds for termination under WIS. STAT. § 48.415(9)(a) were established. He asserts that clear and convincing evidence did not show Codi was conceived as a result of an act of sexual intercourse that was a violation of WIS. STAT. § 948.02(2) rather than an act of sexual intercourse that was not a violation of that statute or any of the other statutes listed in § 48.415(9)(a). In the alternative, he asserts that the court applied a conclusive presumption that Codi was conceived as the result of a sexual assault in violation of § 948.02(2) and that the application of this conclusive presumption violates his constitutional rights.

¶3 We conclude that clear and convincing evidence established grounds for termination under WIS. STAT. § 48.415(9)(a) and the court did not apply a conclusive presumption. We therefore affirm.

BACKGROUND

¶4 The petition filed in this action alleged that Codi was conceived as a result of a sexual assault in violation of WIS. STAT. § 948.02(2), which prohibits sexual contact or sexual intercourse with a person who has not yet attained the age of sixteen. The petition also alleged that Jackson was charged in a criminal complaint with two counts under § 948.02(2) and one count contrary to WIS. STAT. § 948.09,[2] which prohibits sexual contact or intercourse with a child who has attained the age of sixteen and is not the person's spouse. The petition further alleged that the two counts contrary to § 948.02(2) were dismissed and read in and that Jackson pleaded no contest to the count under § 948.09.

¶5 At the fact-finding hearing, Shannon's testimony presented the relevant evidence, which is undisputed. Her sixteenth birthday was on September 13, 1992, and at the time Jackson, who was then nineteen, was her boyfriend. She had unprotected sex with him on September 4, 1992, September 11, 1992, and September 25, 1992. Codi was born on May 29, 1993, and weighed six pounds, three and one-half ounces. Shannon testified that it is undisputed that Jackson is Codi's biological father.

¶6 Jackson did not testify and did not contradict Shannon's testimony on these points. He argued that because the third incident of sexual intercourse fell within the possible period of conception and was not the result of a violation of WIS. STAT. § 948.02(2), Shannon had not proved that parenthood was the result of sexual assault. He also argued that the legislature did not intend the statute to

[2] The petition erroneously describes the third count as under WIS. STAT. § 948.02(2), but as the attached criminal complaint makes clear, the third count was under § 948.02(9).

apply to boyfriend/girlfriend situations where there was consensual sex, but only to "rapist-type situations," which this was not.

¶7 With respect to Jackson's first argument, the court applied WIS. STAT. § 891.395[3] to determine the presumptive period of conception, which the court found was from August 2 to October 1, 1992. The court found this presumption was not rebutted. The court concluded that WIS. STAT. § 48.415(9) did not require that Shannon establish that Codi was conceived as a result of the act of intercourse that occurred on September 4 or on September 11, 1992; rather, she need only prove that an act of sexual intercourse violating WIS. STAT. § 948.02(2) occurred during the possible conceptive period, and she had done that.

¶8 With respect to Jackson's second argument, the court concluded that the legislature plainly intended, by referencing WIS. STAT. § 948.02(2), to include acts of sexual intercourse that were in fact consensual but where the age of the child nevertheless made it a sexual assault under that statute. The court also pointed out that the provision in WIS. STAT. § 48.415(9)(b)[4]—allowing the mother

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[3] WISCONSIN STAT. § 891.395 provides:

> **Presumption as to time of conception.** In any paternity proceeding, in the absence of a valid birth certificate indicating the birth weight, the mother shall be competent to testify as to the birth weight of the child whose paternity is at issue, and where the child whose paternity is at issue weighed 5 1/2 pounds or more at the time of its birth, the testimony of the mother as to the weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of the child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

[4] WISCONSIN STAT. § 48.415(9)(b) provides:

(continued)

to be heard on her desire for termination of the father's parental rights where the child was conceived as a result of a sexual assault in violation of § 948.02(1) or (2)—indicated the legislature's intent to deal with situations where there was a consensual relationship by allowing the mother to express her views on termination of the father's parental rights at the dispositional stage, not by excluding those situations from § 48.415(9). Jackson does not pursue this argument on appeal.

DISCUSSION

¶9 On appeal, Jackson renews his argument that, because one of the incidents of sexual intercourse occurred after Shannon's sixteenth birthday but within the presumptive period of conception, Shannon did not establish by clear and convincing evidence that Codi was conceived as a result of a sexual assault in violation of WIS. STAT. § 948.02(2).[5] A resolution of this issue presents a question of statutory construction, an issue of law, which we review de novo. ***Smith v. Williams***, 2001 WI App 285, ¶8, 249 Wis. 2d 419, 638 N.W.2d 635. In construing this statute, we do not read words in isolation but read the section or paragraph in its entirety. ***Id.*** at ¶9. Our goal in construing a statute is to discern the intent of the legislature, and we begin by examining the language of the

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> (b) If the conviction or other evidence specified in par. (a) indicates that the child was conceived as a result of a sexual assault in violation of s. 948.02 (1) or (2), the mother of the child may be heard on her desire for the termination of the father's parental rights.

[5] The grounds for termination of parental rights must be established by clear and convincing evidence. WIS. STAT. §§ 48.31(1) and 48.424(2). This is also a constitutional requirement. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768.

statute. ***Id.*** at ¶8. If that plainly expresses the intent of the legislature, we apply that language to the facts at hand. ***Id.***

¶10 Jackson relies on the title of WIS. STAT. § 48.415(9), "Parenthood as a Result of Sexual Assault," and on the first sentence to argue that the petitioner must prove that the specific act of intercourse that constituted sexual assault in violation of the specified statutes was the act of intercourse that conceived the child. However, if one continues with the second sentence, it is clear that the legislature did not intend that. The second sentence plainly expresses the legislature's intent that "[c]onception as a result of sexual assault as specified in this paragraph may be proved by … evidence … indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child." In other words, the phrase "conceived as a result of a sexual assault" in the first sentence is modified by the second sentence. Under the second sentence it is plainly sufficient to prove that a sexual assault as specified in the paragraph occurred during a possible time of conception.

¶11 The evidence Shannon presented at the fact-finding hearing clearly and convincingly establishes conception as a result of sexual assault as defined in the second sentence of WIS. STAT. § 48.415(9). In this case, the "possible time of conception" was established by applying the presumption in WIS. STAT. § 891.395 because of the undisputed evidence of the child's weight. Jackson had the opportunity to rebut the presumption of the time of conception, but did not present any evidence to so. Therefore the period of conception was clearly and convincingly established to be from August 2 to October 1, 1992, as the trial court found. There is also no dispute that two acts of sexual intercourse constituting sexual assault in violation of WIS. STAT. § 948.02(2) took place during that time

period. Accordingly, the evidence clearly and convincingly establishes conception as a result of sexual assault as defined in the second sentence of § 48.415(9)(a).

¶12 Jackson also argues that the court applied a presumption that, if any sexual assault occurred during the period of conception, the child was conceived during that sexual assault as opposed to other acts of intercourse that occurred during that same time period that were not sexual assaults. According to Jackson, he rebutted this presumption because the chance of conception resulting from the act of sexual intercourse that was not a violation of WIS. STAT. § 948.02(2) was one in three. Since the court did not view this evidence as sufficient to rebut the presumption, in Jackson's view the court applied an irrebuttable or conclusive presumption, which Jackson asserts violates his fundamental liberty interest in parenting his child. *See* ***Walworth County Dep't of Human Servs. v. Elizabeth W.***, 189 Wis. 2d 432, 436, 525 N.W.2d 384 (Ct. App. 1994) (because parents have fundamental liberty interest in matters of family life, state's intervention to terminate parental rights must be accomplished by procedures meeting the requirements of the Due Process clause of the Fourteenth Amendment).

¶13 Jackson relies on the jury instruction WIS JI—CHILDREN 371[6] in arguing that the statute applies a presumption. We do not agree with the jury

[6] WISCONSIN JI—CHILDREN 371 provides:

> This statutory ground is not so easily understood and applied, however, in scenarios involving incidents between the respondent and the mother of **both** consensual intercourse and one or more sexual assaults during the conceptive period. Paternity tests are obviously not yet sophisticated enough to identify the specific physical event, "causing" or "resulting" in a child's conception. In these scenarios, the statutory framework is problematic, seemingly requiring the petitioner to prove what is scientifically impossible to prove.

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instruction comment that the statute is employing a presumption that the conception occurred from intercourse constituting sexual assault if any sexual assault occurred during the conceptive period. Rather, we read the statute to express the legislature's intent that parental rights be terminated if a sexual assault occurred during a possible period of conception. In other words, the legislature is making a policy determination that a father who commits sexual assault on the mother of his child during the possible period of conception loses the right to parent that child.

¶14 Accordingly, we conclude that WIS. STAT. § 48.415(9)(a) does not apply a presumption. Rather, as we construe the statute, it establishes grounds for termination of parental rights if a sexual assault by the father of the mother has occurred within the possible period of conception. Jackson does not argue that, if construed in this way, § 48.415(9)(a) violates his right to substantive due process because it is not narrowly tailored to serve a compelling state interest. *See* ***Monroe County Dep't of Human Servs. v. Kelli B.***, 2003 WI App 88, ¶8, 263 Wis. 2d 413, 662 N.W.2d 360 (because termination of parental rights interferes with a fundamental liberty interest, substantive component of due process clause requires that state show termination is narrowly tailored to serve a competing state interest). And we have already concluded that Shannon has established by clear and convincing evidence the grounds for termination in § 48.415(9)(a) as we have

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> … This language in effect establishing a statutory presumption seems to permit termination of a father's rights for sexually assaulting the mother during her conceptive period. This interpretation conflicts, however, with the clear language of the subsection's title and first sentence which requires that the assaultive behavior resulted in conception.

construed the statute. Therefore we affirm the trial court's order terminating Jackson's parental rights.

By the Court.—Order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.