COURT OF APPEALS
DECISION
DATED AND RELEASED

August 23, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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Nos. 94-1975
95-0765

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

In the Interest of Martin B., Jr., A Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

MARTIN B., SR.,

Respondent-Appellant.

APPEALS from orders of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

NETTESHEIM, J. Martin B., Sr. appeals from juvenile court orders terminating his parental rights to his nonmarital child and rejecting his claim of ineffective assistance of trial counsel. On appeal, Martin raises three issues. First, he contends that the court erred by failing to adjudicate his

paternity before terminating his parental rights. Second, he contends that the evidence demonstrated that he had established a substantial parental relationship with the child and therefore termination was improper pursuant to § 48.415(6)(a)2, STATS. Third, he contends that his trial counsel was ineffective. We reject Martin's arguments. We affirm the juvenile court orders.

INTRODUCTION

On September 27, 1993, the State filed a petition seeking to terminate the parental rights of both the mother and Martin, the father of the child whose age was then two years and nine months. At the time of the child's birth, the mother was age fourteen and Martin was age eighteen. The petition was duly served upon both the mother and Martin. The mother did not contest the petition, and in due course, the juvenile court entered an order terminating her parental rights.

As to Martin, the petition alleged, inter alia, that Martin was the child's father and that he had "failed to assume parental responsibility to this child pursuant to Section 48.415(6), Wis. Stats." Martin appeared in the action with an attorney. He advised the juvenile court that he wished to contest the action. He also filed a motion pursuant to § 48.423, STATS., alleging that he was the father of the child and asking for a hearing to adjudicate his claimed paternity.

Following a series of pretrial hearings regarding scheduling, the juvenile court decided to adjudicate the paternity issue in conjunction with the

termination proceedings. The matter went to trial, and the State and Martin each introduced evidence concerning the paternity and termination issues. In its findings at the conclusion of the hearing, the court first adjudicated Martin as the child's father and then further determined that the State had proved that Martin had failed to establish a substantial parental relationship with the child. At the dispositional hearing, the court ruled that it was in the child's best interests to terminate Martin's parental rights. We will recite the additional facts and procedure about the case as we discuss each appellate issue.

ADJUDICATION OF PATERNITY

Martin contends that the juvenile court erred by failing to adjudicate his claimed paternity to the child *before* adjudicating whether grounds for termination of his parental rights existed. Martin contends that the language of § 48.415(6)(a)2, STATS., contemplates a prior paternity adjudication as an element of a termination of parental rights cause of action. As such, he contends that the State failed to prove this necessary element in this case.

We begin with a discussion of the relevant statutes. The State relied on § 48.415(6)(a), STATS., as the grounds for termination of Martin's parental rights. This statute applies in a termination case involving a nonmarital child who has not been adopted or whose parents have not intermarried and where paternity has not been adjudicated prior to the filing of the petition. This section provides, in part:

> FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child is a nonmarital child who has not been adopted or whose parents have not

> subsequently intermarried under s. 767.60, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and ….

Section 48.415(6)(a).

The statute then goes on to lay out two alternative scenarios which bear upon the grounds for termination in such a case. Which of these alternatives will apply depends on whether the paternity of the child has previously been adjudicated following the filing of the petition. The two scenarios are as follows:

> 1. The person or persons who may be the father of the child have been given notice under s. 48.42 but have failed to appear or otherwise submit to the jurisdiction of the court and that such person or persons have never had a substantial parental relationship with the child; *or*
>
> 2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the filing of a petition for termination of parental rights although the father had reason to believe that he was the father of the child and has not assumed parental responsibility for the child.

Section 48.415(6)(a)1, 2, STATS. (emphasis added).

Section 48.423, STATS., provides:

> **Rights of persons alleging paternity**. If a man who alleges that he is the father of the child appears at the hearing and wishes to contest the termination of his parental rights, the court shall set a date for a hearing on the issue of paternity or, if all parties agree, the court

> may immediately commence hearing testimony concerning the issue of paternity. The court *shall* inform the man claiming to be the father of the child of any right to counsel under s. 48.23. The man claiming to be the father of the child must prove paternity by clear and convincing evidence. [Emphasis added.]

Thus, in a termination of parental rights case commenced under § 48.415(6)(a), STATS., the petition, of necessity, cannot allege which scenario will apply at the termination hearing since that determination depends on whether any putative father invokes the paternity adjudication procedures of § 48.423, STATS., following the filing of the petition. If the putative father fails to appear or otherwise submit to the jurisdiction of the court, the juvenile court shall proceed pursuant to subd. 1 of § 48.415(6)(a). In such a case, the court may terminate the putative father's parental rights if such person has "never had a substantial parental relationship with the child." Section 48.415(6)(a)1.

However, if the putative father appears and invokes the paternity procedures of § 48.423, STATS., then the juvenile court shall proceed pursuant to subd. 2 of § 48.415(6)(a), STATS. In such a case, if paternity is established, the court may terminate the putative father's parental rights if "the father did not establish a substantial parental relationship with the child prior to the filing of [the] petition … although the father had reason to believe that he was the father of the child and has not assumed parental responsibility for the child." ***Id.***[1]

[1] It does not appear to us that there is any practical or legal difference between the nonappearing putative father who has "never had a substantial parental relationship with the child" pursuant to subd. 1 of § 48.415(6)(a), STATS., and the appearing putative father who is adjudged the father and

We conclude that the purpose of § 48.423, STATS., is to provide a paternity adjudication procedure in a situation where the putative father appears and wishes to contest the termination petition. This procedure not only protects the rights of the putative father, but also assures that the judicial and legal resources involved in the termination proceeding are properly focused on a litigant with recognized legal and biological claims to the child.

In this case, Martin appeared in the termination proceedings, advised the juvenile court that he wished to contest the termination petition and requested a paternity adjudication hearing pursuant to § 48.423, STATS. When the court took up the scheduling of this matter, it inquired whether the parties could stipulate that Martin was the father of the child. The State readily agreed, noting that it had filed the petition on the premise that Martin was the child's father. Martin also agreed to the proposed stipulation. The guardian ad litem, however, did not.[2]

(..continued)
who "did not establish a substantial parental relationship with the child" pursuant to subd. 2 of the statute. Obviously, one who never had a substantial parental relationship with the child also never established such a relationship. Conversely, one who never established such a relationship also never had it. To this extent, the two subdivisions would appear to require the same proof.

However, subd. 2 has an added component which subd. 1 does not. Subdivision 2 further provides that the adjudicated father had reason to believe that he was the father and had not assumed parental responsibility. This added provision would appear to protect a man who did not know that he had fathered a child and therefore did not establish a substantial parental relationship with the child.

Therefore, we reject Martin's further argument that unless we adopt his argument, the statute unconstitutionally accords a nonappearing putative father greater rights and protection than a putative father who appears in the proceedings. Moreover, this argument is waived because it was not raised before the juvenile court.

[2] In her appellate brief, the guardian ad litem explains that the reason she withheld her approval

Since no stipulation was forthcoming, the juvenile court then scheduled the matter for trial, consolidating both the paternity and termination issues.[3] At the ensuing hearing, the parties presented evidence on both issues. In its bench decision, the juvenile court began its remarks with a finding that Martin was the child's father. The court then additionally found that Martin had failed to assume his parental responsibilities. At the later dispositional hearing, the court terminated Martin's parental rights.

Martin argues that this procedure was error. He contends that the statutory scheme requires a *prior* paternity adjudication and that such be proven by the State as an element included in the grounds for termination under § 48.415(6)(a)2, STATS.[4] He reasons that this element was not proven in this case because the juvenile court did not conduct a prior paternity proceeding and did not make a prior paternity adjudication pursuant to § 48.423, STATS.

In response, the State and the guardian ad litem contend that the language in § 48.415(6)(a)2, STATS., referring to a prior paternity adjudication

(..continued)
of the proposed stipulation was because she had not been involved in the ongoing Child in Need of Protection or Services proceedings and had not been able to complete her investigation of the matter because the mother had absconded during those proceedings. The guardian ad litem wanted to ensure that there were no other possible fathers.

[3] The guardian ad litem argues that Martin waived this appellate issue because he never objected to the juvenile court's "consolidation" of the two issues into one proceeding. While we do not see any express objection by Martin to the court's procedure, we choose not to invoke waiver because he brought a written motion seeking a prior paternity adjudication pursuant to § 48.423, STATS.

[4] In support of this argument, Martin observes that § 48.415, STATS., is the statute which sets out the various grounds of termination of parental rights.

pursuant to § 48.423, STATS., does not create an element of grounds for termination, but rather is a procedural mechanism to assure that proper notice has been given to a putative father.

We need not resolve this dispute. We will agree arguendo with Martin's contention that a prior adjudication is an element of the grounds for termination of his parental rights. However, we further hold that such was properly proven by the State and properly adjudicated by the juvenile court in this case.[5]

When Martin invoked the protections and procedures of § 48.423, STATS., the juvenile court immediately recognized its obligation to litigate that question, and it set about scheduling the matter for hearing. Since the State in its petition and Martin through his invocation of § 48.423 both were contending that Martin was the child's father, the court understandably inquired whether the parties could stipulate to Martin's paternity. Both parties said they would so stipulate. However, because she had not yet fully investigated the matter, the guardian ad litem could not yet join in the stipulation. Were it not for this inability, it appears to us that a formal paternity hearing under the statute would not have been necessary.

[5] The State also argues that if any error occurred on this issue, it was harmless pursuant to § 805.18(1), STATS. We need not address this issue because we have assumed arguendo that a prior paternity adjudication is an element of the grounds for termination and that the element was properly proven and adjudicated.

Against this backdrop, the juvenile court decided to consolidate the two issues at a single hearing, and the parties introduced evidence on both issues at this consolidated proceeding. Finally, and most importantly, the juvenile court stated at the outset of its bench decision, "First off, the Court will find … as a first step in this procedure … that the Court is required to determine adjudication of paternity …." The court then proceeded to find that Martin was the child's father.[6]

This, therefore, was not a case in which Martin's desire to be adjudicated the child's father was frustrated or impeded. To the contrary, the issue was fully tried and adjudicated. The consolidation of the two issues did not offend the statutes nor abridge Martin's rights.[7]

FAILURE TO ASSUME PARENTAL RESPONSIBILITY/
SUBSTANTIAL PARENTAL RELATIONSHIP

Martin next argues that the evidence showed that he had, in fact, assumed his parental responsibility towards the child. He bases this argument on the language of § 48.415(6)(a)2, STATS., which defines a failure to assume

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[6] Martin argues that the juvenile court merely determined the "fact" of his paternity, not its "adjudication." We disagree. The juvenile court opened its bench decision by recognizing its obligation to adjudicate the paternity question. The court then went on to factually determine that Martin was the father of the child. Martin does not explain what more the juvenile court should have done to "adjudicate" him as the father of the child.

[7] Martin argues that the consolidation of the two issues precluded any intervening opportunity for members of his family to seek to adopt the child. However, the facts of this case show that Martin and his family knew that he was the child's father long before the termination proceeding was commenced by the State. Martin had substantial opportunity to commence a paternity action outside the context of this proceeding. *See* §§ 48.025 and 767.45(1)(d), STATS.

parental responsibility as a failure to "establish a substantial parental relationship with the child prior to the filing of [the] petition." Paragraph (b), in turn, defines "substantial parental relationship" as follows:

> "[S]ubstantial 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 or the mother during her pregnancy and whether the person has neglected or refused to provide care or support.

Martin argues that the evidence shows that during the first five months following the child's birth, he assisted in providing care and support to the child. He concedes that after May 1991, he had little contact with the child and that his relationship with the child was no longer "substantial" thereafter. Martin argues, however, that if the evidence shows that a substantial parental relationship once existed, it makes no difference that the relationship may have later diminished or disappeared.

Martin concedes, however, that his appellate construction of the statute was not asserted in the juvenile court.[8] In fact, this failing forms the basis for one of Martin's ineffective assistance of trial counsel claims—a matter we will discuss later in this opinion. Instead, in the juvenile court, Martin's

[8] Martin's construction of the statute was asserted at the ***Machner*** hearing regarding his claim of ineffective assistance of trial counsel.

attorney, the State and the juvenile court construed the statute to mean that even if a substantial parental relationship had once existed, termination could still occur if the relationship no longer existed prior to the filing of the petition. We therefore deem the matter waived.

INEFFECTIVE ASSISTANCE OF COUNSEL

As his final issue, Martin argues that his trial counsel was ineffective. He bases this argument on the two issues we have previously addressed: trial counsel's failure to seek a prior adjudication of paternity and her failure to assert Martin's appellate construction of § 48.415(6)(a)2, STATS.

Since we have concluded that the juvenile court's consolidation of the paternity and termination issues did not offend the statutes or otherwise abridge Martin's rights, we hold that trial counsel's performance as to that matter was not ineffective. We do not address this argument further.

However, trial counsel's failure to assert the interpretation of § 48.415(6)(a)2, STATS., which Martin's appellate counsel now asserts on appeal, is a closer question. Nonetheless, we hold that counsel's performance was not ineffective.

Martin's appellate approach to this question assumes that we are duty bound to interpret § 48.415(6)(a)2, STATS., and then, in light of that interpretation, determine whether trial counsel was ineffective. However, this approach overlooks that the issue before us is whether trial counsel was

ineffective—a determination which does not necessarily *require* us to construe this statute.

When we address a claim of ineffective assistance of counsel, we determine whether trial counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. ***Id***. We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. ***Id***.

What Martin, the State and the guardian ad litem all overlook in this discussion is that while § 48.415(6)(a)2, STATS., has been the subject of limited appellate discussion,[9] *the construction urged by Martin on appeal has never been addressed, much less adopted, by any appellate court of this state.* Thus, the question we must answer is whether Martin's trial counsel's interpretation of the statute is one which constituted reasonably effective representation, *separate and apart from how the statute may ultimately be construed by an appellate court in a case where the issue is preserved.* Where the grounds in support of a claim of ineffective assistance of counsel rest on an unsettled area of the law, the threshold task for the reviewing court is not to decide what the law shall be, but rather whether trial counsel was deficient for failing to raise the issue. *See* ***McMahon***, 186 Wis.2d at 84, 519 N.W.2d at 628. Where the differing interpretations offered by appellate counsel and trial counsel both represent

[9] *See, e.g.*, ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 500 N.W.2d 649 (1993).

reasonable analyses, we cannot say that trial counsel's approach was deficient. *See* ***id***.

If we confined our consideration of the reasonableness of trial counsel's interpretation of § 48.415(6)(a)2, STATS., to only the language of that subdivision, we might well say that Martin's appellate interpretation might be the more reasonable. This is because the statute speaks only of the father establishing a parental relationship without expressly stating that it must endure to the time of the filing of the petition.

However, when we consider the further and more detailed definition of "substantial parental relationship" set out in para. (b) of the statute, we might well say that trial counsel's interpretation is more reasonable. This is because this provision speaks of the "acceptance and exercise of *significant* responsibility for the *daily* supervision, education, protection and care of the child." Section 48.415(6)(b), STATS. (emphasis added). These words, particularly "significant" and "daily," reasonably suggest a longer and more substantive parental commitment than the first five months of a three-year-old child's life.

The point to be made is that both approaches offer reasonable interpretations of the statute. Perhaps in the final analysis, Martin's interpretation will prevail. But that determination will have to await another day. Ineffective assistance of counsel is not established merely because trial

counsel could have, but did not raise an issue of first impression. We are not persuaded that trial counsel's performance was deficient.[10]

By the Court.—Orders affirmed.

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

[10] We do not hold, in all instances, that trial counsel's interpretation of a statute which has not previously been construed constitutes effective assistance of counsel. If the language of such a statute, or its legislative history, compelled but one reasonable meaning, we might well say that a contrary interpretation by trial counsel was ineffective. Here, however, neither the statute on its face nor its legislative history (which we have examined) conveys but one reasonable meaning.