COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2110 **Cir. Ct. No. 2005PA59**

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

IN RE THE PATERNITY OF MELODY A.K.

EARL W. H.,

PETITIONER-APPELLANT,

V.

DIANA M. K. AND BRETT K.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. IRWIN, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Earl W.H. appeals from an order that dismissed his paternity action without ordering genetic testing. We affirm for the reasons discussed below.

BACKGROUND

¶2 Earl filed a paternity action alleging that he is the biological father of Melody A.K., who was born to Diana M.K. while Diana was married to Brett K. Earl asked for genetic testing. The family court commissioner noted that the case involved a presumptively marital child and indicated that she would need additional information on the best interests of the child before ordering genetic testing.

¶3 The family court commissioner appointed Attorney Christopher Rogers as guardian ad litem for the child. Earl moved for a new guardian ad litem on the grounds that Rogers was unfairly prejudiced against Earl due to what he perceived as false allegations made by Diana. Both the court commissioner and later the circuit court denied that motion.

¶4 Earl next moved for discovery of a number of items including child support files, Diana's counseling records from the Department of Workforce Development, Brett's records from the Department of Motor Vehicles, Brett and Diana's criminal records, Department of Social Services records, health care records, lease information and other rental records, and tax information. The State refused to turn over a number of the requested records on grounds of confidentiality and lack of relevance. The circuit court subsequently entered an order barring Earl from making pro se discovery requests to Diana or Brett as a sanction for abusing the discovery process by including vulgar and sexual language on envelopes sent to them. The court required any future discovery requests to be made through counsel. Earl moved for reconsideration, contending that Diana or Brett had falsified the writings on the envelopes to implicate him and complaining that he had not been given copies of the envelopes on which the sanction was based, but the court stood by its ruling. The court also denied the

motion for discovery from the Jefferson County Child Support Agency after Earl had withdrawn his requests relating to other agencies.

¶5 Meanwhile, Rogers moved to dismiss the paternity action on the grounds that it would not be in Melody's best interest to have Earl adjudicated as her father. The Jefferson County Child Support Agency joined the request to determine the child's best interest before ordering genetic testing. Following a hearing, the circuit court acknowledged that both Earl and Brett had sexual relations with Diana during the presumptive conception period. However, the court determined that it would not be in Melody's best interest to adjudicate whether Earl was her actual biological father, and therefore dismissed the paternity action without ordering genetic testing.

¶6 On appeal, Earl challenges the court's refusal to appoint a new guardian ad litem, its order requiring him to hire an attorney to pursue discovery and its subsequent acceptance of certain medical records provided by Diana, and its refusal to order genetic testing.

DISCUSSION

Guardian Ad Litem

¶7 Earl contends the circuit court erred in refusing his motion to replace the guardian ad litem.[1] The guardian ad litem, Rogers, took no position on the question below, and has not addressed its merits on appeal. Rogers suggests the issue would be moot if this court were to affirm the substance of the trial court's decision to dismiss the paternity action. However, since the circuit court was

[1] Earl also claims the family court commissioner should have granted the motion, but we only review the circuit court's decision, since it was the final word below.

acting on Rogers' motion to dismiss the action, an erroneous failure to replace him as the guardian ad litem could necessitate a remand. We will therefore review the circuit court's decision on this issue.

¶8 We first note that there is no statutory provision setting forth criteria for the replacement of the guardian ad litem. The provision Earl cites, WIS. STAT. § 767.407(5) (2005-06),[2] refers to the termination of a guardian ad litem's duties, which usually occurs after the circuit court case proceedings have concluded. It does not refer to the removal or replacement of a guardian ad litem for cause.

¶9 Assuming for the sake of argument that a party may properly ask the court to remove a guardian ad litem for failure to perform his or her statutory duties under WIS. STAT. § 767.407(4), the decision whether to do so would appear to be discretionary in nature since there is nothing in the statutes which gives the parties any role in deciding *who* the court chooses to serve as guardian ad litem. Here, the trial court rejected Earl's claim that Rogers was biased against him, noting that Earl's real complaint was that Rogers was not weighing the relevant best interest factors in the way Earl would like. The court also rejected Earl's claim that Rogers had not conducted a sufficient investigation, noting that the case was still in its early stages and there would be time for additional investigation later. Finally, the court noted that the guardian ad litem had already invested a significant amount of time in the case.[3] We are satisfied that the court's discussion represents a reasonable exercise of discretion, and even if we were to

[2] 2005 Wis. Act 443 § 25 (eff. Jan. 1, 2007) renumbered WIS. STAT. § 767.045 to WIS. STAT. § 767.407. All references to the Wisconsin Statutes in this opinion are to the 2005-06 version unless otherwise noted.

[3] We recognize that Earl disputes how much time the guardian ad litem had actually put into the case at that point in the proceedings, but we defer to the circuit court's factual finding on that issue, since it was in the best position to evaluate Rogers' involvement.

consider the question de novo, we see nothing in the record that would warrant the guardian ad litem's removal.

Discovery Sanction & Medical Records

¶10 Next, Earl complains that the court order requiring him to conduct discovery only through an attorney was imposed following a hearing scheduled on Earl's own motion to compel discovery, with no notice that any sanction was to be considered and without providing Earl any opportunity to dispute the factual basis for the sanction. Earl points out that the guardian ad litem gave the court the envelopes which Diana and Brett claimed Earl had sent to them at the hearing, but Earl could not see them because he was appearing telephonically. Earl also notes that the trial court explicitly stated at the hearing that it was not going to spend time litigating how the lewd writings got onto the envelopes, but subsequently made a factual finding that Earl was responsible for the writings based on the court's examination of the envelopes themselves.

¶11 Earl claims that the discovery sanction violated his due process and equal protection rights, as well as his rights to self-representation and access to the courts. In terms of what discovery was actually denied by the court's sanction, Earl refers in various parts of his brief to interrogatories regarding the date of conception and when Diana was diagnosed as pregnant as well as medical records relating to the pregnancy.

¶12 When the trial court asked Earl at the hearing what discovery he still felt he needed after testimony had been taken, the only items Earl mentioned were the dates of Diana's doctor's appointments and medical records that would shed light on the date of conception. Although the trial court ordered Diana to produce those records after the hearing, Earl complains that he was not given an opportunity to challenge their authenticity or cross-examine Diana about them.

¶13 We will assume for the sake of argument that entering the discovery sanction without providing Earl an adequate opportunity to litigate its factual basis, and then allowing Diana to produce some discovery after the hearing without giving Earl an adequate chance to rebut it violated due process. Even so, we conclude that Earl's discovery issues were rendered moot by the dismissal of the action. In other words, if the action had proceeded to an adjudication of Melody's paternity, Earl might have been entitled to some of the additional discovery he sought. However, once the action was dismissed on the grounds of the best interest of the child, any right to discovery of materials related to the questions of Diana's conception date or Melody's actual paternity was extinguished as well.

Best Interests of the Child

¶14 The Wisconsin statutes authorize a man who alleges that he is the biological father of a child to file a paternity action and to request that genetic tests be performed. *See* WIS. STAT. §§ 767.80(1)(d) and 767.84(1)(a).[4] However:

> In an action to establish the paternity of a child who was born to a woman while she was married, if a male other than the woman's husband alleges that he, not the husband, is the child's father, a party may allege that a judicial determination that a male other than the husband is the father is not in the best interest of the child. If the court or a supplemental court commissioner under s. 757.675(2)(g) determines that a judicial determination of whether a male other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.

[4] 2005 Wis. Act 443 §§ 184 and 211(c) (eff. Jan. 1, 2007) renumbered WIS. STAT. § 767.45 to § 767.80 and renumbered WIS. STAT. § 767.48(1)(a) to § 767.84(1)(a).

WIS. STAT. § 767.863(1m).[5] The Wisconsin Supreme Court has held that this statute does not violate the substantive due process rights of a biological father who has not established a substantial relationship with his child. *See* ***W.W.W. v. M.C.S.***, 161 Wis. 2d 1015, 1026-29, 468 N.W.2d 719 (1991). In ***W.W.W.***, the court discussed ***Michael H. v. Gerald D.***, 491 U.S. 110 (1989), at length, noting that all nine U.S. Supreme Court justices in that case considered biology alone insufficient to provide a natural father with a liberty interest in establishing paternity over a child born into another man's marriage, although the high court had split on whether biology plus a substantial relationship would be sufficient. ***Id.*** The Wisconsin Supreme Court has recently confirmed that a man asserting paternity of a marital child must demonstrate that he has actually assumed parental responsibilities for the child before this state will recognize that he has any substantial liberty interest in the relationship. ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶¶18-19, 270 Wis. 2d 384, 677 N.W.2d 630.

¶15 Here, Earl argues that he attempted to establish a relationship with his child, but that his efforts were blocked by Diana, who obtained a series of no contact orders against him. We agree with the guardian ad litem, however, that the main impediment to Earl's ability to establish a relationship with his child was his own incarceration. In any event, we are satisfied the record supports the trial court's finding that Earl had no relationship at all with Melody, much less a substantial one, since Earl had never met Melody and never provided any financial or emotional support to her. We therefore conclude that Earl failed to establish any constitutional liberty interest which would preclude application of WIS. STAT. § 767.863(1m), and the trial court properly considered whether it would be in

[5] 2005 Wis. Act 443, § 198 (eff. Jan 1, 2007) renumbered WIS. STAT. § 767.458(1m) to § 767.863(1m).

Melody's best interest to have Earl adjudicated as her father before addressing the merits of Earl's paternity claim.

¶16 The trial court found that Brett got Melody and the couple's other children up in the morning and put them to bed at night. It therefore concluded that Brett and Diana had an intact family, even though Brett was also maintaining a separate residence. The court further found that Brett had physically, emotionally and financially supported Melody since her birth, and that he was the only father Melody had ever known. The court expressed concern that Brett had a conviction for child abuse against another infant child, but observed that Brett had successfully completed parenting and anger management courses, as well as his extended supervision.

¶17 Meanwhile, the court found that Earl had a lengthy and violent criminal history, and had also been involuntarily committed for mental illness. The court noted that Earl would not even be released from prison until Melody was nearly seven and that he had not yet completed any treatment for his problems. Under these circumstances, the court found it likely that any contact Earl might have with Melody would be severely restricted by DOC officials and would require professional intervention.

¶18 The trial court's findings were all based on testimony in the record, and those findings support the court's determination that it would not be in Melody's best interest to adjudicate whether Earl is her actual biological father. We therefore affirm the trial court's decision to dismiss the paternity action without reaching the question of paternity pursuant to WIS. STAT. § 767.863(1m).

By the Court.—Order affirmed.

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