COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP752 **Cir. Ct. No. 1998PA209PJ**

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

IN RE THE PATERNITY OF G.E.G.:

WENDY ROWELL-GOFTON,

PETITIONER-APPELLANT,

V.

TONY EVANS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. This appeal involves a dispute between Wendy Rowell-Gofton and Tony Evans arising out of the paternity judgments relating to

their children, Grace and Brooke. At Evans' request, and over Rowell-Gofton's objection, the circuit court amended the judgments to change the children's surnames to a surname consisting of Evans' surname and part of Rowell-Gofton's surname separated by a hyphen. Under WIS. STAT. § 767.89(3m)(b) (2005-06),[1] circuit courts have the authority to order this type of name change in a paternity judgment, provided that the change is in a child's best interests. However, § 767.89(3m)(b) did not exist at the time of the paternity judgments here. On appeal from the circuit court's order, Rowell-Gofton argues that the circuit court lacked the authority to change the children's names and erred by applying § 767.89(3m) retroactively. We disagree, and conclude that the circuit court had the authority to amend the paternity judgments as provided in § 767.89(3m)(b) under WIS. STAT. § 767.59, the statute authorizing revision of support and maintenance orders. We therefore affirm.

Background

¶2 The paternity judgments determining that Evans is the father of Grace and Brooke were entered in December 1998 and March 2001, respectively.[2]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. WISCONSIN STAT. ch. 767 was reorganized and revised by 2005 Wis. Act 443, effective January 1, 2007. *See generally* 2005 Wis. Act 443; *see also* ***id.***, § 267 (stating the effective date of January 1, 2007). As part of the reorganization and revision, the legislature renumbered the statutes at issue here. *See* 2005 Wis. Act 443, §§ 147, 148, 218, 261. In this opinion, we refer to the renumbered statutes. The substantive changes to those statutes under 2005 Wis. Act 443 do not affect our decision.

[2] A copy of the paternity judgment for Brooke is not in the record, but Rowell-Gofton informs us that March 2001 is the date of the judgment, and Evans does not disagree. For reasons that are unclear, the record in Brooke's case is not before us. The parties acknowledge this and proceed under the assumption that the pertinent facts are the same for both children. We follow the parties' lead and do the same, taking our facts from the record in Grace's case, but discussing those facts as if they pertain to both children.

At the time, Grace was named Grace Gofton and Brooke was named Brooke Rowell.

¶3 The legislature subsequently amended the paternity judgment statute, WIS. STAT. § 767.89. The amendment created a new subsection, (3m), with an effective date of September 1, 2001. *See* 2001 Wis. Act 16, § 3793m, 9400. That subsection reads:

> CHANGE OF CHILD'S NAME. (a) Upon the request of both parents, the court shall include in the judgment or order determining paternity an order changing the name of the child to a name agreed upon by the parents.
>
> (b) Except as provided in par. (a), the court may include in the judgment or order determining paternity an order changing the surname of the child to a surname that consists of the surnames of both parents separated by a hyphen or, if one or both parents have more than one surname, of one of the surnames of each parent separated by a hyphen, if all of the following apply:
>
> 1. Only one parent requests that the child's name be changed, or both parents request that the child's name be changed but each parent requests a different name change.
>
> 2. The court finds that such a name change is in the child's best interest.

WIS. STAT. § 767.89(3m).

¶4 Five years later, in September 2006, Evans moved to amend the paternity judgments to change the children's surnames. He relied on WIS. STAT. § 767.89(3m) and WIS. STAT. § 806.07, the general statute for relief from judgments. Rowell-Gofton opposed the motion, contending that the circuit court lacked the authority to change the children's names.

¶5 The circuit court concluded that it had the authority to order the surname changes. The court determined that it could apply WIS. STAT.

§ 767.89(3m) retroactively, provided that the name change was in the children's best interests. In its written order, the court also cited its authority under WIS. STAT. § 806.07. After finding that the name change was in the children's best interests, the circuit court ordered that the children's surnames be changed as provided in § 767.89(3m)(b). In other words, the circuit court ordered that the children's surnames be changed to a surname consisting of Evans' surname and part of Rowell-Gofton's surname separated by a hyphen. Rowell-Gofton appealed.

Discussion

¶6 Rowell-Gofton asserts that the circuit court lacked authority to amend the judgments to change the children's names. She does not challenge the circuit court's best interests determination. Thus, the dispute is limited to what statute or statutes, if any, provided the circuit court with the authority to amend the paternity judgments to change Grace's and Brooke's names. To resolve the dispute, we must interpret and apply statutes to undisputed facts, a question of law for our *de novo* review. *See* ***State v. Wilke***, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

¶7 Evans argues that the circuit court had the authority to change the children's names, as provided in WIS. STAT. § 767.89(3m)(b), under WIS. STAT. § 806.07. Evans also argues that the circuit court had the authority to change the children's names, as provided in § 767.89(3m)(b), under para. (1c)(a) of WIS.

STAT. § 767.59, the statute pertaining to revision of support and maintenance orders. We agree with the latter proposition.[3]

¶8 Our analysis consists of two parts. We first discuss the circuit court's authority under WIS. STAT. § 767.59(1c)(a). We then address whether the circuit court erred by giving WIS. STAT. § 767.89(3m)(b) retroactive effect.

A. Circuit Court's Authority Under WIS. STAT. § 767.59(1c)(a)

¶9 Rowell-Gofton asserts, without discussion, that WIS. STAT. § 767.59 does not apply here because it pertains only to child support "provisions" in paternity judgments and does not authorize the revision of a paternity judgment for purposes of a name change. We disagree.

¶10 WISCONSIN STAT. § 767.59 applies to the revision of "support and maintenance orders," which are broadly defined as follows:

> (1) DEFINITION. In this section, "support or maintenance order" means a judgment or order providing for child support under this chapter or s. 48.355(2)(b)4., 48.357(5m)(a), 48.363(2), 938.183(4), 938.355(2)(b)4., 938.357(5m)(a), 938.363(2), or 948.22(7), for maintenance payments under s. 767.56, for family support payments under this chapter, or for the appointment of trustees or receivers under s. 767.57(5).

[3] We may affirm the circuit court's ruling on a question of law on a different ground than that relied on by the circuit court. ***State v. Gribble***, 2001 WI App 227, ¶27 n.10, 248 Wis. 2d 409, 636 N.W.2d 488.

The paternity judgments here are judgments or orders providing for child support under WIS. STAT. ch. 767.[4] Accordingly, those judgments are "support or maintenance order[s]" within the meaning of § 767.59.

¶11 Subsection (1c) of WIS. STAT. § 767.59 further provides, in relevant part, as follows:

> (1c) COURT AUTHORITY. (a) On the petition, motion, or order to show cause of either of the parties, … a court may … do any of the following:
>
> 1. Revise and alter a support or maintenance order as to the amount and payment of maintenance or child support and the appropriation and payment of the principal and income of property held in trust.
>
> 2. *Make any judgment or order on any matter that the court might have made in the original action*.

(Emphasis added.)

¶12 Thus, the circuit court here had the authority, upon proper "petition, motion, or order to show cause," to make "any judgment or order on any matter that the court might have made in the original [paternity] action[s]" pertaining to the children. Evans reads this language in WIS. STAT. § 767.59(1c)(a) in combination with WIS. STAT. § 767.89(3m)(b) to provide the circuit court with the authority to change the children's names.

[4] The original paternity judgment relating to Grace provides for child support. We assume that the paternity judgment relating to Brooke does the same. We note that the paternity judgment statute states that any judgment or order determining paternity "shall contain … [a]n order requiring either or both of the parents to contribute to the support of any child of the parties who is less than 18 years old." WIS. STAT. § 767.89(3)(c).

¶13 At first glance, Evans' reading of WIS. STAT. § 767.59(1c)(a) might seem flawed. Arguably, the circuit court's order changing Grace's and Brooke's names is not an order that the court "might have made in the original action" because WIS. STAT. § 767.89(3m) did not exist at that time. On closer examination, however, we determine that such a restrictive interpretation of § 767.59(1c)(a)2. is unreasonable, and therefore reject it. Under such an interpretation, circuit courts would always, under all circumstances, be forever bound by whatever law existed at the time of the original action any time a party seeks a revision under § 767.59(1c)(a)2. At a minimum, it would be unreasonable not to apply subsequent law when the legislature intends that law to have retroactive effect.

¶14 Accordingly, we conclude that WIS. STAT. § 767.59(1c)(a)2. is not necessarily restricted to the law in existence at the time of the original action. That does not end our inquiry, however, because Rowell-Gofton argues that the circuit court's decision applied WIS. STAT. § 767.89(3m)(b) retroactively and that the statute is prospective only. We address that argument in the next section.

B. Whether The Circuit Court Erred By Giving WIS. STAT. § 767.89(3m)(b) Retroactive Effect

¶15 Rowell-Gofton argues that the circuit court erred by applying WIS. STAT. § 767.89(3m) retroactively. She cites the general rule that statutes are presumed to be prospective and "will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application." *See, e.g.*, ***Hunter v. School Dist. of Gale-Ettrick-Trempealeau***, 97 Wis. 2d 435, 444-45, 293 N.W.2d 515 (1980) (citation omitted).

¶16 It is not apparent from WIS. STAT. § 767.89(3m) whether the legislature intended the statute to be applied retroactively. For example, the legislature could have specified, but did not, that § 767.89(3m) applies only to paternity actions originally filed after the statute's effective date. Although the statute's effective date was September 1, 2001—after the date of the paternity judgments in this case—"[t]he establishment of effective dates does not determine whether a statute will apply retroactively" because "[a]ll statutes have effective dates." ***Salzman v. DNR***, 168 Wis. 2d 523, 529, 484 N.W.2d 337 (Ct. App. 1992).

¶17 Moreover, Rowell-Gofton's statement of the general rule of prospective application of statutes is incomplete because it omits exceptions for "remedial" or "procedural" statutes:

> The general rule of statutory construction is that statutes are construed prospectively and not retroactively. ***City of Madison v. Town of Madison***, 127 Wis. 2d 96, 101-102, 377 N.W.2d 221, 224 (Ct. App. 1985). However, if the statute at issue is remedial or procedural, it will be applied retroactively unless there is a clearly expressed legislative intent to the contrary or unless retroactive application will interfere with contracts or vested rights. ***Id.*** at 102, 377 N.W.2d 224.

Lins v. Blau, 220 Wis. 2d 855, 862, 584 N.W.2d 183 (Ct. App. 1998); *see also* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶40 & n.24, __ Wis. 2d __, 735 N.W.2d 1. Thus, if WIS. STAT. § 767.89(3m)(b) is remedial or procedural, it will be applied retroactively unless there is a clearly expressed legislative intent to the contrary, or unless retroactive application will interfere with contracts or vested rights.

¶18 The criteria for determining whether a statute is substantive, procedural, or remedial are more easily stated than applied. "It is often written that if a statute creates, defines, and regulates rights and obligations, it is

substantive." ***Trinity Petroleum***, 2007 WI 88, ¶41. If, instead, a statute "prescribes the method, that is, the legal machinery, used in enforcing a right or remedy, it is procedural." ***Id.*** Remedial statutes are "those which afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." ***State v. Jason J.C.***, 216 Wis. 2d 12, 15, 573 N.W.2d 564 (Ct. App. 1997) (citation and emphasis omitted); *see also* ***Betthauser v. Medical Protective Co.***, 172 Wis. 2d 141, 148, 493 N.W.2d 40 (1992) ("A remedial statute is one which is 'related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing.'" (quoting ***City of Madison v. Town of Madison***, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985) (citations omitted))).[5]

¶19 We conclude that WIS. STAT. § 767.89(3m)(b) is remedial for two reasons.

¶20 First, the statute fills a gap in the statutes that we identified in ***State v. Charles R.P.*** (***In re Paternity of Noah J.M.***), 223 Wis. 2d 768, 590 N.W.2d 21 (Ct. App. 1998). In ***Charles R.P.***, a child's father requested in a paternity proceeding that the circuit court change the child's surname from the mother's surname to the father's surname. ***Id.*** at 770. The circuit court found that the name change would be in the child's best interests and granted the request. ***Id.*** at 771. We reversed, concluding that the circuit court lacked the authority to change the

[5] The procedural and remedial categories are sometimes lumped together. *See, e.g.*, ***J.G. v. State*** (***In re Paternity of C.J.H.***), 149 Wis. 2d 624, 628, 439 N.W.2d 615 (Ct. App. 1989) ("Procedural or remedial statutes merely confirm already-existing rights and promote remedies by curing defects and adding to the means of enforcing existing obligations.").

child's name absent compliance with the more general name change statute, WIS. STAT. § 786.36, and absent the agreement of the child's mother. ***Charles R.P.***, 223 Wis. 2d at 771. Under § 786.36, the child's name could not be changed unless the parents agreed on the change, regardless whether the change was in the child's best interests.[6]

¶21 It was after we decided ***Charles R.P.*** that the legislature amended the paternity judgment statute to include the provision at issue here. *See* 2001 Wis. Act 16, § 3793m. Had WIS. STAT. § 767.89(3m)(b) existed at the time of ***Charles R.P.***, the circuit court in that case would have had the authority to change the child's name as the father requested, assuming the court had correctly determined that the change was in the child's best interests.

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[6] The rule is different for children who have attained the age of 14. *See* WIS. STAT. § 786.36; *see also* ***State v. Charles R.P.*** (***In re Paternity of Noah J.M.***), 223 Wis. 2d 768, 774, 590 N.W.2d 21 (Ct. App. 1998). At the time we decided ***Charles R.P.***, § 786.36 provided, in relevant part, as follows:

> Any resident of this state, whether a minor or adult, may upon petition to the circuit court of the county where he or she resides and upon filing a copy of the notice, with proof of publication, as required by s. 786.37, if no sufficient cause is shown to the contrary, have his or her name changed or established by order of the court. *If the person whose name is to be changed is a minor under the age of 14 years, the petition may be made by: both parents, if living, or the survivor of them; the guardian or person having legal custody of the minor if both parents are dead or if the parental rights have been terminated by judicial proceedings; or the mother, if the minor is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, except that the father must also make the petition unless his rights have been legally terminated.... Any change of name other than as authorized by law is void.*

WIS. STAT. § 786.36 (1997-98) (emphasis added). The statute has been modified since the time of ***Charles R.P.***, but not in a way that affects our decision.

¶22 Second, WIS. STAT. § 767.89(3m)(b) does not create new rights or redefine obligations, at least not in the sense that those concepts are used in the relevant case law. *Cf.* ***Schulz v. Ystad***, 155 Wis. 2d 574, 598, 456 N.W.2d 312 (1990) (elimination of child support obligor's statutory right to seek modification, reduction, or elimination of accumulated arrearages on showing of sufficient cause redefined obligations and was a substantive, not remedial or procedural, statutory change); ***J.G. v. State*** (***In re Paternity of C.J.H.***), 149 Wis. 2d 624, 629, 439 N.W.2d 615 (Ct. App. 1989) ("grandparent liability" child support statute was substantive, not remedial, because it afforded new rights to those bringing paternity actions to seek support from grandparents and it imposed new legal obligations on a class of persons not previously responsible for support).

¶23 We further conclude that retroactive application of WIS. STAT. § 767.89(3m)(b) does not impair contract or vested rights and, therefore, need not be limited to prospective application on that basis. *See* ***Lins***, 220 Wis. 2d at 862. Although changing a child's name may be a significant matter for child and parents alike, it does not impair contract or vested rights. If anyone were to have a vested right in a child's name it would be the child, but the child's rights are protected by the requirement that a name change requested by only one parent be in the child's best interests. *See* § 767.89(3m)(b)2.

¶24 For the reasons stated, we see no reason to limit WIS. STAT. § 767.89(3m)(b) to a prospective application such that it could not be applied here.

Conclusion

¶25 In sum, we conclude that the circuit court had the authority under WIS. STAT. § 767.59(1c)(a)2. to amend the paternity judgments to change the

children's surnames as provided in WIS. STAT. § 767.89(3m)(b). Accordingly, we affirm the circuit court's order.

By the Court.—Order affirmed.

Recommended for publication in the official reports.