COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP914 **Cir. Ct. No. 2005FA350**

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

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF KAILA DREW FENDOS:

DEBRA ALBRECHT,

APPELLANT,

V.

MIRAYRA FENDOS-BELL AND BRIAN FENDOS,

RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: JAY R. TLUSTY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Debra Albrecht, pro se, appeals an order dismissing for lack of standing her motion for visitation with her granddaughter,

Kaila Fendos. Albrecht's argument, while a bit disjointed, ultimately asserts she fulfilled the standing requirements. We conclude the court correctly determined Albrecht has failed to meet her burden, although we reach that conclusion for a different reason than the circuit court. We therefore affirm the order.

Background

¶2 Albrecht's daughter, Mirayra, an Army reservist and group home manager, married Brian Fendos, a corrections officer, in 2001. Kaila was born to the marriage in 2003. From January 2004 to January 2005, Mirayra was deployed overseas. During that time, Albrecht cared for Kaila a few days a week to accommodate Brian's work schedule. Brian's mother also assisted in Kaila's care.

¶3 Mirayra and Brian jointly petitioned for divorce in 2005. The stipulated divorce was granted on November 21, 2005, and Mirayra and Brian were awarded joint custody and shared placement of Kaila. The joint custody arrangement has continued without incident. After the divorce, Albrecht continued to visit Kaila. Also, Mirayra began dating Brent Bell, who she eventually married and with whom she had a son in July 2006.

¶4 In March 2006, Albrecht went to Mirayra and Brent's home to pick up Kaila. Albrecht claims the child, left in Brent's care because Mirayra was already at work, was dirty and not ready to leave. Once Kaila and Albrecht left, they stopped at McDonald's and, while helping Kaila use the restroom, Albrecht claims she observed blood in Kaila's underwear. In April 2006, Albrecht reported concerns that Brent was molesting Kaila to the social services department. However, nothing in the record indicates what action, if any, the department took in response to these allegations.

¶5 Mirayra and Brian assert that during the spring of 2006, Albrecht's behavior became increasingly erratic, so much so that they and Brent sought and were granted restraining orders against her. Moreover, Mirayra and Brian jointly decided that Albrecht should not be permitted to visit Kaila and stopped any visitation. Thus, in October 2006, nearly a year after Mirayra and Brian's divorce was final, Albrecht filed a motion which appeared to request not only visitation but primary physical placement and sole legal custody of Kaila.[1]

¶6 In December 2006, Mirayra and Brian moved to dismiss Albrecht's motion for lack of standing. The court granted their motion, essentially concluding Albrecht had failed to fulfill the second prong of the applicable standing test. Albrecht appeals.

Discussion

¶7 With limited exception, "upon petition by a grandparent … the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child." WIS. STAT. § 767.43(1).[2] The courts have interpreted this statute to mean that a grandparent has standing to seek visitation under the statute when two circumstances are present:

[1] Based on the circuit court's decision, it appears that either the court construed the motion as one for visitation only or Albrecht abandoned any other claims.

[2] WISCONSIN STAT. § 767.43 was previously numbered § 767.245. The renumbering was effective January 1, 2007. *See* 2005 Wis. Act 443, §§ 101, 267. However, the official publication of the 2005-06 statutes included the section as renumbered. On appeal, the parties' briefs refer to § 767.43. Thus, we cite to the renumbered statute as published in the 2005-06 books, unless noted, even though the books contain changes that were not effective until 2007.

> [F]irst, an "underlying action affecting the family unit has previously been filed"; and second, the child's family is nonintact, so that it may be in the child's best interests to order visitation "to mitigate the trauma and impact of [the] dissolving family relationship."

Cox v. Williams, 177 Wis. 2d 433, 439, 502 N.W.2d 128 (1993) (quoting ***Van Cleve v. Hemminger***, 141 Wis. 2d 543, 549, 415 N.W.2d 571 (Ct. App. 1987)).

¶8 A determination to grant or deny visitation is committed to the circuit court's 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, however, is a question of law. ***Le Fevre v. Schrieber***, 167 Wis. 2d 733, 736, 482 N.W.2d 904 (1992).

¶9 The circuit court here correctly concluded that Albrecht had fulfilled the first prong of the ***Van Cleve*** standing test, with the divorce between Mirayra and Brian as the qualifying underlying action affecting the family. As the circuit court noted, although the divorce was final, the court "retains judicial authority as to changes in placement[,] custody and support." We agree with this determination.

¶10 As to the second prong of the standing test, Albrecht attempts to convince us to extend the definition of family, for statutory purposes, to include grandparents. However, we conclude that we need not determine whether Albrecht is part of Kaila's family, whether Kaila's family is non-intact, or whether there is a dissolving family relationship. Rather, we read the standing test to necessarily contain an implicit causation requirement: the underlying action affecting the family from the first prong must be responsible for the alleged "trauma" and dissolving family relationship of the second prong.

¶11 In ***Marquardt v. Hegemann-Glascock***, 190 Wis. 2d 447, 526 N.W.2d 834 (Ct. App. 1994), the mother, Karen, had two sons, Zachary and Benjamin. Karen had never married Zachary's father and brought a paternity action against him to establish support. Karen later married David Glascock and Benjamin was born of the marriage. When Karen stopped permitting her mother, Marquardt, to visit the boys, Marquardt brought a visitation petition, based on the paternity action as the underlying action affecting the family.

¶12 We noted that although the grandparent visitation statute is broadly worded, cases interpreting it have defined the scope of the statute. We wrote that "unless a previously filed action threatens to expose the children to the trauma of a dissolving family relationship, there is no justification for the state to interfere with the parents' decisions regarding what is in the best interest of their children." ***Id.*** at 453. Because Marquardt failed to show the paternity action threatened to expose Zachary and Benjamin to "the trauma of a dissolving family relationship" or that the action threatened the integrity of their family unit, we concluded she lacked standing and the trial court properly rejected her petition.

¶13 Subsequent to ***Marquardt***, the supreme court addressed the question of whether the non-biological parent partner in a dissolved same-sex relationship could seek visitation rights to her ex-partner's biological child under what is now WIS. STAT. § 767.43. ***Holtzman v. Knott***, 193 Wis. 2d 649, 667, 533 N.W.2d 419 (1995). To help answer that question, the supreme court examined the legislative history of that section and concluded that the applicable historical notes indicated that "the committee's primary concern was with custody issues prompted by the divorce or legal separation of a married couple." ***Id.*** at 672-73.

¶14 Here, we do not have "custody issues prompted by the divorce or legal separation of a married couple." Indeed, this divorced couple is in apparent agreement on custody and visitation issues. The record reveals that subsequent to the divorce, Albrecht saw Kaila without objection for nearly a year. It is not the divorce but Albrecht's own actions at some time after the divorce which have precipitated the denial of visitation.[3] In other words, it is not the divorce which threatens to cause trauma or dissolve any familial relationship between Kaila and Albrecht, but Albrecht herself.

¶15 When the potential trauma of a dissolving family relationship comes from a source other than the underlying action affecting the family, we cannot fathom that WIS. STAT. § 767.43 should work to grant standing. If Mirayra and Brian had remained married and refused to permit Albrecht to visit Kaila, we would be loathe to interfere: parental decision-making on how to raise a child, including a decision on third-party visitation, is a protected liberty interest with which the State generally does not interfere absent a powerful countervailing interest. *See*, *e.g.*, ***Troxel v. Granville***, 530 U.S. 57, 66-69 (2000).

¶16 While the legislature and the courts consider the possible trauma of a divorce to be one of those countervailing interests, the dispute in this case has

[3] Albrecht has not seriously challenged Mirayra and Brian's contention that they stopped visitation because of her erratic behavior.

nothing to do with the underlying action affecting the family. WISCONSIN STAT. § 767.43 therefore cannot justify the action for visitation.[4]

By the Court.—Order affirmed.

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

[4] Albrecht also claimed she could proceed under WIS. STAT. § 767.43(3), but she is in error. That section only applies to a non-marital child. *See* WIS. STAT. § 767.43(3)(a). Kaila was born of her parents' marriage. Additionally, we note that were we to proceed under § 767.43(3), we would apply a presumption that a fit parent's decision regarding grandparent visitation is in the child's best interest. ***Roger D.H. v. Virginia O.***, 2002 WI App 35, ¶19, 250 Wis. 2d 747, 641 N.W.2d 440.