COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2786

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

IN RE THE PATERNITY OF GREG HARRISON L.:

JEROME E.M.,

PETITIONER-RESPONDENT,

V.

GAIL M., F/K/A GAIL L.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Gail M. appeals from the "Findings of Fact, Conclusions of Law, and Judgment of Paternity and Periods of Physical Placement," following a bench trial. She argues that the trial court erred in concluding that she was not entitled to a hearing to determine whether, before

ordering blood tests and adjudicating Jerome E. M.'s paternity petition, it would be in her son's best interests to determine whether Jerome was his father. She also argues that the trial court erroneously exercised discretion in awarding Jerome periods of placement with her son.

We conclude that, under ***Thomas M.P. v. Kimberly J.L.***, 207 Wis.2d 388, 558 N.W.2d 897 (Ct. App. 1996), the trial court correctly ruled that Gail had no right to a "best interests" hearing, and that Jerome had a right to the adjudication of his paternity petition. We also conclude that the trial court properly exercised discretion in ordering periods of physical placement with Jerome, subject to his satisfaction of certain conditions. Accordingly, we affirm.

The facts relevant to resolution of this appeal are not in dispute. On June 28, 1991, Gail gave birth to Greg. On April 22, 1994, despite never having had any contact with Greg,[1] Jerome petitioned for the determination of his alleged paternity. Gail moved to dismiss the petition on the grounds that an adjudication of paternity would not be in Greg's best interests. Concluding that ***Thomas M.P.*** controlled, the trial court denied her motion, ordered blood tests, determined that Jerome was Greg's father, and refused to consider Greg's best interests until addressing issues of custody and placement.

[1] According to Greg's guardian ad litem, however, "at the time of [Greg's] birth, [Jerome] showed an initial interest in that child by filing the declaration of paternity" and, "prior to commencement of this paternity case, he sent cards to the child, ... he sent gifts, ... he attempted to initiate a parental role or relationship with the child." Evidence also revealed that Jerome had established a custodial account for Greg and placed money in that account. The trial court found that Jerome had, indeed, shown a continuing interest in Greg since shortly after his birth.

In ***Thomas M.P.***, this court considered the constitutionality of § 767.458(1m), STATS., the statute Gail challenges. In relevant part, the statute states:

> In an action to establish the paternity of a child who was born to a woman while she was married, where a man 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 man other than the husband is the father is not in the best interest of the child. If the court ... determines that a judicial determination of whether a man 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. [2]

Our standards of review of Gail's challenge to the statute in the instant appeal are identical to those recited in ***Thomas M.P.*** and need not be repeated here.

As in the instant case, the mother in ***Thomas M.P.*** moved to dismiss the paternity petition of a man who alleged that he was the father of her child. ***Thomas M.P.***, 207 Wis.2d at 391, 558 N.W.2d at 899. As in the instant case, the mother argued that the determination of paternity would not be in her child's best interests. ***Id.*** As in the instant case, the mother in ***Thomas M.P.*** brought an equal protection challenge, though she argued that § 767.458(1m), STATS., violated *her child's* right to equal protection by unreasonably distinguishing between children born inside and outside of wedlock, ***id.*** at 395-96, 558 N.W.2d at 900, whereas Gail argues that the statute violates *her* right to equal protection by doing so.

[2] The quoted portion of § 767.458(1m), STATS., differs slightly from the statute considered by this court in ***Thomas M.P. v. Kimberly J.L.***, 207 Wis.2d 388, 558 N.W.2d 897 (Ct. App. 1996). Subsequent to the circuit court litigation in ***Thomas M.P.***, the legislature modified the last sentence, replacing the word "blood" with the word "genetic." *See* 1995 Wis. Act 100, § 11. The modification, however, has no bearing on the issues in the instant appeal.

In ***Thomas M.P.***, this court rejected the mother's arguments and reversed the trial court's order for a "best interests" hearing to decide whether paternity should be determined. We concluded:

(1) The statutes governing who may bring a paternity petition and how courts must respond to such actions "expressly provide[] the alleged father of a child the right to a determination of paternity, regardless of the circumstances of the case or the circumstances out of which paternity may have arisen." ***Id.*** at 394, 558 N.W.2d at 900; *see* § 767.45(1) and (5)(a), STATS., and § 767.48(1)(a), STATS. Thus, we explained:

> Because the legislature has not provided a best interests hearing, the court exceeded the legislatively mandated procedure when it ordered a best interests hearing as a prerequisite to blood tests. The trial court therefore lacked the statutory authority to conduct the best interests hearing and to dismiss the paternity proceedings.

Id.

(2) Section 767.458(1m), STATS., does not violate the equal protection rights of a child born outside of wedlock. We explained:

> At first blush, one could easily come to the conclusion that children born outside of wedlock should not be treated differently because it is the child's best interests that are at issue. The legislature could have said that, but it did not. The question then becomes whether there is a legitimate rational basis for this distinction. The reasonable basis for the legislation is to protect children born into a marriage from the interference of another man with the existing marital father-child relationship, and to preserve family unity.
>
> The statute promotes the traditional respect for the sanctity of marriage and the preservation of the unitary family.... "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

> We are satisfied that the historic respect for the unitary family and the legislature's intent to preclude interference with an otherwise secure environment for the child are sufficient reasonable grounds for the legislature's classifications, and the legislative classification is germane to the purpose of the law. We therefore determine that § 767.458(1m), STATS., withstands the equal protection challenge.

Thomas M.P., 207 Wis.2d at 397-98, 558 N.W.2d at 901 (citations omitted).

In the instant appeal, Gail raises an issue identical to that addressed in ***Thomas M.P.***: whether a "best interests" determination regarding adjudication of paternity should be a prerequisite to such adjudication. She also raises an issue that is almost identical to that addressed in ***Thomas M.P.***: whether § 767.458(1m), STATS., denies equal protection *to women who have children outside of wedlock*, notwithstanding the fact that ***Thomas M.P.*** held that the statute does not deny equal protection *to children* by distinguishing between those born inside and outside of wedlock. On both issues, we reject her arguments.

Regarding whether a "best interests" determination should be required, Gail contends that this court's decision in ***Thomas M.P.*** "was wrong" and, therefore, she "respectfully urges this court to disregard the erroneous conclusion of the Third District [Wisconsin Court of Appeals decision in ***Thomas M.P.***] and to remand this case to a new circuit court judge for consideration of whether an adjudication of paternity would be in Greg's best interest." This, of course, we cannot do; ***Thomas M.P.*** controls.[3] *See* ***Cook v. Cook***, 208 Wis.2d

[3] Additionally, we note, even if the trial court had concluded that a "best interests" determination was a prerequisite to the paternity determination, the paternity adjudication still would have taken place. As the guardian ad litem explains:

> [W]hen the trial court in this case ultimately applied the best interests standard it concluded, over the objection of the appellant, that Jerome should have periods of placement with Greg. Had the best interest standard been applied by the trial

(continued)

166, 190, 560 N.W.2d 246, 256 (1997) ("[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.").

Regarding whether § 767.458(1m), STATS., denies equal protection to women who have children outside of wedlock, Gail contends that because her equal protection theory focuses on *her* rights, rather than those of *her child*, ***Thomas M.P.*** does not control. But as Greg's guardian ad litem has pointed out in his brief to this court: "[Gail] offers no argument how or why the outcome should be different. The rational basis for the classification as found in [***Thomas M.P.***] exists whether challenged by child or mother." We agree. Although Gail has offered earnest arguments that could be directed to the legislature to persuade it to reconsider or refine the distinction it has drawn, she has provided no authority to suggest that ***Thomas M.P.***'s rationale, rejecting the equal protection challenge on behalf of a child, should be any less applicable to an equal protection challenge on behalf of the mother.[4]

Gail also argues that "[e]ven if this court agrees with the trial court that a pre-adjudication determination of the best interests of the child should not be not [sic] required, this court still should reverse that portion of the judgment awarding Jerome periods of physical placement with Greg." Again, we disagree.

> court prior to adjudication as urged by the appellant, the outcome would have been the same.

[4] Gail attempts to bring her equal protection challenge not only to § 767.458(1m), STATS., but also to several other statutes and administrative rules which, she contends, establish an improper statutory scheme that violates the rights of many other mothers who, under a variety of circumstances, give birth out of wedlock. As she concedes, however, "she does not fall within any of these categories." Thus, Gail fails to establish that any of these additional statutes and rules violates *her* rights. In short, she fails to provide any substantive reply to the argument, from both Jerome and Greg's guardian ad litem, that she lacks standing to bring these additional challenges.

Following the trial, the court awarded sole custody and primary placement to Gail, but also adopted the guardian ad litem's recommendation to award placement to Jerome subject to his satisfaction of several conditions including completion of an alcohol assessment and treatment, if needed, as well as completion of an anger management program. Gail now urges reversal of the trial court's decision based on five factors: (1) the opinion of Dr. Marc Ackerman, the trial court's appointed expert, that placement with Jerome would not be in Greg's best interests; (2) the undisputed evidence of Jerome's violence and threats against his ex-wife, children, Gail, and others; (3) the fact that Greg has never seen Jerome and considers Gail's husband as his father; (4) what she considers the improper weight the trial court placed on Jerome's positive relationship with his granddaughter; and (5) what she also considers the trial court's inappropriate emphasis on § 767.24(4)(b), STATS., and its specification that "[a] child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health." [5]

As Gail acknowledges, a trial court has broad discretion in determining physical placement, and this court will not reverse a trial court's decision granting placement absent an erroneous exercise of discretion or misapplication of law. ***Wiederholt v. Fischer***, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). As she also concedes, additional evidence, as well as the guardian ad litem's recommendation, provided the trial court with arguable bases for its resolution of what the guardian ad litem termed a "very difficult and

[5] The trial court found that there was insufficient evidence that "periods of physical placement [of Greg] with [Jerome] would endanger the child's physical, emotional and mental health." This was, however, but one of numerous factual findings.

very close" case. *See* ***Paige K.B. v. Molepske***, 219 Wis.2d 418, 428-29, 580 N.W.2d 289, 294 (1998) ("[B]oth the GAL and the circuit court are statutorily charged with determining and protecting the best interests of [a] child" in proceedings involving child custody.).

A trial court determining the appropriateness of a child's placement with a non-custodial parent must consider and apply the factors specified in § 767.24(4), STATS. ***Jocius v. Jocius***, 218 Wis.2d 103, 112, 580 N.W.2d 708, 712 (Ct. App. 1998). Although Gail believes that the trial court's decision "gave short shrift to many of the statutory factors," she offers nothing to establish that the trial court failed to consider or apply them properly. Indeed, the record reflects the trial court's careful consideration of the evidence and the relevant statutory factors. As the guardian ad litem points out, the trial court considered substantial evidence beyond that to which Gail refers, including the testimony of Dr. Steven Emiley that it was in Greg's best interests to have contact with Jerome.[6] We see no erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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

[6] The trial court concurred with the guardian ad litem's summation of the conclusion by Dr. Emiley and Dr. Ackerman that "there is the possibility of some emotional trauma to Greg if he is not told who his [biological] father is and learns of this through a source other than his mother at some point in the future." The court declared that Jerome "has been denied access to [Greg] with no hope for access long enough…. I think the older [Greg] gets before he knows who his father is, the tougher it's going to be for him."