COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1452 **Cir. Ct. No. 2003PA22**

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

IN RE THE PATERNITY OF DOMINIC D.B.:

DOUGLAS COUNTY CHILD SUPPORT DEPARTMENT AND DEBRA B., N/K/A DEBRA K.,

PETITIONERS-RESPONDENTS,

V.

HOSSAIN K.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Hossain K., pro se, appeals a paternity judgment entered pursuant to WIS. STAT. § 767.465(2)(a).[1] This section provides that the court may enter a judgment adjudicating paternity if the alleged father fails to appear at a scheduled court-ordered genetic test. On appeal, Hossain interweaves a number of arguments. We conclude that his appellate brief contains the following contentions: (1) there was insufficient evidence to establish probable cause to order a genetic test; (2) a pretrial hearing was required before the court was authorized to order a genetic test; and (3) the court must appoint a guardian ad litem and hold a hearing on the child's best interest before it orders a genetic test. We reject his arguments and affirm the judgment.

FACTS

¶2 In June 2003, the Douglas County Child Support Agency filed a petition alleging that Dominic D. B. was born to Debra B. on December 29, 1992. The petition stated that the mother had intercourse during the conceptive period of March 27, 1992, to May 26, 1992, with Hossain K., the alleged father. The petition also stated that Debra B. was married at the time of conception, but had been separated from her husband for many years and divorced prior to the child's birth. The divorce proceedings adjudicated that her former husband was not the unborn child's biological father.

¶3 Hossain filed a response denying he was the father and moved for a pretrial hearing before genetic testing would be ordered. His motion also stated:

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> Since this child was conceived while [the mother] was married which creates the presumption that her husband is the father (Wis. Stat. 891.41) and a judicial determination that a man other than her husband is the father is not in the best interest of this child, genetic test should not be ordered and this matter should be dismissed as provided for in Wis. Stat. 767.463.

¶4 On August 18, 2003, the court commissioner granted the County's request for genetic testing. On September 16, the court commissioner heard Hossain's motion and stayed the order for genetic testing. On October 21, a second hearing was held before the court commissioner. The paternity interview form, signed by the mother and witnessed by a child support agency case worker, was introduced. Based upon the information contained in the interview form, the County renewed its request for genetic testing. The court commissioner granted Hossain's motion to rescind prior orders compelling Hossain to comply with genetic testing. The court commissioner also found that the "finding of non-paternity" of the husband in the mother's 1992 divorce action was binding. The court commissioner determined that establishing paternity was in the child's best interest and that the presumptive conceptive period under WIS. STAT. § 891.395 was March 4, 1992, to May 3, 1992.[2]

[2] WISCONSIN STAT. § 891.395 provides:

> In any paternity proceeding, in the absence of a valid birth certificate indicating the birth weight, the mother shall be competent to testify as to the birth weight of the child whose paternity is at issue, and where the child whose paternity is at issue weighed 5 1/2 pounds or more at the time of its birth, the testimony of the mother as to the weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of the child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

¶5 The County moved for de novo judicial review of the court commissioner's order rescinding the prior order for genetic testing. *See* WIS. STAT. § 757.69(8). Because of the child's low birth weight, the County challenged the application of WIS. STAT. § 891.395 to determine the conceptive time frame. In response, Hossain filed a document entitled "Memorandum," which provided legal authority for his objections to genetic testing.

¶6 On December 1, 2003, the circuit court heard the County's motion and, based on information in the County's petition, the paternity interview form and a copy of the birth certificate, the court found the conceptive period to be from the second week in April 1992 to the second week in May 1992. The court held that the interview form, along with Debra's affidavit that she had sexual relations only with Hossain during the conceptive period, was a sufficient basis to require Hossain to submit to genetic testing. The court further held that the paternity interview form was properly signed; that neither party requested review of the court commissioner's finding that the child's best interest was served by a paternity determination; that no pretrial conference was necessary before genetic testing could be ordered; and that any presumption that Debra's former husband was the father had been rebutted. It ordered Hossain to submit to genetic testing.

¶7 Hossain declined to submit to genetic testing.[3] The County re-filed its motion for judgment based on Hossain's refusal to submit to scheduled court ordered genetic testing. At an April 16, 2004 motion hearing, Hossain again refused the court commissioner's directive to submit to genetic testing. The court commissioner granted the County's motion for judgment. Pursuant to WIS. STAT. § 767.465(2)(a), the court commissioner entered the paternity judgment adjudicating Hossain to be the father, based on his continued refusal to submit to scheduled court-ordered genetic testing.

¶8 Hossain moved for de novo review. The circuit court set the matter for a de novo hearing and arranged a genetic test for Hossain before the hearing date. Hossain again failed to appear for the testing. On review, the court found that the paternity judgment was properly entered and no pretrial hearing was required. The court rejected Hossain's objection based on the best interest of the child. The court explained:

> [Y]our best interest argument has to do with the fact … that the mother conceived during the marriage, but yet the Court made specific findings at the time of the divorce, and that issue was addressed. The unborn child was represented by a guardian ad litem. … [B]ased on the record, this Court is not convinced that a judicial determination of whether you are the biological father is not in the child's best interest.

[3] Hossain also filed a petition for leave to appeal the nonfinal order to submit to genetic testing. The circuit court stayed the order for genetic testing pending the outcome of his petition for leave to appeal. On March 9, 2004, this court denied his petition, thus eliminating the stay. In his reply brief, Hossain objects that the provisions regarding the duration of the stay were not reduced to writing. He does not, however, indicate by appropriate record reference that he brought this objection to the attention of the trial court. *See* WIS. STAT. RULE 809.19(1)(e). Therefore, we do not address the issue in his reply brief that the provisions regarding the duration of the stay were not reduced to writing. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted) (A party who appeals has the burden to establish "by reference to the court record, that the issue was raised before the circuit court."). In fact, Hossain's appellate reply brief concedes: "In any case, this is not an error I brought before you to correct."

The circuit court entered judgment adjudicating Hossain the father. Hossain appeals the judgment.

DISCUSSION

I.

¶9 WISCONSIN STAT. § 767.465(2)(a) provides, in part, that "if a respondent is the alleged father and fails to appear at the … court-ordered genetic test, … the court shall enter an order adjudicating the respondent to be the father and appropriate orders for support, legal custody and physical placement." A judgment may not be entered under sub. 2(a) if more than one person is alleged in the petition to be the father, unless only one of those persons fails to appear and all of the other male respondents have been excluded as the father. ***Id.***

¶10 Here, Hossain does not dispute that he failed to appear at the scheduled court ordered genetic test. He is the only alleged father and the only person alleged in the County's petition and Debra's affidavit to have had sexual relations with Debra during the conceptive period. Accordingly, the circuit court was entitled to enter the paternity judgment pursuant to WIS. STAT. § 767.465(2)(a).

¶11 Hossain also does not dispute that he had sexual intercourse with the mother during the dates she alleged in the paternity interview form. Nonetheless, he raises a two-pronged challenge. First, he contends that the County failed to demonstrate sufficient evidence to establish probable cause that he had sexual intercourse with Debra during the conceptive period. Second, he claims that the mother's assertion is insufficient to order the genetic test. We reject his arguments.

¶12 WISCONSIN STAT. § 767.48(1)(a), "Genetic Tests in paternity actions," authorizes the trial court to order genetic testing upon probable cause to believe the alleged father had sexual intercourse with the mother "during a possible time of the child's conception." Probable cause "may be established by a sufficient petition or affidavit of the child's mother." ***Id.***

¶13 WISCONSIN STAT. § 767.48(1)(a) reads:

> The court may, *and upon request of a party shall*, require the child, mother, any male for whom there is probable cause to believe that he had sexual intercourse with the mother during a possible time of the child's conception, or any male witness who testifies or will testify about his sexual relations with the mother at a possible time of conception to submit to genetic tests. Probable cause of sexual intercourse during a possible time of conception may be established by a sufficient petition or affidavit of the child's mother or an alleged father, filed with the court, or after an examination under oath of a party or witness, when the court determines such an examination is necessary. (Emphasis added.)

¶14 Here, probable cause was demonstrated by sufficient petition, affidavit and paternity interview form, within the meaning of WIS. STAT. § 767.48. The paternity interview form the mother signed stated that the date of her last menses was during the first week of April 1992. The mother states she had sexual relations three to four times with Hossain during the conceptive period of March 27 to May 26, 1992[4] and that a pregnancy test in the first week of May 1992, was positive. She also stated that she had no sexual relations with any other man during the conceptive period. In addition, the record discloses a copy of the birth

[4] That the mother's affidavit included a broader time frame, during which she claimed to have intercourse with Hossain and no other, than the court's finding as to the conceptive time period, does not provide a basis for reversal.

certificate indicating Dominic was born to her on December 29, 1992. He weighed five pounds two and one half ounces at birth.

¶15 Although the interview form was not sworn to, it states: "I have read the above questions and answers (or they have been read aloud to me) this date, and the answers are true and correct to the best of my knowledge and belief." It was signed by the mother and witnessed by Kim Moen, a caseworker.

¶16 The court was entitled to rely on the petition, together with the paternity interview form, to satisfy the requirements of WIS. STAT. § 767.48(1)(a). The documents permitted the court to determine that the conceptive time period occurred after the date of the last menses and before the positive pregnancy test. The trial court correctly determined that because the baby was less than five and one-half pounds at birth, the 240- to 300-day conceptive time frame before the baby's birth set out in WIS. STAT. § 891.395 did not apply.[5] *See* ***State ex rel. Skowronski v. Mjelde***, 112 Wis. 2d 110, 116, 332 N.W.2d 289 (1983).

¶17 We agree with the trial court's ruling that although the interview form was not formally sworn, it was witnessed and attested to, and therefore was

[5] WISCONSIN STAT. § 891.395 provides:

> In any paternity proceeding, in the absence of a valid birth certificate indicating the birth weight, the mother shall be competent to testify as to the birth weight of the child whose paternity is at issue, and where the child whose paternity is at issue weighed 5 1/2 pounds or more at the time of its birth, the testimony of the mother as to the weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of the child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

sufficient under WIS. STAT. § 767.48(1)(a). The court's finding, that "competent evidence has been presented to establish the conceptive period in this case was from about the second week of April 1992 to the second week of May, 1992" is not clearly erroneous. *See* WIS. STAT. § 805.17(2). Because the mother attested that Hossain was the only person with whom she had sexual relations during that conceptive time frame, the court was entitled to determine that probable cause existed to order Hossain to submit to genetic testing.

¶18 Hossain argues, nonetheless, that he refused genetic testing under WIS. STAT. § 767.458(2), because other males who had sexual intercourse with the mother during the conceptive time period may be ordered tested. However, he refers to no evidence of the mother having intercourse with any other male during the conceptive time period, and the record discloses none. Because the record lacks any evidence to support his assertion, his argument must fail.

¶19 Hossain further argues that the County must provide evidence to overcome the marital presumption. Because the County provided evidence to overcome the presumption, we reject his argument. WISCONSIN STAT. § 891.41, entitled, "Presumption of paternity based on marriage of the parties," provides:

> (1) A man is presumed to be the natural father of a child if any of the following applies:
>
> (a) He and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.

¶20 This presumption, that a child conceived during marriage is the husband's child, is rebuttable. *See* ***Schmidt v. Schmidt***, 21 Wis. 2d 433, 124 N.W.2d 569 (1963). Here, the court found that the mother and her husband were divorced in September 1992, when the mother was pregnant. They had been

separated since 1979 and, when they divorced in 1992, they stipulated that the unborn child was not of the marriage. The court found that their divorce file indicated the guardian ad litem for the unborn child was satisfied the child was not of the marriage. The record contains no basis to challenge these findings.

II.

¶21 Next, Hossain argues that Wisconsin law provides that the court shall conduct a pretrial hearing.[6] He argues that the court made an error of law

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[6] WISCONSIN STAT. § 767.46, entitled "Pretrial paternity proceedings," reads:

> (1) A pretrial hearing shall be held before the court or a circuit or supplemental court commissioner under s. 757.675 (2) (g). A record or minutes of the proceeding shall be kept. At the pretrial hearing the parties may present and cross-examine witnesses, request genetic tests and present other evidence relevant to the determination of paternity.
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> (2) On the basis of the information produced at the pretrial hearing, the court shall evaluate the probability of determining the existence or nonexistence of paternity in a trial and shall so advise the parties. On the basis of the evaluation, the court may make an appropriate recommendation for settlement to the parties. This recommendation may include any of the following:
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> (a) That the action be dismissed with or without prejudice.
>
> (b) That the alleged father voluntarily acknowledge paternity of the child.
>
> (c) If the alleged father voluntarily acknowledges paternity of the child, that he agree to the duty of support, the legal custody of the child, periods of physical placement of the child and other matters as determined to be in the best interests of the child by the court.
>
> (3) If the parties accept a recommendation made in accordance with this section, judgment shall be entered accordingly.

(continued)

when it concluded that no pretrial hearing was required to order genetic testing. We conclude that Hossain fails to establish that the circuit court erred. In addition to its authority to order genetic testing under WIS. STAT. § 767.48(1)(a), a court may order genetic testing at the initial appearance, under WIS. STAT. § 767.458(2). This section reads:

> (2) *At the first appearance*, if it appears from a sufficient petition or affidavit of the child's mother or an alleged father, or from sworn testimony of the child's mother or an alleged father, that there is probable cause to believe that any of the males named has had sexual intercourse with the mother during a possible time of the child's conception, *the court may, or upon the request of any party shall, order any of the named persons to submit to genetic tests.* The tests shall be conducted in accordance with s. 767.48. The court is not required to order a person who has undergone a genetic test under s. 49.225 to submit to another genetic test under this subsection unless a party requests additional tests under s. 767.48 (2). (Emphasis added.)

¶22 Hossain provides no explanation why a court could not authorize genetic testing under the plain language of WIS. STAT. § 767.458(2) or § 767.48(1)(a), without first holding a pretrial hearing. While genetic testing may be ordered following a pretrial hearing as provided in § 767.48(1), there is nothing

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> (4) If a party or the guardian ad litem refuses to accept a recommendation made under this section and genetic tests have not yet been taken, the court shall require the appropriate parties to submit to genetic tests. After the genetic tests have been taken the court shall make an appropriate final recommendation.
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> (5) If the guardian ad litem or any party refuses to accept any final recommendation, the action shall be set for trial.
>
> (6) The informal hearing may be terminated and the action set for trial if the court finds it unlikely that all parties would accept a recommendation in this section.

to indicate testing may not be ordered without a pretrial hearing under these statutory sections.

¶23 In any event, the record reveals that a number of pretrial motion hearings addressed the facts in the petition and paternity interview form. At the hearings, the court and court commissioner articulated reasons to determine that probable cause existed to conclude Hossain was the only male alleged to have had sexual intercourse with the mother during the conceptive time period. Hossain fails to explain why those hearings do not satisfy the requirements of WIS. STAT. § 767.48(1). Moreover, Hossain never suggests what evidence he would have submitted had he been afforded an additional hearing. Accordingly, he has not demonstrated prejudice as a result of the court's alleged noncompliance with § 767.48(1). *See* WIS. STAT. § 805.18; ***In re D.L.H.***, 142 Wis. 2d 606, 608, 419 N.W.2d 283 (Ct. App. 1987). As a result, his argument is rejected.

III.

¶24 Finally, Hossain argues that the circuit court erroneously entered judgment because it was required to conduct a hearing on the child's best interest and appoint a guardian ad litem to represent that interest. Hossain relies on WIS. STAT. § 767.458(1m), which reads as follows:

> (1m) 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 or a circuit or supplemental court commissioner under s. 757.675 (2) (g) 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. (Emphasis added.)

¶25 However, separate statutory sections provide that the court may order blood tests, and shall order blood tests if requested by a party. *See* WIS. STAT. §§ 767.46(4) and 767.48(1). The plain wording of these statutes shows that ordering blood tests under §§ 767.46(4) and 767.48(1) does not depend on a finding that a determination of paternity would, or would not, be in the child's best interest. As a result, we reject Hossain's claim of error.

¶26 In any event, Hossain refers to no evidence to support his contention that a determination of the paternity of a man other than the mother's ex-husband was contrary to the child's best interest. In fact, despite no formal request, the court specifically addressed Hossain's concerns at the hearing on the County's motion for judgment, as well as on other occasions.[7] The court noted that the mother and the husband had been separated for many years and were divorced before the child's birth. A guardian ad litem had been appointed for the unborn child during the divorce proceedings. The husband was adjudicated not to be the father and he never established a relationship with the child. The mother attested to her sexual relationship with Hossain, and no other male, during the conceptive time frame.

[7] Hossain acknowledges that following the October 21, 2003, hearing, the court commissioner entered an order stating: "Establishing paternity is in the subject child's best interest …." On the County's motion for a de novo hearing, the trial court found: "Neither party has formally requested this Court conduct a de novo review of that finding [of the child's best interest]." As a result, the court performed no formal review on that specific determination. ***In re A.M.L.***, 161 Wis. 2d 133, 137, 467 N.W.2d 570 (Ct. App. 1991). Because Hossain fails to show that he specifically requested the appointment of a guardian ad litem, or moved for a formal hearing on the child's best interest, he has failed to preserve his claim of error. *See* ***Hillman v. Columbia County***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991). Here, because no formal request was made, the circuit court did not formally review the court commissioner's ruling.

¶27 While we have rejected the proposition that "a determination of biological paternity is *always* in the best interest of the child," ***In re D.L.H.***, 142 Wis. 2d at 614, it is the declared policy of this state that generally it is in the child's best interest to have a paternity determination. *See* ***In re A.M.L.***, 161 Wis. 2d 133, 137, 467 N.W.2d 570 (Ct. App. 1991). Paternity proceedings were designed to enable the child to establish parentage and protect the child's financial well-being. *See* ***In re R.W.L.***, 116 Wis. 2d 150, 157-58, 341 N.W.2d 682 (1984). The child can be interested in determining his or her right to support or inheritance, obtaining a complete medical history, amassing genealogical information or establishing a meaningful bond with his or her father. *See* ***In re D.S.L.***, 159 Wis. 2d 747, 752, 465 N.W.2d 242 (Ct. App. 1990). The record lacks any evidence to suggest that a paternity determination would not be in the child's best interest. We conclude that Hossain fails to provide ground for reversal on the basis of a lack of a guardian ad litem or the child's best interest.

¶28 Hossain claims, nonetheless, that additional statutes provide support for his argument, citing WIS. STAT. §§ 767.475(1) and 767.463. Section 767.475(1), entitled "Paternity procedures," provides:

> (1) (a) Except as provided in par. (b), the court may appoint a guardian ad litem for the child and shall appoint a guardian ad litem for a minor parent or minor who is alleged to be a parent in a paternity proceeding unless the minor parent or the minor alleged to be the parent is represented by an attorney.
>
> (a) The court shall appoint a guardian ad litem for the child if s. 767.045 (1) (a) or (c) applies or if the court has concern that the child's best interest is not being represented.

Section 767.463 provides:

> Except as provided in s. 767.458 (1m), at any time in an action to establish the paternity of a child, upon the motion

> of a party or guardian ad litem, the court or circuit or supplemental court commissioner under s. 757.675 (2) (g) may, with respect to a man, refuse to order genetic tests, if genetic tests have not yet been taken, and dismiss the action if the court or circuit or supplemental court commissioner determines that a judicial determination of whether the man is the father of the child is not in the best interest of the child.

¶29 Here, however, the circuit court specifically noted that neither party formally requested to review the court commissioner's finding as to the child's best interest. The court also noted its reasons to conclude the adjudication of paternity did not violate the child's best interest. Thus, the record failed to provide a basis for the appointment of a guardian ad litem.

¶30 Hossain also relies on ***Randy A.J. v. Norma I.J.***, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, for the propostion that the determination of paternity may not be in the child's best interest. However, in ***Randy A.J.***, it was undisputed that the husband was unaware of his wife's affair and believed the daughter born during the marriage was his biological child and the two developed deep emotional ties to one another. ***Id.***, ¶30. Here, in contrast, it is undisputed that the mother's ex-husband has had no relationship whatsoever with the child. This distinction renders Hossain's attempted analogy to ***Randy A.J.*** inapplicable.[8]

[8] Hossain raises a number of additional arguments that are resolved by our conclusion that the court properly ordered genetic testing. He further argues that the mother stated that she had intercourse with Hossain three to four times between March 27 to May 26, 1992. He asserts,

> As you can readily see her statement provides for time unaccounted for by the mother within which others may have had intercourse with her (March 4-March 27) and there was time (perhaps the only time sex occurred) included by the mother's statement which included alleged intercourse with Hossain during the caption [sic] was not possible (May 3-May 26).

(continued)

By the Court.—Judgment affirmed.

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

He claims that the legislature intended that medical evidence be required to prove paternity. He further argues that the paternity interview form's questions to the mother were leading. He contends that the County increased its evidentiary burden by asserting that the statutory presumption did not apply due to the child's low birth weight. He challenges the interview form as an incomplete unsworn questionnaire. Because Hossain's arguments fail to demonstrate that the order for genetic testing was erroneously entered, they are rejected.

Our conclusion also eliminates the need to address Hossain's arguments related to claim prelusion and issue preclusion. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Cases should be decided on the "narrowest possible ground.").

Also, the County's response brief inexplicably addresses an argument that the circuit court erroneously set child support. Hossain does not, however, raise this issue as a separate argument in his main brief, *see* WIS. STAT. § 809.19(1)(e), and, accordingly, we do not address it. ***Waushara County v. Graf,*** 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (It is well established that appellate courts need not and ordinarily will not consider or decide issues that are not specifically raised on appeal.). To the extent he raises this issue in his reply brief, it is not addressed because we do not address issues raised for the first time in a reply brief. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).