COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2486

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JON K., A PERSON UNDER THE AGE OF 18:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

CARL H.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] The Walworth County Department of Health & Human Services (DHHS) appeals from an order finding that the circuit court has no authority to use the best interests of the child analysis to determine whether to adjudicate Carl H. as the biological father of Jon K. under WIS. STAT. § 48.423. We affirm the circuit court because the best interests of the child are not relevant to the determination of paternity.

FACTS

¶2 Jon K. was born on September 9, 1997. Only one parent, his mother Nancy Ann K., was listed on the birth certificate.[2] On December 7, 1997, Carl H. assaulted Nancy Ann K. and was convicted of aggravated battery and sentenced to ten years in prison.

¶3 Subsequently, the DHHS filed a petition for termination of parental rights, naming Carl H. as the putative father. The DHHS then moved for genetic testing to determine whether Carl H. was the biological father of Jon K. The court granted the motion and, pursuant to a court order, blood tests were performed. The results indicated that there was a 99.85% chance that Carl H. was the biological father of Jon K. Carl H. filed a motion asking to be adjudicated the father of Jon K. A hearing was held. At the hearing, the DHHS and the guardian ad litem argued that before adjudicating Carl H. as the biological father, the court had to conduct a best interests of the child analysis under the general principles in WIS. STAT. § 48.01(1), which states that "the best interests of the child … shall always be of paramount consideration." The circuit court took the matter under

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] On July 12, 1999, by order of the circuit court of Walworth county, Nancy Ann K.'s parental rights to Jon K. were terminated.

advisement and asked for briefs. Ultimately, the court ruled that there is no authority supporting a best interests analysis before adjudicating Carl H. to be the biological father of Jon K.

ANALYSIS

¶4 The issue is whether the circuit court has the authority to conduct a best interests of the child analysis before making a determination that a putative father is the biological father. Because this is an issue requiring statutory interpretation, our review is de novo. We understand this case to be controlled by WIS. STAT. § 48.426(2), which states:

> The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

¶5 The controlling case on WIS. STAT. § 48.426(2) is ***In Interest of C.E.W.***, 124 Wis. 2d 47, 368 N.W.2d 47 (1985). In ***C.E.W.***, the Waukesha County Department of Social Services filed a petition requesting the involuntary termination of the parental rights of C.E.W., the natural father, to his three minor children. *See* ***id.*** at 49. The natural mother's parental rights had already been terminated. The circuit court dismissed the petition for termination of the parental rights of C.E.W. because according to the circuit court, "the jury … returned a verdict finding that it was not appropriate at this time to terminate the parental rights of [C.E.W.]." ***Id.***

¶6 ***C.E.W.*** came to the supreme court on certification by the court of appeals, where the question before the supreme court was "whether in proceedings for the termination of parental rights the best interests of the child standard is to be applied throughout the entire proceeding." ***Id.*** at 59. The supreme court articulated the answer:

> A termination of parental rights hearing is a bifurcated procedure: The initial stage is a fact finding hearing which determines whether grounds for terminating parental rights exist….
>
> In the second stage of the proceeding the circuit court decides the disposition of the child…. Therefore, in contrast to the language in sec. 48.01(2), the language of secs. 48.424(3) and 48.426(2) appears to limit the "best interests" standard to the dispositional stage in the termination proceeding. We conclude that at the fact finding stage, the fact finder—here the jury—does not consider the best interests of the child standard.

Id. at 60-61.

¶7 We conclude that a declaration of paternity is a fact-finding decision in which the best interests of the child analysis is not to be considered. If the jury or the fact finder is not to apply the best interests of the child analysis when deciding whether or not to terminate parental rights, there is no logical reason to apply it when determining paternity.[3]

[3] We note that the parties make reference to WIS. STAT. § 767.463. This statute provides that the best interests of the child may be considered before ordering genetic testing if the biological origins of a child of a marriage are questioned. *See* ***id.*** This statute and the scheme it establishes are easily distinguishable from both a termination of parental rights case and a determination of paternity case. WISCONSIN STAT. ch. 767 is the family law chapter. In this chapter, there is a presumption that a child born during a marriage is the biological child of the married couple. *See* WIS. STAT. § 891.39. Because of this assumption, it is a tough call to "upset the apple cart" and declare another man the biological father. It is for this reason that the best interests of the child may be considered before ordering genetic testing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4.