05AP0077

SUPREME COURT
STATE OF WISCONSIN

In re the Paternity of C.A.V.M:

Shannon E.T.,

Petitioner-Appellant-Petitioner,

Bye and Goff & Rohde, Ltd.,

Appellants,

v.

Alicia M. V.M., an individual, by her guardians Patricia N. and Brian V.M.,

Respondents-Respondents.

BRIEF AND APPENDIX OF PETITIONER-APPELLANT-PETITIONER

REVIEW GRANTED FROM
COURT OF APPEALS, DISTRICT FOUR
CASE NO. 05-0077

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR
MONROE COUNTY, THE HONORABLE MICHAEL J. McALPINE PRESIDING,
MONROE COUNTY CIRCUIT COURT
CASE NO. 04-PA-59

MURPHY & PRACHTHAUSER
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ANSWERED BY THE TRIAL COURT: No. The court reasoned that a paternity action is not allowed because a stillbirth is not the birth of a "child" within the meaning of the paternity statute, Wis. Stat. § 767.45. (R42:1-6; Court of Appeals Decision, ¶ 4)

ANSWERED BY THE COURT OF APPEALS: No, but for reasons other than those relied on by the trial court. The court of appeals concluded that Wis. Stat. § 767.45(1) is ambiguous, and that the legislative history indicates that an unmarried father of a stillborn child may not bring an action to establish his paternity for the sole purpose of bringing a wrongful death action. (Court of Appeals Decision, ¶ 1)

II. IN A WRONGFUL DEATH ACTION BASED ON A STILLBORN CHILD, ARE ISSUES OF PARENTAGE TO BE RESOLVED UNDER WIS. STAT. § 885.23?

NOT ANSWERED BY THE TRIAL COURT.

NOT ANSWERED BY THE COURT OF APPEALS.

STATEMENT OF THE CASE

On February 13, 2003, Alicia M.V.M. was involved in a motor vehicle accident in Wood County, Wisconsin. (R2:2 at ¶ 8) Alicia was 27 weeks pregnant with Caden V.M. and Caden was viable. (R2:2 at ¶ 4; R18:2; Court of Appeals Decision, ¶ 2) As a result of the accident, Caden was stillborn. (R18:2; R2:2 at ¶ 8).

Shannon E.T. claims that he is Caden's biological father. (R2:2 at ¶ 10) Shannon is named as Caden's father in the child's birth announcement from St. Joseph's Hospital, (R2:7), as well as the child's obituary in the Wisconsin Rapids Daily Tribune, (R18:2). Shannon resided with Alicia during periods of her pregnancy and assisted with Caden's prenatal care. (Court of Appeals Decision, ¶ 2)

Shannon E.T. commenced a wrongful death action in Wood County against American Family Insurance Company, the insurer for the drivers involved in the motor vehicle accident. *See* Wis. Stat. § 895.03; *also see Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 148 N.W.2d 107 (1967). (R14:13-14; R2:1-2; R14:13-15). However, the trial court concluded that the wrongful death action could not proceed until Shannon E.T. established his parentage.

Rather than following the procedure mandated by Wis. Stat. § 885.23, the trial court stayed the action, and compelled Shannon E.T. to institute a separate paternity action. (R2:2 at ¶ 1)

A paternity action was commenced in Monroe County, but the court dismissed the claim for failure to state a claim upon which relief can be granted. *See* Wis. Stat. § 802.06(2). (R42:1) The court held that the paternity statute, Wis. Stat. § 767.45, requires a "live birth" before the court may determine paternity. Therefore, a father can not bring a paternity action when there is a stillbirth. (R42:1-6)

Shannon E.T. appealed the dismissal of the paternity action, and the Court of Appeals certified the matter to this Court on the issue of whether "birth of a child" in Wis. Stat. § 767.45 requires a live birth. Certification was denied. (Court of Appeals Decision, ¶ 9 n.5, citing *Shannon E.T. v. Alicia M. V.M.*, No.05-77, unpublished certification (Ct. App. July 14, 2005), denied (Wis. Sept. 8, 2005)).

The Court of Appeals proceeded to affirm the dismissal of the paternity action, but with an entirely different rationale than the trial court. The Court of Appeals found that the paternity statute was ambiguous. After reviewing

the legislative history of Wis. Stat. § 767.45(1), the Court of Appeals concluded that the statute does not "permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action." (Court of Appeals Decision, ¶ 24)

The Court of Appeals discussed whether Shannon E.T. may bring a motion in the wrongful death action to have paternity determined under Wis. Stat. § 885.23:

> Because § 885.23 provides a procedure for a determination of paternity in a civil action other than a paternity action, when paternity is relevant in that other action, the question arises whether the legislature intended that a paternity action be initiated for that purpose, ... One might reasonably argue that these are simply two vehicles available to a person in Shannon's situation. Alternatively, one might also reasonably argue that the legislature did not intend that a paternity action be initiated solely for the purpose of determining when it is a relevant issue in another action. (Court of Appeals Decision, ¶ 22.)

Shannon E.T.'s position is that he should be permitted to establish paternity under Wis. Stats. §§ 885.23 or 767.45.

The trial court in the wrongful death case declined to proceed under § 885.23, and the Court of Appeals has declined to review the trial court's actions.

> We are not ruling on the correctness of the circuit court's decision in the wrongful death action. (Court of Appeals Decision, ¶ 25)

As a result, Shannon E.T. has been left in legal limbo, unable to proceed with his wrongful death claim. Shannon E.T. now asks this Court to harmonize these statutes and spell out the proper procedure for establishing his parentage of Caden.

ARGUMENT

I. THE PUTATIVE FATHER OF A STILLBORN CHILD MAY ESTABLISH PATERNITY UNDER WIS. STAT. § 767.45 FOR THE SOLE PURPOSE OF BRINGING A WRONGFUL DEATH ACTION BASED ON THE DEATH OF THE CHILD.

The authority of the circuit court in paternity actions is limited to that provided in the paternity statutes. *State v. Charles R.P.*, 223 Wis.2d 768, 771, 590 N.W.2d 21 (Ct.App.1998). The interpretation of a statute and its application to a set of facts are questions of law that this Court reviews independently. *Id.*

When interpreting a statute, the court is to give effect to the plain meaning of the words in the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Thus, the court first looks at the plain language of the statute. *Id.*, ¶ 44. If the language is plain and unambiguous, the court must apply it as written without further inquiry. *Id.*

The circuit court concluded that a stillborn child is not a "child" within the meaning of the paternity statute,

even though this Court decided almost 40 years ago, in *Kwaterski, supra,* that a viable infant who receives injury and by reason thereof is stillborn, is a "person" within meaning of wrongful death statute. Indeed, the overwhelming majority of jurisdictions now permit parents to make some form of recovery for the loss of a fetus. *See Pierce v. Physicians Ins. Co. of Wisconsin, Inc.*, 2005 WI 14, ¶ 20, 278 Wis.2d 82, 692 N.W.2d 558.[1]

Therefore, there is no question that Caden's father may bring a wrongful death action against the person or persons responsible for his stillbirth. However, the trial court in the wrongful death case ruled that the putative father, Shannon E.T., may not proceed with the action until the issue of parentage was decided. Rather than ordering genetic testing under Wis. Stat. § 885.23, the trial court entered a stay of the action.[2]

Wis. Stat. § 767.45 plainly creates the right of a putative father to bring a paternity action:

> (1) The following persons may bring an action or motion, including an action or motion for

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[1] In *Pierce, supra.*, ¶ 34, a medical malpractice action following the stillbirth of an infant, this Court established that the mother may recover as a parent, for the wrongful death of the stillborn infant; and as a patient, for her personal injuries, including the negligent infliction of emotional distress.

[2] There is no record of the reason for Judge Zappen's stay in the Wood County wrongful death action.

> declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41(1):
>
> (a) The child.
>
> (b) The child's natural mother.
>
> (c) Unless s. 767.62(1) applies, a man presumed to be the child's father under s. 891.405 or 891.41(1).
>
> (d) A man alleged or alleging himself to be the father of the child.
>
> ...
>
> (3) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, ... (Emphasis added.)

Since Shannon E.T. alleges that he is Caden's natural father, he has the statutory right to bring a paternity action under the express language of § 767.45(1)(d).

Nevertheless, the circuit court in the paternity action determined that the statute requires a live birth, and that a viable fetus is not a "child" for purpose of the statute. (R42:1-6) This deviates from *Kwaterski, supra*, and almost 40 years of legal precedent.

A. A VIABLE FETUS IS A "CHILD" FOR PURPOSES OF THE PATERNITY STATUTE.

The circuit court incorrectly relied on *State ex rel. Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 561 N.W.2d 729 (1997) in holding that the paternity statute requires a

live birth. The issue in *Kruzicki* was whether a pregnant woman was subject to jurisdiction in a CHIPs proceeding on the basis of jurisdiction over the "child" under the Children's Code, Wis. Stat. § 48.02(2). *Id.* at 122. This Court found that the Children's Code could not be used to exercise jurisdiction over the pregnant woman, because the legislature intended the word "child" in the Children's Code to "mean a human being born alive." *Id.* at 127-28.

In *Kruzicki* this Court reasoned that Children's Code "provisions dealing with taking a child into custody, providing parental notification, and releasing a child from custody would require absurd results" if the Code's definition of "child" included "fetus." *Id.* at 128.

Physical custody of a fetus would require physical custody of the mother, and *Kruzicki* essentially finds that the Children's Code was not intended to authorize physical custody over the mother. But there is no requirement for physical custody in a paternity action. Certainly, this case does not implicate any physical custody issues,

In this case, the analysis and authority cited by Justice Crooks' dissent in *Kruzicki* is more apt:

> In light of medical knowledge concerning fetal development, several sources, including precedent of this court, indicate that the ordinary and accepted meaning of the words "child" and

> "person" includes a viable fetus. *Id.* at 140 (Crooks, J., dissenting).

The meaning of "child" under the paternity statute should be interpreted in accord with the general line of authorities cited by Justice Crooks. [3]

Kwaterski is particularly notable, since that case determined that a viable fetus was a "child" for purposes of the wrongful death statute. The Court reasoned:

> Denying a right of action for negligent acts which produce a stillbirth leads to some very incongruous results. For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn child, who was more

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[3] The accompanying footnote cites the following authorities: *See In Re Baby Girl K.*, 113 Wis. 2d 429, 335 N.W.2d 846 (1983) (holding that the word "child" as used in Wis. Stat. § 48.415(6)(b) includes a fetus), *appeal dismissed, Buhse v. Krueger*, 465 U.S. 1016 (1984); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967) (concluding that the word "person" includes a viable fetus for purposes of wrongful death statute); *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 355-56, 99 N.W.2d 163 (1959) (referring to a viable fetus as a "child"), *overruled on other grounds by In re Estate of Stromsted*, 99 Wis. 2d 136, 299 N.W.2d 226 (1980); *Whitner v. State*, No. 24468, 1996 WL 393164, at *1 (S.C. July 15, 1996) (in an analogous case, the court interpreted a provision of South Carolina's Children's Code that defined "child" as "person under the age of eighteen." The court held that the word "person," and therefore "child," includes a viable fetus.); American Heritage Dictionary 332 (3d ed. 1992) (defining "child" as "[a]n unborn infant; a fetus"); Black's Law Dictionary 239 (6th ed. 1990) (defining "child" as "unborn or recently born human being").
Kruzicki, 209 Wis. 2d at 140 n.3 (Crooks, J., dissenting).

> severely injured and died as the result of the tortious acts of another, could recover nothing. 34 Wis. 2d at 20 (emphasis added).

The reasoning of the trial court in the paternity case undermines Shannon E.T.'s wrongful death claim. As a father he could maintain a paternity action to establish a right to make a claim for injury to a child born with grievous injury, but be denied a claim for wrongful death. This is an incongruous and absurd result.

In order to avoid absurd results, the paternity statute must be interpreted in harmony with the wrongful death statute. An unmarried father would have a right to bring a wrongful death action for the death of a fetus because a fetus is a "person." However, the unmarried father would not have a right to determine paternity because a fetus is not a "child." It is absurd to conclude a fetus is a "person" but not a "child."

It also would be unreasonable to conclude the Legislature intended the unmarried father to have a statutory right to bring a wrongful death action, but no remedy in paternity to facilitate that claim. Such an interpretation of the statute would be contrary to the Remedies Clause of the Wisconsin Constitution, Wis. Const. art. I, § 9 ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs ....").

Such an interpretation would also pose equal protection concerns.[4] Wisconsin law establishes a rebuttable presumption that a married man is the natural father of a child conceived or born during the marriage. Wis. Stat. § 891.41(1)(a). Thus, a married father could pursue a wrongful death claim, but an unmarried father could not pursue such a claim. There is no valid or reasonable basis for treating married and unmarried fathers differently in their right to pursue a wrongful death claim for the death of a stillborn child. *See, e.g.*, U.S. Const., amend. XIV, § 2; Wis. Const., art. I, § 1; *Aicher ex. rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 128, 613 N.W.2d 849 (2000)(discussing equal protection).

Under the trial court's reasoning, a married man would be denied a paternity remedy if he desired to rebut the presumption of paternity. The trial court's interpretation

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[4] The Court of Appeal took note of significant changes to the paternity statute to authorize a man alleging that he is the father to bring a paternity action. 1979 Wis. Laws, ch. 352, § 25, added the child, the mother, a man presumed or alleged to be the father, and specified others as persons authorized to bring the action. *See* Wis. Stat. § 767.45(1) (1981-82). "This amendment occurred following changes that had been made to other statutes to provide a procedure for an unmarried father to declare his paternity, which, legislative notes show, were prompted by United States Supreme Court decisions relating to the rights of unmarried fathers. (Court of Appeals Decision, ¶ 17)

would transform the rebuttable presumption under Wis. Stat. § 891.41(1)(a) into an irrebuttable one.

Finally, the reasons supporting the trial court's interpretation of the statute do not actually preclude a putative father from maintaining a paternity action for a stillborn child. The trial court relied on certain provisions of Chapter 767 that, in the court's view, would be nullified by allowing a paternity action for a stillborn child. The order or judgment in a paternity action is required to contain provisions regarding child custody, placement, and which parent may claim the child as a dependent for tax purposes. *See* Wis. Stat. § 767.51(3)(b)-(d).

However, these provisions would not be offended or nullified by allowing a paternity action in this case. Instead, the final order may address these matters by specifying that because Caden is deceased, no substantive order need be issued regarding custody, placement and dependent status.

B. THE PATERNITY STATUTE DOES NOT EXCLUDE PETITIONS BY PUTATIVE FATHERS FOR THE SOLE PURPOSE OF BRINGING A WRONGFUL DEATH ACTION.

The Court of Appeals adopted a rationale different from the trial court, concluding that based on legislative

intent gleaned from legislative history, a paternity action may not "be initiated by a man alleging he is the father when the sole purpose is to obtain a determination of paternity so that he may proceed with a wrongful death action." (Court of Appeals Decision, ¶ 10)

The Court of Appeals decision grafts onto the paternity statute a "sole" exception that appears nowhere in the text. In essence, the Court of Appeals' ruling now requires courts in paternity actions to assess whether a petitioner's purpose in seeking a paternity ruling is a proper or legitimate purpose as envisioned by the legislature.

However, the plain language of the paternity statute negates this rationale. The statute provides that certain persons may bring "an action or motion ... for the purpose of determining the paternity of a child." Wis. Stat. § 767.45(1)(emphasis added). The statute does not provide for a further inquiry into the reason for the requested paternity determination.

On points where statutory language is plain, courts apply the statutory language without resort to extrinsic materials to determine legislative intent. *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. The paternity

statute does not require an inquiry into the purpose for the requested paternity ruling.

Furthermore, this Court should adopt an interpretation that will advance the intent of the statute, which is to facilitate the determination of the biological parents of the children of Wisconsin. It does not serve judicial economy to dismiss this paternity action and send the litigants back to the Wood County wrongful death action without guidance on whether a paternity determination is available by motion there.

II. IN A WRONGFUL DEATH ACTION BASED ON A STILLBORN CHILD, ISSUES OF PARENTAGE ARE TO BE RESOLVED UNDER WIS. STAT. § 885.23.

The Wisconsin Legislature has determined that in the absence of a marriage, a man is presumed to be the natural father of a child if he and the mother have acknowledged paternity. *See* Wis. Stat. §§ 891.405 and 891.41(1). Caden's mother, Alicia M.V.M. sustained a brain injury, and may be incapable of making such an acknowledgment. (Affidavit of Brian V. M., R31:1 at ¶ 2) *Also see* Wis. Stat. § 69.15(3)(b)1. or 3.

As a result, Shannon E.T.'s paternity may be relevant in the wrongful death action. In which case, Wis. Stat. § 885.23 plainly commands the trial court to order genetic

testing. (Court of Appeals Decision, ¶ 22) The statute provides:

> **885.23. Genetic tests in civil actions.** Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.48. The results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of the parties refuses to submit to the tests that fact shall be disclosed upon trial. (Emphasis added.)

The trial court elected to ignore Wis. Stat. § 885.23, even though the statute is mandatory, rather than discretionary.[5] Instead of ordering genetic test, the trial court stayed the wrongful death case.[6] As a result, Shannon E.T. filed his separate paternity action.

CONCLUSION

Shannon E.T. respectfully requests that this Court reverse the Court of Appeals Decision and remand to the circuit court for paternity proceedings. In the alternative, this Court should make it clear that issues of

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[5] Since Caden has been buried, genetic testing may require exhumation.

[6] A stay is not contemplated by § 885.23, and a party's failure to comply with an order for genetic testing merely requires an adverse jury instruction.

parentage are to be decided in the wrongful death case under Wis. Stat. § 885.23.

Dated: September 27, 2006.

MURPHY & PRACHTHAUSER

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this petition is 18 pages (not including the Appendix).

Moses Josef Zimmermann

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COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2005AP77 **Cir. Ct. No. 2004AP59**

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

IN RE THE PATERNITY OF C.A.V.M.:

SHANNON E. T.,

PETITIONER-APPELLANT,

BYE, GOFF & ROHDE, LTD.,

APPELLANTS,

V.

ALICIA M. V.M. AN INDIVIDUAL, BY HER GUARDIANS, PATRICIA N. AND BRIAN V.M.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

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

¶1 VERGERONT, J. Shannon E.T. appeals from an order dismissing an action under WIS. STAT. § 767.45[1] to establish his paternity of C.A.V.M., stillborn as the result of a motor vehicle accident. Shannon brought this action to establish his paternity for the purpose of the wrongful death action that he had already initiated. We conclude that § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action based on the stillbirth. Accordingly, although our rationale differs from that of the circuit court, we affirm the dismissal of this action.

BACKGROUND

¶2 The paternity petition alleged as follows. Alicia M. V.M. was involved in a car accident when she was twenty-seven weeks pregnant with C.A.V.M and C.A.V.M. was viable. As a result of the accident, C.A.V.M. was stillborn and Alicia was incapacitated. Shannon is the father of C.A.V.M., and during periods of the pregnancy he resided with Alicia and assisted with C.A.V.M.'s prenatal care. Shannon seeks a paternity determination in connection with a wrongful death action based on C.A.V.M.'s stillbirth that he has filed in another county; that action has been continued pending the determination in this paternity action.

¶3 Alicia, through her guardians, filed a motion to dismiss this action, arguing that WIS. STAT. § 767.45 does not provide a basis for determining the paternity of a stillborn and, therefore, Shannon's petition failed to state a claim

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

upon which relief could be granted and the court lacked competency over the matter. Shannon disputed this construction of § 767.45, arguing that the statute does not define "child," and does not require a live birth in order for a court to adjudicate paternity.

¶4 In a written decision, the circuit court granted the motion to dismiss. The court concluded that a paternity action under WIS. STAT. § 767.45 required the "birth" of a child and concluded that a stillbirth did not qualify as the "birth" of a child. In reaching this conclusion, the court employed an analysis similar to that which the supreme court used in ***State ex rel. Angela M. W. v. Kruzicki***, 209 Wis. 2d 112, 561 N.W.2d 729 (1997). In that case, the supreme court concluded that "child" in WIS. STAT. § 48.02(2) (1993-94) meant a human being born alive and did not include a viable fetus; the court reached that conclusion by considering the word in its statutory context. ***Angela M.W.***, 209 Wis. 2d at 137. In this case, the circuit court considered the requirements in WIS. STAT. § 767.51(3)(b)-(d) that a paternity judgment "shall" contain orders for the legal custody, physical placement, and support of a child, as well as a determination as to which parent, if eligible, has the right to claim the child as an exemption for federal tax purposes. The court found that none of these provisions would apply if there were a stillbirth, and therefore allowing the paternity adjudication of a stillborn would render these statutory requirements absurd. The court also noted that § 767.45(3) requires that the "birth" of the child occur before a paternity adjudication is completed, and, in light of the requirements for the judgment in § 767.51(3)(b)-(d), the legislature meant a live birth.[2]

[2] Alicia also filed a motion, through her guardians, seeking to disqualify the firm representing Shannon in this action on the ground that it was the same firm the guardians had (continued)

DISCUSSION

¶5 On a motion to dismiss for failure to state a claim,[3] we take as true the allegations in the complaint and all reasonable inferences therefrom. ***Scott v. Savers Property & Cas. Ins. Co.***, 2003 WI 60, ¶5, 262 Wis. 2d 127, 663 N.W.2d 715. Whether a complaint states a claim for relief presents a question of law, which we review de novo. ***Id.***, ¶6.

¶6 The resolution of the motion to dismiss here requires a construction of various statutory provisions, which is also a question of law. ***Marder v. Bd. of Regents of Univ. of Wis. Sys.***, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110. When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Cir. Ct. for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used,

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retained to represent Alicia in connection with the accident. The submissions showed that, after investigating the accident, the firm informed Alicia's guardians that it would not pursue any action on her behalf. Less than a month later, the same firm filed the wrongful death action on behalf of Shannon against American Family Mutual Ins. Co., Alicia's insurer, and the driver of the other car, alleging that he was the father of C.A.V.M. and the negligence of Alicia and of the other driver caused the accident, which resulted in the stillbirth of C.A.V.M. Alicia's motion to disqualify asserted that this paternity action is contrary to her interests and, in the prior representation of her, the firm had obtained confidential information that could be used against her in this action. The circuit court granted this motion. The law firm appeals that order, with other counsel representing Shannon in appealing the order dismissing this action. Because of our disposition of the dismissal order, it is not necessary to consider the disqualification order.

[3] Both of the parties appear to agree that a motion to dismiss for failure to state a claim is the proper formulation of a motion asserting that Shannon may not obtain a paternity declaration under WIS. STAT. §§ 767.45-767.62 because C.A.V.M. was stillborn. We accept this formulation for purposes of our analysis. The significant point for our standard of review is that we are construing §§ 767.45-767.62 based on the facts alleged in the petition, and thus a question of law is presented, which we review de novo.

not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. *Id.*, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.*, ¶48. If we conclude that the application of these principles results in statutory language that is ambiguous—that is, capable of being understood by reasonably well-informed persons in two or more senses—then we may employ sources extrinsic to the statutory text. *Id.*, ¶¶47, 50. These extrinsic sources are typically items of legislative history. *Id.*, ¶50.

¶7 In the circuit court and in their initial briefs the parties focused on the meaning of the word "child" in WIS. STAT. § 767.45(1), which provides in relevant part:

> (1) The following persons may bring an action or motion, including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41 (1):
>
> (a) The child.
>
> (b) The child's natural mother.
>
> (c) Unless s. 767.62 (1) applies, a man presumed to be the child's father under s. 891.405 or 891.41 (1).
>
> (d) A man alleged or alleging himself to be the father of the child.[4]

[4] The rest of WIS. STAT. § 767.45(1) provides:

> (e) The personal representative of a person specified under pars. (a) to (d) if that person has died.
>
> (f) The legal or physical custodian of the child.

(continued)

¶8 The parties agree that the word "child" is ambiguous in this statute. Shannon argues that the more reasonable construction is that "child" includes a fetus that is stillborn, while Alicia argues that it is more reasonable to construe "child" to require a live birth. Shannon argues, in addition, that if we construe "child" to exclude a fetus that is stillborn, then he is deprived of the opportunity to bring a wrongful death action, which, he asserts, he has the right to bring under *Kwaterski v. State Farm Mutual Automobile Ins. Co.*, 34 Wis. 2d 14, 15, 22, 148 N.W.2d 107 (1967). In *Kwaterski*, the court construed the term "person" in the wrongful death statute, WIS. STAT. § 895.03 (1965), to include a viable fetus; the court concluded that the parents had a cause of action against the driver of the other vehicle for wrongful death, based on the allegations that the other driver's negligence caused injuries to the fetus that resulted in a stillbirth. *Kwaterski*, 34 Wis. 2d at 15, 22.

(g) This state whenever the circumstances specified in s. 767.075 (1) apply, including the delegates of the state as specified in sub. (6).

(h) This state as provided under sub. (6m).

(i) A guardian ad litem appointed for the child under s. 48.235, 767.045 (1) (c) or 938.235.

(j) A parent of a person listed under par. (b), (c) or (d), if the parent is liable or is potentially liable for maintenance of a child of a dependent person under s. 49.90 (1) (a) 2.

(k) In conjunction with the filing of a petition for visitation with respect to the child under s. 767.245 (3), a parent of a person who has filed a declaration of paternal interest under s. 48.025 with respect to the child or a parent of a person who, before April 1, 1998, signed and filed a statement acknowledging paternity under s. 69.15 (3) (b) 3. with respect to the child.

¶9 We asked for supplemental briefing on the question of how, if at all, WIS. STAT. § 885.23 relates to the issue whether Shannon may bring a paternity action under WIS. STAT. § 767.45(1) for purposes of determining his paternity so that he may pursue a wrongful death claim. Section 885.23 provides:

> **Genetic tests in civil actions.** Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.48. The results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of the parties refuses to submit to the tests that fact shall be disclosed upon trial.

Shannon's position is that, although he might have the right to bring a motion under § 885.23 to determine his paternity in the wrongful death action, he also has a right to bring this paternity action for that purpose because the circuit court "has not permitted a paternity determination in that action." Alicia's position is that § 885.23 is irrelevant to whether Shannon may bring a paternity action to determine his paternity of a stillborn.[5]

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[5] We asked for supplemental briefing after our certification to the supreme court was denied. *See* ***Shannon E.T. v. Alicia M. V.M.***, No. 05-77, unpublished certification (WI App July 14, 2005), denied (WI Sept. 8, 2005). The issue we certified was whether "birth of a child" in WIS. STAT. § 767.45 requires a live birth.

In our order on supplemental briefing, in addition to asking the parties to address WIS. STAT. § 885.23, we asked them to brief whether the case ***DiBenedetto v. Jaskolski***, 2003 WI App 70, ¶¶22-32, 261 Wis. 2d 723, 661 N.W.2d 869, has any bearing on the issue whether Shannon may bring an action under WIS. STAT. § 767.45(1) to determine his paternity of C.A.V.M. for the purpose of bringing a wrongful death action. In the referenced ***DiBenedetto*** paragraphs, we held that the personal representative had the authority in that probate proceeding to bring a motion under §§ 767.45(1)(e) and 885.23 to determine the paternity of the decedent, which was necessary in order to determine his lawful heirs; and, we concluded the personal representative had acted unreasonably in not doing so. We do not discuss ***DiBenedetto*** in this opinion because we conclude it does not assist in resolving the issue on this appeal.

¶10 We view the dispositive issue to be whether Shannon may bring a paternity action for the sole purpose of determining his paternity so that he may proceed with the wrongful death action involving C.A.V.M. We conclude that WIS. STAT. §§ 767.45—767.62 (which we will refer to as "the paternity statute") is ambiguous on this point. By consulting the legislative history of the statute and considering WIS. STAT. § 885.23, which we view as a related statute, we conclude the legislature did not intend that a paternity action be initiated by a man alleging he is the father when the sole purpose is to obtain a determination of paternity so that he may proceed with a wrongful death action.

¶11 In general, the paternity statute establishes a very detailed procedure for making a determination of paternity and for making decisions and orders regarding the care of the "child" and expenses associated with the "child." WISCONSIN STAT. § 767.50(1) provides that the "trial shall be divided into 2 parts. The first part shall deal with the determination of paternity. The 2nd part shall deal with child support, legal custody, periods of physical placement, and related issues." There is no express provision that a paternity action may be brought only if the paternity adjudication is for the purposes of establishing "child support, legal custody, periods of physical placement, and related issues." However, we conclude this is a reasonable construction of the statute in view of § 767.50(1), the provisions regarding the best interests of the child, *see, e.g.*, WIS. STAT. §§ 767.46(2) and 767.463, and the provision on the contents of a judgment or order of paternity, WIS. STAT. § 767.51(3). That section provides:

> (3) A judgment or order determining paternity shall contain all of the following provisions:
>
> (a) An adjudication of the paternity of the child.

> (b) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.24.
>
> (c) An 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, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.25.
>
> (d) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c) (1) (B), or as an exemption for state tax purposes under s. 71.07 (8) (b).
>
> (e) An order requiring the father to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth, based on the father's ability to pay or contribute to those expenses.
>
> (f) An order requiring either or both parties to pay or contribute to the costs of the guardian ad litem fees, genetic tests as provided in s. 767.48 (5) and other costs.
>
> (g) An order requiring either party to pay or contribute to the attorney fees of the other party.

¶12 We conclude it is reasonable to read WIS. STAT. § 767.51(3) as expressing a legislative intent that any paternity judgment must contain provisions regarding the child's support, care, and custody. However, we do not agree with Alicia that § 767.51(3) plainly means that every paternity judgment or order must contain all the items in that section, thus showing that the legislature intended that "child" requires a live birth. First, when a baby is born alive but then dies, there is no need for orders regarding custody, placement, and current and future child support. In other words, the provisions that contemplate making decisions about a live child are inapplicable both where there is a stillbirth and where there is a live birth but the child dies thereafter. Second, even if the child is alive at the time of the proceeding, there may be no need for some of the orders. For example, a

paternity action may be brought within nineteen years of a child's birth, *see* WIS. STAT. §§ 767.475(5) and 893.88, but if the child is over eighteen, there would be no orders on legal custody or physical placement under para. (b) in § 767.51(3). Other examples are: there may be no guardian ad litem fees or genetic tests and so no reason for an order under para. (f), and there may be no attorneys and so no reason for an order under para. (g).

¶13 Third, we observe that, while orders regarding the custody and placement of the child and support of the child (to the extent it is current and future support) under WIS. STAT. § 767.51(3)(b)-(d) obviously do not apply if there is a stillbirth, that is not true of contribution "to the reasonable expenses of the mother's pregnancy," and it may not be true of the expenses of "the child's birth." Section 767.51(3)(e). Plainly there are "expenses of the mother's pregnancy" such as doctor visits, even if there is a stillbirth rather than a live birth. Whether "expenses of ... the child's birth" includes the hospital expenses from a stillbirth requires a construction of "birth" and "child." In short, we view § 767.51(3) as illustrating the ambiguity of the meaning of "child" and "birth" rather than resolving it.[6]

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[6] For essentially the same reason, we do not agree with Alicia that WIS. STAT. § 767.45(3) shows the legislature's intent that there be a live birth rather than a stillbirth. That section provides:

> (3) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except that service of process, service and filing of pleadings, the first appearance and the taking of depositions to preserve testimony may be done before the birth of the child.

(continued)

¶14 Because we conclude the statute is ambiguous, we consider the legislative history to determine whether the legislature intended that a paternity action be initiated in a situation such as this—when there was a stillbirth and no order is sought other than a paternity adjudication for the purpose of pursuing a wrongful death action concerning the stillbirth.

¶15 The paternity statute has its origins in a statute almost as old as Wisconsin's statehood. WIS. STAT. ch. 31 (1849). The original statute was concerned with the ability of the town in which a child was born to an unmarried mother to obtain money from the father for the child's support and for the expenses of "the lying in and the support and attendance upon the mother of such child during her sickness." *See* WIS. STAT. ch. 31, §§ 3, 7, 13 (1849).

¶16 Subsequent changes provided that paternity actions (then called illegitimacy actions) were to be brought only by the district attorney. *See* WIS. STAT. ch. 166 (1929).[7] It was not until 1963 that the legislature authorized the court to make other than financial provisions for the child: WIS. STAT. § 52.21(2), created by 1963 Wis. Laws, ch. 426, § 2, authorized the court in a paternity action

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This section plainly permits a paternity action to be brought while the woman is still pregnant, at which time no one knows if there will be a live birth. This section does not state that the action must be dismissed if there is a not a live birth. Thus, for example, if the woman or district attorney brought a paternity action during the pregnancy, the action was stayed, and there was a stillbirth, it may be that the woman or district attorney would wish to continue the action to obtain a determination of paternity and payment of or contribution for the expenses of pregnancy and the medical expenses associated with the stillbirth under WIS. STAT. § 767.51(3)(e). Whether a proper construction of the statute would allow this is an issue we need not resolve in this case. However, we do not agree that § 767.45(3) plainly would not allow this.

[7] 1907 Wis. Laws, ch. 648 enacted WIS. STAT. § 1533m, which required the district attorney "to appear and prosecute in all bastardy proceedings." Certain towns still retained the authority to enter into a compromise with the putative father and release him from liability, but that town authority ended in 1929, when the authority to compromise was given only to district attorneys. *See* 1929 Wis. Laws, ch. 439, § 10, enacting WIS. STAT. § 166.22.

to make orders for "the suitable care, custody, support, and maintenance of the child," in addition to the financial orders that had long been required. However, the requirement that the action must be initiated with a complaint by the district attorney remained until 1981. *See* 1979 Wis. Laws, ch. 352, repealing §§ 52.22-52.25, effective July 1, 1981.

¶17 The significant changes that authorized a man alleging he is the father to bring a paternity action were enacted by 1979 Wis. Laws, ch. 352, § 25, which also added the child, the mother, a man presumed or alleged to be the father, and specified others as persons authorized to bring the action. *See* WIS. STAT. § 767.45(1) (1981-82). This amendment occurred following changes that had been made to other statutes to provide a procedure for an unmarried father to declare his paternity,[8] which, legislative notes show, were prompted by United States Supreme Court decisions relating to the rights of unmarried fathers.[9]

¶18 Another area of significant changes in 1979 Wis. Laws, ch. 352 brought paternity actions more in line with orders in divorce actions concerning the care, custody, and support of children; indeed, the statute at that time was renumbered and placed in WIS. STAT. ch. 767, "Actions Affecting the Family." *See* 1979 Wis. Laws, ch. 352, §§ 19, 25.[10] Material in the legislative record shows

[8] *See* 1973 Wis. Laws, ch. 263, § 19, enacting WIS. STAT. § 269.56(3m), which was subsequently renumbered to WIS. STAT. § 806.04(3m), *see* Judicial Council Committee's note, 1977, WIS. STAT. § 806.04, and was repealed by 1979 Wis. Laws, ch. 352, §26; and *see* 1973 Wis. Laws, ch. 263, §§ 2, 3, 6 and 7, enacting WIS. STAT. §§ 48.025, 48.195, 48.42(3), and 48.425.

[9] *See* the prefatory note prepared by the legislative council, located in the drafting records for 1973 Wis. Laws, ch. 263, in the Legislative Reference Bureau Analysis of 1973 S.B. 566, LRB-4575/1.

[10] WISCONSIN STAT. § 767.51(3), as originally enacted in 1979 Wis. Laws, ch. 352, § 25, provided:

(continued)

that these changes were intended to ensure that children of unmarried parents were treated in the same way as children of married parents who were no longer living together or were divorced. *See* Division of Economic Assistance Memorandum of September 6, 1978, regarding the Paternity Committee Report, from Sherwood K. Zink, Legal Counsel of the Bureau of Child Support, located in the drafting records to 1979 Wis. Laws, ch. 352, S.B. 249.

¶19 The amendment to WIS. STAT. § 767.45(1) authorizing the listed persons to bring a "motion" as well as an "action" was enacted by 1987 Wis. Act 413, § 68. The introductory note to that act stated: it is "in the interest of each child to identify the child's father for reasons including medical information and financial support ... it is the policy of this state to promote the interest of children in knowing the identity of both parents." 1987 Wis. Act 413, § 1.

¶20 The language in WIS. STAT. § 767.45(1), "including an action or motion for declaratory judgment," was added by 1993 Wis. Act 481, § 127. That same act made changes in a number of other statutes that were described in fiscal estimates as improving child support collection by "streamlining procedures and

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> The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay or contribute to the reasonable expenses of the mother's pregnancy and confinement during pregnancy and may direct either party to pay or contribute to the costs of blood tests, attorney fees and other costs. Contributions to the costs of blood tests shall be paid to the county which paid for the blood tests.

It was amended to its present form by 1999 Wis. Act 9, § 3065cs.

providing additional tools to establish paternities and establish and collect child support." *See* Fiscal Estimate of May 11, 1994, on Child Support Enforcement, prepared by DHSS, 1994 Spec. Sess. S.B. 2, located in the drafting records for 1993 Wis. Act 481, part 1, LRB-6036.

¶21 This legislative history shows that the current paternity statute reflects a number of important legislative policies and purposes: that mothers and other entities who incur expenses related to the mother's pregnancy, the birth of a child and the care of a child have a procedure to determine paternity so that the father contributes to those expenses; that unmarried fathers have a procedure for establishing their paternity so that they can participate in parenting their child; that courts have the same authority to make orders regarding the care of children in their best interests that they have in other actions affecting the family; and that children of unmarried parents have a procedure for establishing who their father is and obtaining any benefits that flow from that.[11] None of these policies and purposes appear to encompass bringing a paternity action to determine paternity for the sole purpose of bringing another action. Thus, while legislative history does not conclusively demonstrate that the legislature did not intend this, we view the legislative history as an indication that the legislature did not.

¶22 We now turn to an examination of WIS. STAT. § 885.23. The language of the statute plainly provides for a determination of paternity if it is

[11] There are other policies and purposes expressed in the text of the statute itself, which we do not mention because they are not relevant to our analysis. For example, WIS. STAT. § 767.45(1)(c), enacted by 1979 Wis. Laws, ch. 352, § 25, provides that "[a] man presumed to be the child's father" may bring a paternity action to rebut that presumption. This text expresses another purpose of the statute: to provide a procedure which men presumed by statute to be the father can use to establish that they are not the father.

relevant in a civil action. Thus, it is plain that a paternity action is not the only action in which a determination of paternity may be made. We do not agree with Alicia that § 885.23 is irrelevant to our construction of WIS. STAT. § 767.45. Because § 885.23 provides a procedure for a determination of paternity in a civil action other than a paternity action, when paternity is relevant in that other action, the question arises whether the legislature intended that a paternity action be initiated for that purpose, even though no other order regarding the care of the child or expenses associated with the pregnancy or the child's birth is sought. One might reasonably argue that these are simply two vehicles available to a person in Shannon's situation. Alternatively, one might also reasonably argue that the legislature did not intend that a paternity action be initiated solely for the purpose of determining paternity when it is a relevant issue in another action.

¶23 We conclude the latter construction is more reasonable. First, the predecessor to WIS. STAT. § 885.23 was originally enacted in 1935. *See* 1935 Wis. Laws, ch. 351, § 1. Because there already existed a procedure for determining paternity in a civil action within that action, when paternity was relevant, there is no reason to think the legislature intended to create an entirely separate action for that purpose when, in 1979 Wis. Laws, ch. 352, § 25, it expanded the list of persons permitted to bring a paternity action. Second, as we have discussed above, the legislative history of the paternity statute indicates that the changes in the statute over the years were driven by policies and purposes that do not include creating a separate action to determine paternity for the purpose of bringing another action.

¶24 We conclude that WIS. STAT. § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action.

Accordingly, although our rationale differs from that of the circuit court, we affirm the dismissal of this action.[12]

¶25 We emphasize that our conclusion on the proper construction of WIS. STAT. § 767.45(1), and our discussion of WIS. STAT. § 885.23 in arriving at that conclusion is not, as Alicia contends, an advisory opinion. We are not ruling on the correctness of the circuit court's decision in the wrongful death action. That decision is not before us. We do not know precisely what that decision was, what the grounds for it were, and what arguments were made to that court. Nothing in this opinion requires that the circuit court in the wrongful death action grant a motion by Shannon in that action to allow him to establish his paternity. Whether such a motion, if brought, should be granted depends on the resolution of issues we do not address in this case, including whether Shannon's paternity is relevant in that action, which, in turn, depends on whether, if he is the father of C.A.V.M., he has a cause of action for wrongful death. These issues are not before us and we do not address them.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

[12] In the initial round of briefing Shannon argued that, if we do not construe WIS. STAT. § 767.45(1) to permit him to bring this action, there is a violation of his right to a remedy (that is, on his wrongful death claim) under article I, section 9 of the Wisconsin Constitution and his right to equal protection of the law under Fourteenth Amendment of the United States Constitution and article I, section 1 of the Wisconsin Constitution. Both of these arguments were brief and both were based on the premise that there was no procedure for establishing paternity for the purpose of the wrongful death claim except through a paternity action. In his supplemental brief, Shannon takes the position that he may bring a motion under WIS. STAT. § 885.23 in the wrongful death action. We therefore do not address his constitutional arguments. We also do not address the argument in Shannon's initial brief that WIS. STAT. § 895.01(a), which provides that a cause of action to determine paternity survives, requires that he be permitted to bring this action. This argument consists of two sentences and is not adequately developed.

COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2005AP77

Cir. Ct. No. 2004AP59

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE PATERNITY OF C.A.V.M.:

SHANNON E. T.,

PETITIONER-APPELLANT,

BYE, GOFF & ROHDE, LTD.,

APPELLANTS,

V.

ALICIA M. V.M. AN INDIVIDUAL, BY HER GUARDIANS, PATRICIA N. AND BRIAN V.M.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

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

¶1 VERGERONT, J. Shannon E.T. appeals from an order dismissing an action under WIS. STAT. § 767.45[1] to establish his paternity of C.A.V.M., stillborn as the result of a motor vehicle accident. Shannon brought this action to establish his paternity for the purpose of the wrongful death action that he had already initiated. We conclude that § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action based on the stillbirth. Accordingly, although our rationale differs from that of the circuit court, we affirm the dismissal of this action.

BACKGROUND

¶2 The paternity petition alleged as follows. Alicia M. V.M. was involved in a car accident when she was twenty-seven weeks pregnant with C.A.V.M and C.A.V.M. was viable. As a result of the accident, C.A.V.M. was stillborn and Alicia was incapacitated. Shannon is the father of C.A.V.M., and during periods of the pregnancy he resided with Alicia and assisted with C.A.V.M.'s prenatal care. Shannon seeks a paternity determination in connection with a wrongful death action based on C.A.V.M.'s stillbirth that he has filed in another county; that action has been continued pending the determination in this paternity action.

¶3 Alicia, through her guardians, filed a motion to dismiss this action, arguing that WIS. STAT. § 767.45 does not provide a basis for determining the paternity of a stillborn and, therefore, Shannon's petition failed to state a claim

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

upon which relief could be granted and the court lacked competency over the matter. Shannon disputed this construction of § 767.45, arguing that the statute does not define "child," and does not require a live birth in order for a court to adjudicate paternity.

¶4 In a written decision, the circuit court granted the motion to dismiss. The court concluded that a paternity action under WIS. STAT. § 767.45 required the "birth" of a child and concluded that a stillbirth did not qualify as the "birth" of a child. In reaching this conclusion, the court employed an analysis similar to that which the supreme court used in ***State ex rel. Angela M. W. v. Kruzicki***, 209 Wis. 2d 112, 561 N.W.2d 729 (1997). In that case, the supreme court concluded that "child" in WIS. STAT. § 48.02(2) (1993-94) meant a human being born alive and did not include a viable fetus; the court reached that conclusion by considering the word in its statutory context. ***Angela M.W.***, 209 Wis. 2d at 137. In this case, the circuit court considered the requirements in WIS. STAT. § 767.51(3)(b)-(d) that a paternity judgment "shall" contain orders for the legal custody, physical placement, and support of a child, as well as a determination as to which parent, if eligible, has the right to claim the child as an exemption for federal tax purposes. The court found that none of these provisions would apply if there were a stillbirth, and therefore allowing the paternity adjudication of a stillborn would render these statutory requirements absurd. The court also noted that § 767.45(3) requires that the "birth" of the child occur before a paternity adjudication is completed, and, in light of the requirements for the judgment in § 767.51(3)(b)-(d), the legislature meant a live birth.[2]

[2] Alicia also filed a motion, through her guardians, seeking to disqualify the firm representing Shannon in this action on the ground that it was the same firm the guardians had (continued)

DISCUSSION

¶5 On a motion to dismiss for failure to state a claim,[3] we take as true the allegations in the complaint and all reasonable inferences therefrom. ***Scott v. Savers Property & Cas. Ins. Co.***, 2003 WI 60, ¶5, 262 Wis. 2d 127, 663 N.W.2d 715. Whether a complaint states a claim for relief presents a question of law, which we review de novo. ***Id.***, ¶6.

¶6 The resolution of the motion to dismiss here requires a construction of various statutory provisions, which is also a question of law. ***Marder v. Bd. of Regents of Univ. of Wis. Sys.***, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110. When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Cir. Ct. for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used,

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retained to represent Alicia in connection with the accident. The submissions showed that, after investigating the accident, the firm informed Alicia's guardians that it would not pursue any action on her behalf. Less than a month later, the same firm filed the wrongful death action on behalf of Shannon against American Family Mutual Ins. Co., Alicia's insurer, and the driver of the other car, alleging that he was the father of C.A.V.M. and the negligence of Alicia and of the other driver caused the accident, which resulted in the stillbirth of C.A.V.M. Alicia's motion to disqualify asserted that this paternity action is contrary to her interests and, in the prior representation of her, the firm had obtained confidential information that could be used against her in this action. The circuit court granted this motion. The law firm appeals that order, with other counsel representing Shannon in appealing the order dismissing this action. Because of our disposition of the dismissal order, it is not necessary to consider the disqualification order.

[3] Both of the parties appear to agree that a motion to dismiss for failure to state a claim is the proper formulation of a motion asserting that Shannon may not obtain a paternity declaration under WIS. STAT. §§ 767.45-767.62 because C.A.V.M. was stillborn. We accept this formulation for purposes of our analysis. The significant point for our standard of review is that we are construing §§ 767.45-767.62 based on the facts alleged in the petition, and thus a question of law is presented, which we review de novo.

not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. *Id.*, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.*, ¶48. If we conclude that the application of these principles results in statutory language that is ambiguous—that is, capable of being understood by reasonably well-informed persons in two or more senses—then we may employ sources extrinsic to the statutory text. *Id.*, ¶¶47, 50. These extrinsic sources are typically items of legislative history. *Id.*, ¶50.

¶7 In the circuit court and in their initial briefs the parties focused on the meaning of the word "child" in WIS. STAT. § 767.45(1), which provides in relevant part:

> (1) The following persons may bring an action or motion, including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41 (1):
>
> (a) The child.
>
> (b) The child's natural mother.
>
> (c) Unless s. 767.62 (1) applies, a man presumed to be the child's father under s. 891.405 or 891.41 (1).
>
> (d) A man alleged or alleging himself to be the father of the child.[4]

[4] The rest of WIS. STAT. § 767.45(1) provides:

> (e) The personal representative of a person specified under pars. (a) to (d) if that person has died.
>
> (f) The legal or physical custodian of the child.

(continued)

¶8 The parties agree that the word "child" is ambiguous in this statute. Shannon argues that the more reasonable construction is that "child" includes a fetus that is stillborn, while Alicia argues that it is more reasonable to construe "child" to require a live birth. Shannon argues, in addition, that if we construe "child" to exclude a fetus that is stillborn, then he is deprived of the opportunity to bring a wrongful death action, which, he asserts, he has the right to bring under *Kwaterski v. State Farm Mutual Automobile Ins. Co.*, 34 Wis. 2d 14, 15, 22, 148 N.W.2d 107 (1967). In *Kwaterski*, the court construed the term "person" in the wrongful death statute, WIS. STAT. § 895.03 (1965), to include a viable fetus; the court concluded that the parents had a cause of action against the driver of the other vehicle for wrongful death, based on the allegations that the other driver's negligence caused injuries to the fetus that resulted in a stillbirth. *Kwaterski*, 34 Wis. 2d at 15, 22.

(g) This state whenever the circumstances specified in s. 767.075 (1) apply, including the delegates of the state as specified in sub. (6).

(h) This state as provided under sub. (6m).

(i) A guardian ad litem appointed for the child under s. 48.235, 767.045 (1) (c) or 938.235.

(j) A parent of a person listed under par. (b), (c) or (d), if the parent is liable or is potentially liable for maintenance of a child of a dependent person under s. 49.90 (1) (a) 2.

(k) In conjunction with the filing of a petition for visitation with respect to the child under s. 767.245 (3), a parent of a person who has filed a declaration of paternal interest under s. 48.025 with respect to the child or a parent of a person who, before April 1, 1998, signed and filed a statement acknowledging paternity under s. 69.15 (3) (b) 3. with respect to the child.

¶9 We asked for supplemental briefing on the question of how, if at all, WIS. STAT. § 885.23 relates to the issue whether Shannon may bring a paternity action under WIS. STAT. § 767.45(1) for purposes of determining his paternity so that he may pursue a wrongful death claim. Section 885.23 provides:

> **Genetic tests in civil actions.** Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.48. The results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of the parties refuses to submit to the tests that fact shall be disclosed upon trial.

Shannon's position is that, although he might have the right to bring a motion under § 885.23 to determine his paternity in the wrongful death action, he also has a right to bring this paternity action for that purpose because the circuit court "has not permitted a paternity determination in that action." Alicia's position is that § 885.23 is irrelevant to whether Shannon may bring a paternity action to determine his paternity of a stillborn.[5]

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[5] We asked for supplemental briefing after our certification to the supreme court was denied. *See* ***Shannon E.T. v. Alicia M. V.M.***, No. 05-77, unpublished certification (WI App July 14, 2005), denied (WI Sept. 8, 2005). The issue we certified was whether "birth of a child" in WIS. STAT. § 767.45 requires a live birth.

In our order on supplemental briefing, in addition to asking the parties to address WIS. STAT. § 885.23, we asked them to brief whether the case ***DiBenedetto v. Jaskolski***, 2003 WI App 70, ¶¶22-32, 261 Wis. 2d 723, 661 N.W.2d 869, has any bearing on the issue whether Shannon may bring an action under WIS. STAT. § 767.45(1) to determine his paternity of C.A.V.M. for the purpose of bringing a wrongful death action. In the referenced ***DiBenedetto*** paragraphs, we held that the personal representative had the authority in that probate proceeding to bring a motion under §§ 767.45(1)(e) and 885.23 to determine the paternity of the decedent, which was necessary in order to determine his lawful heirs; and, we concluded the personal representative had acted unreasonably in not doing so. We do not discuss ***DiBenedetto*** in this opinion because we conclude it does not assist in resolving the issue on this appeal.

¶10 We view the dispositive issue to be whether Shannon may bring a paternity action for the sole purpose of determining his paternity so that he may proceed with the wrongful death action involving C.A.V.M. We conclude that WIS. STAT. §§ 767.45—767.62 (which we will refer to as "the paternity statute") is ambiguous on this point. By consulting the legislative history of the statute and considering WIS. STAT. § 885.23, which we view as a related statute, we conclude the legislature did not intend that a paternity action be initiated by a man alleging he is the father when the sole purpose is to obtain a determination of paternity so that he may proceed with a wrongful death action.

¶11 In general, the paternity statute establishes a very detailed procedure for making a determination of paternity and for making decisions and orders regarding the care of the "child" and expenses associated with the "child." WISCONSIN STAT. § 767.50(1) provides that the "trial shall be divided into 2 parts. The first part shall deal with the determination of paternity. The 2nd part shall deal with child support, legal custody, periods of physical placement, and related issues." There is no express provision that a paternity action may be brought only if the paternity adjudication is for the purposes of establishing "child support, legal custody, periods of physical placement, and related issues." However, we conclude this is a reasonable construction of the statute in view of § 767.50(1), the provisions regarding the best interests of the child, *see, e.g.*, WIS. STAT. §§ 767.46(2) and 767.463, and the provision on the contents of a judgment or order of paternity, WIS. STAT. § 767.51(3). That section provides:

> (3) A judgment or order determining paternity shall contain all of the following provisions:
>
> (a) An adjudication of the paternity of the child.

> (b) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.24.
>
> (c) An 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, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.25.
>
> (d) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c) (1) (B), or as an exemption for state tax purposes under s. 71.07 (8) (b).
>
> (e) An order requiring the father to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth, based on the father's ability to pay or contribute to those expenses.
>
> (f) An order requiring either or both parties to pay or contribute to the costs of the guardian ad litem fees, genetic tests as provided in s. 767.48 (5) and other costs.
>
> (g) An order requiring either party to pay or contribute to the attorney fees of the other party.

¶12 We conclude it is reasonable to read WIS. STAT. § 767.51(3) as expressing a legislative intent that any paternity judgment must contain provisions regarding the child's support, care, and custody. However, we do not agree with Alicia that § 767.51(3) plainly means that every paternity judgment or order must contain all the items in that section, thus showing that the legislature intended that "child" requires a live birth. First, when a baby is born alive but then dies, there is no need for orders regarding custody, placement, and current and future child support. In other words, the provisions that contemplate making decisions about a live child are inapplicable both where there is a stillbirth and where there is a live birth but the child dies thereafter. Second, even if the child is alive at the time of the proceeding, there may be no need for some of the orders. For example, a

paternity action may be brought within nineteen years of a child's birth, *see* WIS. STAT. §§ 767.475(5) and 893.88, but if the child is over eighteen, there would be no orders on legal custody or physical placement under para. (b) in § 767.51(3). Other examples are: there may be no guardian ad litem fees or genetic tests and so no reason for an order under para. (f), and there may be no attorneys and so no reason for an order under para. (g).

¶13 Third, we observe that, while orders regarding the custody and placement of the child and support of the child (to the extent it is current and future support) under WIS. STAT. § 767.51(3)(b)-(d) obviously do not apply if there is a stillbirth, that is not true of contribution "to the reasonable expenses of the mother's pregnancy," and it may not be true of the expenses of "the child's birth." Section 767.51(3)(e). Plainly there are "expenses of the mother's pregnancy" such as doctor visits, even if there is a stillbirth rather than a live birth. Whether "expenses of ... the child's birth" includes the hospital expenses from a stillbirth requires a construction of "birth" and "child." In short, we view § 767.51(3) as illustrating the ambiguity of the meaning of "child" and "birth" rather than resolving it.[6]

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[6] For essentially the same reason, we do not agree with Alicia that WIS. STAT. § 767.45(3) shows the legislature's intent that there be a live birth rather than a stillbirth. That section provides:

> (3) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except that service of process, service and filing of pleadings, the first appearance and the taking of depositions to preserve testimony may be done before the birth of the child.

(continued)

¶14 Because we conclude the statute is ambiguous, we consider the legislative history to determine whether the legislature intended that a paternity action be initiated in a situation such as this—when there was a stillbirth and no order is sought other than a paternity adjudication for the purpose of pursuing a wrongful death action concerning the stillbirth.

¶15 The paternity statute has its origins in a statute almost as old as Wisconsin's statehood. WIS. STAT. ch. 31 (1849). The original statute was concerned with the ability of the town in which a child was born to an unmarried mother to obtain money from the father for the child's support and for the expenses of "the lying in and the support and attendance upon the mother of such child during her sickness." *See* WIS. STAT. ch. 31, §§ 3, 7, 13 (1849).

¶16 Subsequent changes provided that paternity actions (then called illegitimacy actions) were to be brought only by the district attorney. *See* WIS. STAT. ch. 166 (1929).[7] It was not until 1963 that the legislature authorized the court to make other than financial provisions for the child: WIS. STAT. § 52.21(2), created by 1963 Wis. Laws, ch. 426, § 2, authorized the court in a paternity action

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This section plainly permits a paternity action to be brought while the woman is still pregnant, at which time no one knows if there will be a live birth. This section does not state that the action must be dismissed if there is a not a live birth. Thus, for example, if the woman or district attorney brought a paternity action during the pregnancy, the action was stayed, and there was a stillbirth, it may be that the woman or district attorney would wish to continue the action to obtain a determination of paternity and payment of or contribution for the expenses of pregnancy and the medical expenses associated with the stillbirth under WIS. STAT. § 767.51(3)(e). Whether a proper construction of the statute would allow this is an issue we need not resolve in this case. However, we do not agree that § 767.45(3) plainly would not allow this.

[7] 1907 Wis. Laws, ch. 648 enacted WIS. STAT. § 1533m, which required the district attorney "to appear and prosecute in all bastardy proceedings." Certain towns still retained the authority to enter into a compromise with the putative father and release him from liability, but that town authority ended in 1929, when the authority to compromise was given only to district attorneys. *See* 1929 Wis. Laws, ch. 439, § 10, enacting WIS. STAT. § 166.22.

to make orders for "the suitable care, custody, support, and maintenance of the child," in addition to the financial orders that had long been required. However, the requirement that the action must be initiated with a complaint by the district attorney remained until 1981. *See* 1979 Wis. Laws, ch. 352, repealing §§ 52.22-52.25, effective July 1, 1981.

¶17 The significant changes that authorized a man alleging he is the father to bring a paternity action were enacted by 1979 Wis. Laws, ch. 352, § 25, which also added the child, the mother, a man presumed or alleged to be the father, and specified others as persons authorized to bring the action. *See* WIS. STAT. § 767.45(1) (1981-82). This amendment occurred following changes that had been made to other statutes to provide a procedure for an unmarried father to declare his paternity,[8] which, legislative notes show, were prompted by United States Supreme Court decisions relating to the rights of unmarried fathers.[9]

¶18 Another area of significant changes in 1979 Wis. Laws, ch. 352 brought paternity actions more in line with orders in divorce actions concerning the care, custody, and support of children; indeed, the statute at that time was renumbered and placed in WIS. STAT. ch. 767, "Actions Affecting the Family." *See* 1979 Wis. Laws, ch. 352, §§ 19, 25.[10] Material in the legislative record shows

[8] *See* 1973 Wis. Laws, ch. 263, § 19, enacting WIS. STAT. § 269.56(3m), which was subsequently renumbered to WIS. STAT. § 806.04(3m), *see* Judicial Council Committee's note, 1977, WIS. STAT. § 806.04, and was repealed by 1979 Wis. Laws, ch. 352, §26; and *see* 1973 Wis. Laws, ch. 263, §§ 2, 3, 6 and 7, enacting WIS. STAT. §§ 48.025, 48.195, 48.42(3), and 48.425.

[9] *See* the prefatory note prepared by the legislative council, located in the drafting records for 1973 Wis. Laws, ch. 263, in the Legislative Reference Bureau Analysis of 1973 S.B. 566, LRB-4575/1.

[10] WISCONSIN STAT. § 767.51(3), as originally enacted in 1979 Wis. Laws, ch. 352, § 25, provided:

(continued)

that these changes were intended to ensure that children of unmarried parents were treated in the same way as children of married parents who were no longer living together or were divorced. *See* Division of Economic Assistance Memorandum of September 6, 1978, regarding the Paternity Committee Report, from Sherwood K. Zink, Legal Counsel of the Bureau of Child Support, located in the drafting records to 1979 Wis. Laws, ch. 352, S.B. 249.

¶19 The amendment to WIS. STAT. § 767.45(1) authorizing the listed persons to bring a "motion" as well as an "action" was enacted by 1987 Wis. Act 413, § 68. The introductory note to that act stated: it is "in the interest of each child to identify the child's father for reasons including medical information and financial support ... it is the policy of this state to promote the interest of children in knowing the identity of both parents." 1987 Wis. Act 413, § 1.

¶20 The language in WIS. STAT. § 767.45(1), "including an action or motion for declaratory judgment," was added by 1993 Wis. Act 481, § 127. That same act made changes in a number of other statutes that were described in fiscal estimates as improving child support collection by "streamlining procedures and

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> The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay or contribute to the reasonable expenses of the mother's pregnancy and confinement during pregnancy and may direct either party to pay or contribute to the costs of blood tests, attorney fees and other costs. Contributions to the costs of blood tests shall be paid to the county which paid for the blood tests.

It was amended to its present form by 1999 Wis. Act 9, § 3065cs.

providing additional tools to establish paternities and establish and collect child support." *See* Fiscal Estimate of May 11, 1994, on Child Support Enforcement, prepared by DHSS, 1994 Spec. Sess. S.B. 2, located in the drafting records for 1993 Wis. Act 481, part 1, LRB-6036.

¶21 This legislative history shows that the current paternity statute reflects a number of important legislative policies and purposes: that mothers and other entities who incur expenses related to the mother's pregnancy, the birth of a child and the care of a child have a procedure to determine paternity so that the father contributes to those expenses; that unmarried fathers have a procedure for establishing their paternity so that they can participate in parenting their child; that courts have the same authority to make orders regarding the care of children in their best interests that they have in other actions affecting the family; and that children of unmarried parents have a procedure for establishing who their father is and obtaining any benefits that flow from that.[11] None of these policies and purposes appear to encompass bringing a paternity action to determine paternity for the sole purpose of bringing another action. Thus, while legislative history does not conclusively demonstrate that the legislature did not intend this, we view the legislative history as an indication that the legislature did not.

¶22 We now turn to an examination of WIS. STAT. § 885.23. The language of the statute plainly provides for a determination of paternity if it is

[11] There are other policies and purposes expressed in the text of the statute itself, which we do not mention because they are not relevant to our analysis. For example, WIS. STAT. § 767.45(1)(c), enacted by 1979 Wis. Laws, ch. 352, § 25, provides that "[a] man presumed to be the child's father" may bring a paternity action to rebut that presumption. This text expresses another purpose of the statute: to provide a procedure which men presumed by statute to be the father can use to establish that they are not the father.

relevant in a civil action. Thus, it is plain that a paternity action is not the only action in which a determination of paternity may be made. We do not agree with Alicia that § 885.23 is irrelevant to our construction of WIS. STAT. § 767.45. Because § 885.23 provides a procedure for a determination of paternity in a civil action other than a paternity action, when paternity is relevant in that other action, the question arises whether the legislature intended that a paternity action be initiated for that purpose, even though no other order regarding the care of the child or expenses associated with the pregnancy or the child's birth is sought. One might reasonably argue that these are simply two vehicles available to a person in Shannon's situation. Alternatively, one might also reasonably argue that the legislature did not intend that a paternity action be initiated solely for the purpose of determining paternity when it is a relevant issue in another action.

¶23 We conclude the latter construction is more reasonable. First, the predecessor to WIS. STAT. § 885.23 was originally enacted in 1935. *See* 1935 Wis. Laws, ch. 351, § 1. Because there already existed a procedure for determining paternity in a civil action within that action, when paternity was relevant, there is no reason to think the legislature intended to create an entirely separate action for that purpose when, in 1979 Wis. Laws, ch. 352, § 25, it expanded the list of persons permitted to bring a paternity action. Second, as we have discussed above, the legislative history of the paternity statute indicates that the changes in the statute over the years were driven by policies and purposes that do not include creating a separate action to determine paternity for the purpose of bringing another action.

¶24 We conclude that WIS. STAT. § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action.

Accordingly, although our rationale differs from that of the circuit court, we affirm the dismissal of this action.[12]

¶25 We emphasize that our conclusion on the proper construction of WIS. STAT. § 767.45(1), and our discussion of WIS. STAT. § 885.23 in arriving at that conclusion is not, as Alicia contends, an advisory opinion. We are not ruling on the correctness of the circuit court's decision in the wrongful death action. That decision is not before us. We do not know precisely what that decision was, what the grounds for it were, and what arguments were made to that court. Nothing in this opinion requires that the circuit court in the wrongful death action grant a motion by Shannon in that action to allow him to establish his paternity. Whether such a motion, if brought, should be granted depends on the resolution of issues we do not address in this case, including whether Shannon's paternity is relevant in that action, which, in turn, depends on whether, if he is the father of C.A.V.M., he has a cause of action for wrongful death. These issues are not before us and we do not address them.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

[12] In the initial round of briefing Shannon argued that, if we do not construe WIS. STAT. § 767.45(1) to permit him to bring this action, there is a violation of his right to a remedy (that is, on his wrongful death claim) under article I, section 9 of the Wisconsin Constitution and his right to equal protection of the law under Fourteenth Amendment of the United States Constitution and article I, section 1 of the Wisconsin Constitution. Both of these arguments were brief and both were based on the premise that there was no procedure for establishing paternity for the purpose of the wrongful death claim except through a paternity action. In his supplemental brief, Shannon takes the position that he may bring a motion under WIS. STAT. § 885.23 in the wrongful death action. We therefore do not address his constitutional arguments. We also do not address the argument in Shannon's initial brief that WIS. STAT. § 895.01(a), which provides that a cause of action to determine paternity survives, requires that he be permitted to bring this action. This argument consists of two sentences and is not adequately developed.

STATE OF WISCONSIN | CIRCUIT COURT | MONROE COUNTY

IN RE PATERNITY OF C.A.V.M.,
The child of A.M.V.M.,

S.E.T.
Petitioner
vs.
A.M.V.M., an individual, and by her guardians, P.N. and B.V.
Respondents

DECISION AND ORDER

Case No. 04 PA 59

C.A.V.M. was stillborn on February 13, 2004 following a motor vehicle accident. Petitioner, S.E.T, seeks to establish paternity pursuant to Chapter 767 of the Wisconsin Statutes. Respondent, A.M.V., individually and by her guardians, seeks to dismiss this pending paternity action pursuant to §802.06(2), Stats.. The unique issue raised by respondent's motion addresses the legal ability of one alleging to be a father to pursue a paternity determination following a stillbirth. I conclude S.E.T.'s petition does not set forth a claim upon which relief can be granted.

Respondent's motion requires the court to accept as true the allegations of the petition and all reasonable inferences arising therefrom. See *Scott v. Savers Property and Casualty Ins. Co.*, 2003 WI 60, ¶5, 262 Wis.2d 127, 663 N.W.2d 715. The following averments of the petition are therefore treated as true for purposes of the pending motion.

1st: On February 13, 2003, respondent was 27 weeks pregnant with (C.A.V.M.). (C.A.V.M.) was viable. ¶ 4

2nd: On February 13, 2003 respondent was involved in a motor vehicle accident in Wood County, Wisconsin. (C.A.V.M.) was stillborn. ¶8

3rd: Petitioner affirms and alleges that he is the father of (C.A.V.M.). ¶ 10

4th: Attached Exhibit B is an "Announcement of Birth". ¶ 12

Petitioner's motive for pursuing a paternity determination is irrelevant to the existence of either a statutory or common law right to pursue such an action. Petitioner's claim to a determination is statutory.[1]

> Sec. 767.45 Determination of paternity. (1) The following persons may bring an action ... for the purpose of determining the paternity of a child ...:
>
> * * *
>
> (d) A man ... alleging himself to be the father of the child.

I conclude S.E.T.'s statutory right to a paternity determination is dependent upon the "birth" of a child within the context of the paternity determination provisions of Chapter 767[2]. While an action to determine paternity may be commenced before the "birth" of a child, proceedings are stayed until the child's "birth".

[1] "It is well established that paternity proceedings in Wisconsin are purely statutory in origin". (Citations omitted). *J.M.S. v. Benson*, 98 Wis.2d 406, 410, 297 N.W.2d 18, 21 (1980).
[2] §§767.45 – 767.62.

The term "birth" is not defined in Chapter 767 nor elsewhere in the Wisconsin Statutes. While the term "Live Birth" is defined (§§990.001(17) and 990.01(19j)) and used in the Wisconsin Statutes, it is not part of the terminology of our paternity determination statutes. Likewise, the legislature has used the term "Stillbirth", but not in conjunction with the paternity establishing provisions of Chapter 767.

By the use of the terms "Live Birth" and "Stillbirth" it is reasonable to conclude the legislature recognizes there exists distinct types of birth. The statutes affording one the opportunity to pursue a paternity determination do not limit the type of "birth" to either a "Live Birth" or "Stillbirth". The plain meaning of the statute is one I need apply. *Wisconsin Citizen's Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis.2d 318, 677 N.W.2d 612. The plain meaning of "birth" is not limited to the result of the process. However, it is limited when read in context with the other provisions of the paternity statutes.

In the matter of *State ex rel Angela M.W. v. Kuzicki*, 209 Wis.2d 112, 561 N.W.2d 729 (1997) the Wisconsin Supreme Count determined under the Children's Code a child cannot include a fetus – even a viable fetus. The Wisconsin Supreme Court observed:

> We turn next to a consideration of context, examining the §48.02(2) definition of "child" in conjunction with other relevant sections of the Code. When attempting to ascertain the meaning of statutory language, we are

obligated to avoid a construction which would result in an absurdity. *Jungbluth*, 201 Wis.2d at 327. With this in mind, we note that certain relevant sections of the Code would be rendered absurd if "child" is understood to include a viable fetus. For example, in this case, the initial order taking the fetus into custody was issued pursuant to §48.19(1)©. That statute allows a child to be taken into custody by judicial order "upon a showing satisfactory to the judge that the welfare of the child demands that the child be immediately *removed from his or her present custody.*" [Emphasis added.] It is obviously inappropriate to apply this language to a viable fetus in utero.

Section §48.19(2) requires the person taking a child into physical custody to immediately notify the parent by the most practical means. Yet, a pregnant woman would never need notification that her fetus had been taken into "physical custody", for she would already have such notice by virtue of the concomitant circumstances of her own detention.

Section 48.20(2) requires a person taking a child into custody to make every effort to immediately release the child to its parent. This language assumes that the child is at some point removed from the parent. Again, it is axiomatic that a viable fetus in utero cannot be removed from a pregnant woman in the sense conveyed by the statute.

By reading the definition of "child" in context with other relevant sections of Chapter 48, we find a compelling basis for concluding that the legislature intended a "child" to mean a human being born alive. Code provisions dealing with taking a child into custody, providing parental notification, and releasing a child from custody would require absurd results if the §48.02(2) definition of "child" included a fetus. Each of the provisions addresses a critical juncture in a CHIPS proceeding. Yet, each also anticipates that the "child"

> can at some point be removed from the presence of the parent. It is manifest that the separation envisioned by the statute cannot be achieved in the context of a pregnant woman and her fetus. Id., pp. 127-128

The same rationale applies to the matter at hand. Section 767.51(3), Stats., directs that "a judgment or order determining paternity shall contain all of the following:

* * *

> (b) Orders for the legal custody of and periods of physical placement with the child, determined in accordance with s. 767.24.
>
> (c) An order requiring either or both of the parents to contribute tot the support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if the child is pursuing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent, determined in accordance with s. 767.25.
>
> (d) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151 (c) (1) (B), or as an exemption for state tax purposes under s. 71.07(8)(b).

* * *

The language of 767.51(3)(b), (c), and (d), Stats., mandatory in nature, would be rendered absurd if the term "birth" were to include "stillbirths". Custody and placement would be non-issues, as would child support and tax exemption determinations. Even prior to the requirements of the order or judgment, the

opportunity for genetic testing pursuant to §767.48, Stats., would be rendered absurd unless the remains of the "child" were both available and appropriate for genetic testing. It appears the intent of the legislature in using the term "birth" was that of a live birth. There is no question a "birth" occurred but not of the nature contemplated in the paternity statutes.

There exists dated precedent for the concept a paternity determination can be made for a deceased child.

> It is objected that the child had died before the proceeding was taken. The proceeding lies, however, not only for the future but also for the past maintenance of the child, and for the expenses of the mother attending its birth. *Jerdee v. The State*, 36 Wis.170, 171 (1874)

Unfortunately, C.A.V. M. did not survive the injuries he sustained while in his mother's womb and was stillborn.

IT IS HEREWITH ORDERED respondent's motion to dismiss for failure to state a claim upon relief can be granted is hereby granted without costs.

Dated this 29th day of November, 2004.

BY THE COURT:

Michael J. McAlpine
Circuit Judge, Br. II

FILED
MONROE COUNTY, WI
NOV 30 2004
CAROL THORSEN
CLERK OF COURTS

SUPREME COURT
STATE OF WISCONSIN

In Re the Paternity of C. A. V.M.:

SHANNON E. T.,

Petitioner-Appellant-Petitioner,

BYE and GOFF & ROHDE, LTD.,

Appellants,

Appeal No. 2005AP0077

v.

ALICIA M. V.M., an individual,
by her guardians, and PATRICIA N. and
BRIAN V.M.,

Respondents-Respondents.

RESPONDENTS' BRIEF AND APPENDIX

Appeal from a Final Order of the Circuit Court for
Monroe County, Hon. Michael J. McAlpine, Presiding.
Case No. 04-PA-59

Michael J. Roman
State Bar No. 1020648

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STATEMENT OF THE CASE

This case is on appeal from a published decision of the District IV Court of Appeals, *Shannon E.T. v. Alicia M. V.M.*, 2006 WI App 104, ___ Wis. 2d ___, 718 N.W.2d 729, in which the court of appeals affirmed a final order of the trial court for Monroe County, the Honorable Michael J. McAlpine presiding, dismissing Shannon E.T.'s statutory paternity action against Alicia M. V.M. and her legal guardians, Patricia N. and Brian V.M. (Petitioner's App. at A1-16; R49:1-2). Shannon, the putative father, was seeking a paternity determination of a stillborn under Wis. Stat. § 767.45(1) (2003-04).[1] (R2:1-7). Alicia, the mother of the stillborn, and her guardians moved the trial court to dismiss the paternity action pursuant to Wis. Stat. § 802.06(2)(2003-04), because it failed to state a claim upon which relief could be granted and because the trial court lacked competency to make a posthumous paternity determination of a stillborn. (R12:1-2; R12:1). The trial court granted the motion to dismiss, concluding that

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[1] The Wisconsin Legislature enacted wholesale revisions to Chapter 767 of the Wisconsin Statutes on May 23, 2006. *See* 2005 Wis. Act 443. This Act and accompanying revisions, some of which renumber and modify the Chapter 767 statutes discussed in this brief do not become effective until January 1, 2007. *See* 2005 Wis. Act 443, § 267. Therefore, unless otherwise noted, the statutory provisions in this brief reference the 2003-04 Wisconsin Statutes.

Wisconsin law did not permit paternity actions under § 767.45(1) for a stillborn. (R42:1-6).

The court of appeals affirmed, albeit for a different reason. *See Shannon E.T.*, 2006 WI App 104, ¶1. After concluding the statute was ambiguous and reviewing the legislative history of the paternity statutes, the court of appeals concluded "that § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action based on the stillbirth." *Id.* at ¶1, 10-21. The court did note that Wis. Stat. § 885.23 (2003-04) provides for a different avenue for the determination of paternity if it is relevant in a civil action, but because Shannon's wrongful death action was not before the court of appeals, the court declined to issue any ruling on whether the trial court in the wrongful death action must grant Shannon a paternity determination under § 885.23 in that action. *Id.* at ¶ 25.

Shannon petitioned the supreme court to review the court of appeals decision and on August 30, 2006, the supreme court granted the petition. Oral argument on the appeal is scheduled for December 13, 2006, at 9:45 a.m.

STATEMENT OF FACTS

On August 5, 2004, Shannon E.T. filed a petition in Monroe County Circuit Court seeking a paternity determination under § 767.45(1)(d), for a stillborn identified in the petition as "Baby Doe" and later as "C.A. V.M." (R2:1-7; R. App. 201-04). The petition set forth the following allegations, which the trial court and court of appeals treated as true for the purpose of the motion to dismiss. *See* Wis. Stat. § 802.06(2).

1. Allegations in Petition.

Shannon brought the action to determine the paternity of the stillborn "child" of the respondent Alicia M. V.M. (R2:2; R. App. 202). Shannon sought the "determination in connection with a wrongful death action" he filed in a different circuit court in another county. (R2:2; R. App. 202). He alleged that the "action has been continued pending the determination in this paternity action." (R2:2; R. App. 202).

He alleged that on February 13, 2003, Alicia "was involved in a motor vehicle accident in Wood County, Wisconsin. Baby Doe was stillborn." (R2:2; R. App. 202). Alicia was 27 weeks pregnant at the time of the accident, and "Baby Doe" was alleged to be "viable." (R2:2; R. App. 202). Shannon alleged that he had sexual relations with

Alicia resulting in her pregnancy and that he was the father of "Baby Doe." (R2:2; R. App. 202).

Shannon and Alicia were not married, but Shannon alleged that Alicia had resided with him in Monroe County "[d]uring periods of time during her pregnancy." (R2:2; R. App. 202). Shannon alleged that during the pregnancy, he "assisted" with pre-natal care. (R2:2; R. App. 202). Finally, the petition alleged that Alicia was legally incapacitated and the respondents Patricia N. and Brian V.M. had been appointed her legal guardians. (R2:2; R. App. 202). The petition also attached as an exhibit, an "Announcement of Birth" from a hospital birth center, stating "NOT VALID FOR OFFICIAL USE" and noting C.A. was born on February 25, 2003 to "parents Shannon, Alicia." (R2:3,7; App. 203, 204).

2. Trial Court Proceedings and Ruling.

Alicia and her guardians did not file an answer or response to the petition, but instead filed a motion to dismiss the petition pursuant to Wis. Stat § 802.06(2). The trial court held a hearing on the motion to dismiss on October 26, 2004. (R68:1-37). Because of her incapacity, Alicia could not appear, but her guardians were present during the motion. (R68:3). At the conclusion of the

hearing, the court took the motion under advisement so that it could review and research the issue further. (R68:10).

In the meantime, the court asked the parties to consult with experts and address whether any fetal tissue or remains would be available for testing under should the paternity case be allowed to proceed, either after the trial court ruled, or after the procedural issue was resolved by the appellate courts. (R68:28-33). The hospital involved provided a memorandum submitted to the trial court stating that the fetal remains of Alicia's stillborn was not individually interred by the hospital, but was interred in a communal cradle with other fetal remains, and that the individual remains were not identified, nor would the hospital be able to identify: (1) in which cradle Alicia's stillborn was placed, or (2) which of the fetal remains contained in the same communal cradle were those of Alicia's stillborn. (R37:1). Given this information, Shannon's counsel informed the court that "there would be no basis to exhume any part of the body." (R38:1). Shannon's counsel also informed the court that based on information from an expert he consulted, any placental tissue that may have been retained by the hospital was not useable for DNA testing to establish the father. (R38:1).

3. *Trial Court's Ruling.*

On November 30, 2004, the trial court issued a detailed memorandum decision granting Alicia and her guardians' motion to dismiss the paternity action. (R42:1-6). The trial court concluded that Shannon's paternity petition had to be dismissed because the statutory right to a paternity determination under Wis. Stat. § 767.45, was dependent upon the "birth" of a child within the meaning of the paternity provisions of Wis. Stat. Ch. 767. (R42:2). The trial court, after exhaustively analyzing both the paternity statute and other relevant statutes, concluded the Wisconsin Legislature, had required that there be a "live" birth for a paternity determination to be made under the provisions of § 767.45. (R42:6). Because it was undisputed that C. A. V.M. was stillborn, the paternity statutes could not be used to legally establish the stillborn's paternity. (R42:6). Consequently, because the right to a paternity determination in Wisconsin was "purely statutory in origin," the trial court determined Shannon's paternity action had to be dismissed as a matter of law because it did not set forth a claim upon which relief could be granted. (R42:1,2 n.1).

The trial court's written decision on the motion to dismiss was later incorporated into a final written order.

(49:1-2). Shannon timely appealed from that order to the court of appeals.[2] (R55:1).

4. Court of Appeals Ruling.

After considering the initial briefs filed by the parties, the court of appeals certified the appeal to the supreme court on the issue of whether "birth of a child" in § 767.45 required a live birth; the certification was denied. *See Shannon E.T.*, 2006 WI App 104, ¶ 9 n.5. The court of appeals later asked the parties for supplemental briefing on, among other things, the issue of whether Wis. Stat. § 885.23 had any relevance to the issues in the appeal. *See id.* at ¶ 9. Section 885.23 had not been raised by any of the parties in either the trial court or the original court of appeals briefs.

After reviewing the supplemental briefs, the court of appeals issued a published decision on May 25, 2006, affirming the trial court's dismissal of Shannon's paternity

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[2] In a separate order, the trial court also granted Alicia's motion to disqualify Shannon's law firm from representing him in the paternity action due to the firm's previous representation of Alicia in connection with the motor vehicle accident. (R53:4-5; R49:1-2). The law firm separately appealed from this order, but the court of appeals did not need to address the issue in its decision and that portion of the appeal is not before the supreme court. *See Shannon E.T. v. Alicia M. V.M.*, 2006 WI App 104, ¶ 4 n.2, ___ Wis. 2d ___, 718 N.W.2d 729. Depending on the supreme court's decision in this appeal, that issue may still need to be resolved on remand to the court of appeals.

action using a different rationale than the trial court. *See id.* at ¶ 1. The court held that:

> Wis. Stat. § 767.45(1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action.

See id. at ¶ 24.

The court of appeals concluded that the statutory scheme for paternity determinations under §§ 767.45-767.62 was ambiguous on whether a putative father could bring a paternity action for the sole purpose of determining his paternity so he could bring a wrongful death action. *See id.* at ¶ 10. Consequently, unlike the trial court, the court of appeals did not focus merely on the use of the phrase "birth of a child" in the statute and whether that phrase meant "live" birth as opposed to a stillbirth. *See id.* at ¶ 11-13. Instead, the court looked to the entire statutory scheme and concluded it was ambiguous on what it viewed as the dispositive issue in the case. The court concluded:

> By consulting the legislative history of the statute and considering Wis. Stat. § 885.23, which we view as a related statute, we conclude the legislature did not intend that a paternity action be initiated by a man alleging he is the father when the sole purpose is to obtain a determination of paternity so that he may proceed with a wrongful death action.

Id. at ¶ 10. (also noting the court's use of the phrase "the paternity statute" in its opinion referred to the entire statutory paternity scheme not just a specific statute within the scheme).

In reaching its conclusion, the court of appeals not only discussed the specific language of the various paternity statutes but also exhaustively traced the legislative history of the paternity statutes to glean the legislative intent in enacting the current scheme. *See id.* at ¶ 11-21. It concluded this was necessary because the scheme and its various individual provisions provided multiple reasonable constructions on the legislative intent behind the statutory scheme.

For instance, the court also concluded that one reasonable construction of § 767.50(1)(2003-04) (which established how paternity trials were to be conducted) was that paternity actions could only be brought "if the paternity adjudication is for the purposes of establishing 'child support, legal custody, periods of physical placement, and related issues.'" *See id.* at ¶ 11.

The court also concluded that the specific mandated findings required in a paternity judgment or order under

Wis. Stat. § 767.51(3)(2003-04)[3], illustrated the ambiguity of the entire statutory scheme's use of the terms "child" and "birth." *See id.* at ¶ 11-13. That was because, although § 767.51(3) required a judgment or order to contain specific findings or determinations, not all of those determinations would be necessary or possible in all cases of live births or stillbirths. *See id.* at ¶ 11-13.

Given this overall ambiguity of the statutory scheme to the specific question raised in this appeal, the court reviewed the legislative history and revisions to the statute to see if they would resolve the legislative purpose underlying the current paternity statutes. *See id.* at ¶ 14-21. The court concluded:

> This legislative history shows that the current paternity statute reflects a number of important legislative policies and purposes: that mothers and other entities who incur expenses related to the mother's pregnancy, the birth of a child and the care of a child have a procedure to determine paternity so that the father contributes to those expenses; that unmarried fathers have a procedure for establishing their paternity so that they can participate in parenting their child; that courts have the same authority to make orders regarding the care of children in their best interests that they have in other actions affecting the family; and that children of unmarried parents have a

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[3] As the court of appeals noted, effective April 20, 2006, 2005 Wis. Act 304 renumbered and amended Wis. Stat. § 767.51(3)(2003-04). None of the changes were relevant to the court's analysis. *See Shannon E.T.*, 2006 WI App 104, ¶ 11 n.6.

> procedure for establishing who their father is and obtaining any benefits that flow from that. None of these policies and purposes appear to encompass bringing a paternity action to determine paternity for the sole purpose of bringing another action. Thus, while legislative history does not conclusively demonstrate that the legislature did not intend this, we view the legislative history as an indication that the legislature did not.

See id. at ¶ 21 (footnote omitted).

The court next addressed Wis. Stat. § 885.23 and whether it had any relevance to the court's analysis of the ambiguity of the paternity statutes. *See id.* at ¶ 22. In resolving this question, the court stated:

> The language of the statute plainly provides for a determination of paternity if it is relevant in a civil action. Thus, it is plain that a paternity action is not the only action in which a determination of paternity may be made. We do not agree with Alicia that § 885.23 is irrelevant to our construction of Wis. Stat. § 767.45. Because § 885.23 provides a procedure for a determination of paternity in a civil action other than a paternity action, when paternity is relevant in that other action, the question arises whether the legislature intended that a paternity action be initiated for that purpose, even though no other order regarding the care of the child or expenses associated with the pregnancy or the child's birth is sought. One might reasonably argue that these are simply two vehicles available to a person in Shannon's situation. Alternatively, one might also reasonably argue that the legislature did not intend that a paternity action be initiated solely for the purpose of determining paternity when it is a relevant issue in another action.

Id. at ¶ 22. The court concluded that, as relevant to this case, the legislature did not intend to create two methods to determine paternity:

> Because there already existed a procedure for determining paternity in a civil action within that action, when paternity was relevant, there is no reason to think the legislature intended to create an entirely separate action for that purpose when, in 1979 Wis. Laws, ch. 352, § 25, it expanded the list of persons permitted to bring a paternity action. Second, as we have discussed above, the legislative history of the paternity statute indicates that the changes in the statute over the years were driven by policies and purposes that do not include creating a separate action to determine paternity for the purpose of bringing another action.

Id. at ¶ 22-23.

Finally, the court noted it was specifically not addressing whether a motion under § 885.23 should be granted in the still-pending wrongful death lawsuit:

> We are not ruling on the correctness of the circuit court's decision in the wrongful death action. That decision is not before us. We do not know precisely what that decision was, what the grounds for it were, and what arguments were made to that court. Nothing in this opinion requires that the circuit court in the wrongful death action grant a motion by Shannon in that action to allow him to establish his paternity. Whether such a motion, if brought, should be granted depends on the resolution of issues we do not address in this case, including whether Shannon's paternity is relevant in that action, which, in turn, depends on whether, if he is the father of C.A.V.M., he has a cause of action for wrongful death. These issues are not before us and we do not address them.

Id. at ¶ 25. In short, the court of appeals affirmed the trial court's dismissal of Shannon's paternity action, but left the issue of any motion under § 885.23 for resolution in the pending wrongful death case.

ARGUMENT

This appeal is not from a wrongful death action. Nor is it from a court order or ruling dismissing Shannon's wrongful death action. This case is also not about whether Shannon has the right to pursue a wrongful death claim. Instead, this case involves what is likely the first attempt in Wisconsin by an unmarried putative father to use a separate paternity action under § 767.45(1) to determine the paternity of a stillborn. Further, although the case on the surface appears to touch on novel and significant issues involving the rights of unmarried fathers, once one reviews the actual facts presented on this appeal, those issues and concerns quickly dissipate.

Although the court of appeals affirmed the dismissal Shannon's paternity action, its decision was not fatal to any pending wrongful death action Shannon is pursuing. Moreover, any issues related to the wrongful death action are more appropriately dealt with in the context of that lawsuit, not this collateral action. Accordingly, despite his arguments to the contrary, Shannon has presented no reason for the supreme court to reverse the decision of the court of appeals in this case.

To the contrary, the court of appeals conducted a thorough and detailed analysis of all the relevant statutory

provisions and relevant legislative history of those statutes and concluded the legislature never intended a putative father to be able to bring a separate paternity action under § 767.45(1) for the sole purpose of establishing paternity of a stillborn in order to bring a wrongful death action. *See Shannon E.T.*, 2006 WI App 104, ¶ 1. This analysis was both exhaustive and convincing, addressing issues and statutory provisions that had not been argued by the parties in either the trial court or in the court of appeals.

The court of appeals left open the question of whether Shannon could bring a motion pursuant to § 885.23 to determine the paternity of the stillborn in Shannon's pending wrongful death action because that case was not before the court in this appeal. *See id.* at ¶ 25. The court of appeals did not foreclose such a motion, but rightfully concluded it would be inappropriate to issue a mandate in this appeal that would be binding on an entirely separate lawsuit not before it; arising and still pending in a different circuit court; and involving different parties — particularly since the court of appeals did not "know precisely what that decision was, what the grounds for it were, and what arguments were made to that court." *See id.*

The court of appeals simply concluded that a separate

paternity action under § 767.45(1) was inappropriate to determine the paternity of a stillborn for use in another wrongful death action. In effect, the court determined that the legislature likely never even contemplated an action such as Shannon's would be pursued under § 767.45(1).

Moreover, there are no constitutional problems under the court of appeals' interpretation of the relevant statutes in this appeal because the court left open the possibility that Shannon could attempt to pursue a motion under § 885.23 in the wrongful death action. *See id.* at ¶ 24 n.13. Whether the facts and evidence would require the trial court in the wrongful death action to grant Shannon's motion under § 885.23 to seek a paternity finding in that case must be resolved within the confines of *that* case, not the present appeal. Accordingly, the supreme court should reject the arguments raised by Shannon and affirm the court of appeals decision.

I. THE COURT OF APPEALS PROPERLY CONCLUDED WIS. STAT. § 767.45(1) DOES NOT PERMIT A MAN ALLEGING HE IS THE FATHER TO BRING A PATERNITY ACTION FOR THE SOLE PURPOSE OF ESTABLISHING PATERNITY OF A STILLBORN SO THAT HE MAY BRING A WRONGFUL DEATH ACTION.

The court of appeals concluded that the language of the entire paternity statutory scheme was ambiguous in addressing the dispositive issue in this case: whether a separate paternity action under Wis. Stat. § 767.45(1) could

be brought by a putative father for the sole purpose of establishing the paternity of a stillborn for use in a wrongful death action. After reviewing all of the various statutes involved in paternity determinations and their history, the court of appeals concluded the legislature did not intend § 767.45(1) to be used in the manner advocated by Shannon.

Additionally, the court of appeals concluded the legislature had made available a separate procedure under Wis. Stat. § 885.23 in which, when appropriate in a civil action, a court could order "any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.84." *See* Wis. Stat. § 885.23. Because the legislature created this separate method to determine parentage when relevant in civil cases and because the ambiguous language of the paternity statutes and their legislative history established that the legislature never intended § 767.45(1) to be used in the manner urged by Shannon, his separate paternity action in this case was fatally flawed at its inception. The action was properly dismissed and the court of appeals' decision should be affirmed.

A. Standard of Review.

This case was decided on a motion to dismiss pursuant to Wis. Stat. § 802.06(2); thus, the court must take as true all facts pleaded and all reasonable inferences from those facts. *See Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 305, 306 (1987). The application of those facts to statutory provisions, however, presents an issue of law that is subject to *de novo* review. *See State Pub. Serv. Comm'n v. Wisconsin Bell, Inc.*, 211 Wis. 2d 751, 753, 566 N.W.2d 496, 498 (1997). Likewise, the construction and interpretation of statutes present issues of law also subject to *de novo* review. *See id.* Finally, whether a complaint states a claim upon which relief may be granted is also a question of law. *See Watts*, 137 Wis. 2d at 512, 405 N.W.2d at 306.

B. Allegations Relevant to Issue on Appeal.

The only dispositive "facts" on this appeal are the allegations set forth in Shannon's original paternity petition. (R2:2-3; R. App. 202-03). The following allegations are significant to the court of appeals decision: "Baby Doe" was stillborn; Alicia was the mother who was involved in a motor vehicle accident; Alicia was legally incapacitated; and Shannon was seeking the determination in connection with a separate wrongful death

action that he filed in a different circuit court in another county. (R2:2-3; R. App. 202-03). Shannon alleged that the "action has been continued pending the determination in this paternity action." (R2:2). Significantly, these are the only allegations in the petition concerning the other lawsuit or the nature of the trial court's ruling in that case. (R2:2; R. App. 202).[4]

C. Section 767.45(1).

In Wisconsin, "paternity proceedings are statutory in origin...." *See State ex rel. Sowle v. Brittich*, 7 Wis. 2d 353, 358, 96 N.W.2d 337, 341 (1959). Accordingly, if the legislature has not specified a method for a paternity determination, there is no equitable or common law method to seek such the determination.

Section 767.45(1) provides, in relevant part:

> **Determination of paternity**
>
> (1) The following persons may bring an action or motion, including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41 (1):

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[4] A copy of the trial court order in the wrongful death case was submitted later to the trial court in the present appeal, that order for continuance simply states: "Based on the Court's discussion with legal counsel for all parties on Thursday July 1, the Court hereby continues the above captioned case until such time as the issue of paternity has been established." (R19:1).

> (a) The child.
>
> (b) The child's natural mother.
>
> (c) Unless s. 767.62 (1) applies, a man presumed to be the child's father under s. 891.405 or 891.41 (1).
>
> (d) A man alleged or alleging himself to be the father of the child.
>
> (e) The personal representative of a person specified under pars. (a) to (d) if that person has died.
>
> . . . .

Wis. Stat. § 767.45(1).

While this statute unambiguously sets forth *who* may bring an action for the purpose of determining the paternity of a "child" (including a man "alleging himself to be the father of the child," *see* § 767.45(1)(d)), the statute does not define "child." The supreme court has recognized that the term "child" can be ambiguous, if not specifically defined in a statute. *See Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 123, 561 N.W.2d 729, 734 (1997).

Shannon spends a significant portion of his brief attacking the trial court's conclusion that the paternity statutes required a "live" birth and that a stillborn fetus was not a "child" for purpose of the statute. (Petitioner's Br. at 9-16). In the court of appeals, both parties conceded the term "child" was ambiguous. *See Shannon E.T.*, 2006 WI App 104, ¶ 8. Shannon argued "child" necessarily

included a stillborn fetus, the respondents argued "child" as used in § 767.45(1) required a live birth. *See id.* at ¶ 8. Although the respondents still believe there are legitimate issues concerning whether the legislature intended § 767.45(1) to be used in cases where there was not a "live" birth, that is no longer the best rationale supporting dismissal of his paternity action, and it was clearly not the reason the court of appeals rejected Shannon's attempt to use the paternity statute in the manner he is advocating.

Here the court of appeals concluded that the meaning of the term "child" as used in § 767.45(1) alone, was not dispositive of the issue in this case. *See Shannon E.T.*, 2006 WI App 104, ¶ 9-10. Likewise, unlike the trial court, the court of appeals concluded that the term "birth," while ambiguous was not necessarily intended to be limited to only "live" births. *See id.* at ¶ 12-13 & n.7. Thus, the court rejected the limited analysis employed by the trial court to resolve the issue on appeal. Instead, the court of appeals looked to the entire statutory scheme in an attempt to harmonize and gain insight into the intended usage of ambiguous terms such as "child" and "birth" throughout the paternity statutes. *See id.* at ¶ 13.

Courts in Wisconsin attempt to identify and effectuate the legislature's intent when they interpret a statute. *See Guelig v. Guelig*, 2005 WI App 212, ¶ 24, 287 Wis. 2d 472, 704 N.W.2d 916. "Statutory context and structure" also inform a court's interpretation of statutory language, and courts "attempt to harmonize with surrounding and closely related provisions in order to avoid unreasonable results." *Id.* (citation omitted). Thus, where a court can discern a "plain meaning from these intrinsic sources," it need go no "further and apply the statute as written." *Id.* Where there is ambiguity, a court "may also consider extrinsic sources such as statutory history and purpose." *See id.*

Thus, the court of appeals properly attempted to harmonize the paternity statutes by looking to the various statutes contained within the entire paternity statutory scheme. The court's methodology was entirely consistent and appropriate under Wisconsin law. *See id.* As the court of appeals noted, however, reviewing the entire scheme leads to even more ambiguity surrounding the applicability of the paternity statutes to this case.

For instance, Shannon was specifically requesting a jury trial to determine the paternity of the stillborn in this case pursuant to Wis. Stat. § 767.50(2003-04). (R2:3; R. App. 203). The mandatory two-part procedure set forth in

§ 767.50(1), however, seems inapplicable to Shannon's action to determine the paternity of a stillborn. *See* Wis. Stat. § 767.50(1) (providing "the 2d part [of a paternity trial] *shall* deal with child support, legal custody, periods of physical placement, and related issues." (emphasis added)).

Moreover, many of the paternity statutes mandate making decisions and orders regarding the care of the "child" and resolving responsibility for expenses arising from the "child." *See* Wis. Stat. §§ 767.50(1) & 767.51(3). Section 767.51(3) specifically requires that a paternity judgment or order *shall* contain a detailed list of findings and provisions, which the court of appeals concluded expressed further legislative intent that a paternity judgment under § 767.45 must contain provisions regarding the child's support, care, and custody. *See Shannon E.T.*, 2006 WI App 104, ¶ 11-12. The statutory scheme also requires consideration of the best interests of the "child." *See* Wis. Stat. §§ 767.46(2) and 767.463(2003-04). That is plainly incongruous when there is a stillborn.

In addition, Wis. Stat. §§ 767.475(5) and 893.88(2003-04) permit a paternity determination within nineteen years of a "child's" birth. Does that mean the legislature intended a putative father to be able to bring a paternity action under § 767.45 within nineteen years of a stillbirth?

Shannon now urges the supreme court to look outside the paternity statutes to the wrongful death statute in order to interpret § 765.45, rather than looking to "surrounding and closely related provisions in order to avoid unreasonable results." *Guelig*, 2005 WI App 212, ¶ 24. The problem with this argument is that the supreme court has already recognized that Wisconsin courts often given different meanings to such common statutory terms such as "child" depending on the specific context in which it is being used. *See Angela M.W.*, 209 Wis. 2d at 122-123, 561 N.W.2d at 734-35. Thus, what may be a "person" or "child" in one distinct statutory scheme, may not have the same meaning in another scheme. *See id.* Moreover, such an analysis often leads to very divisive legal disputes.

Here the court of appeals concluded that, given the overall ambiguity of such undefined terms as "birth" and "child" as used throughout the paternity statutes, *see Shannon*, 2006 WI App 104, ¶ 13, the better approach was to determine whether Shannon's purpose for seeking the paternity determination of the stillborn was consistent with the legislative intent in permitting paternity actions under the statute in the first place. *See id.* at ¶ 14.

Shannon argues that § 767.45(1) unambiguously states that a putative father may bring an action "for the purpose

of determining the paternity of a child" and that the purpose for him bringing the action in this case is therefore irrelevant in interpreting the statutory scheme. (Petitioner's Br. at 15). Interestingly, Shannon was the one who specifically alleged in his paternity petition that the purpose for his action was in connection with a wrongful death suit. (R2:2; R. App. 202). If his purpose was irrelevant, there was no reason for Shannon to bring it to the trial court's attention in the first place. Moreover, his position on this point is inconsistent with his earlier contention that § 767.45(1) must be interpreted consistent with the wrongful death statute. (Petitioner's Br. at 9-12).

Nonetheless, Shannon now argues the interpretation of the statute should not require "courts in paternity actions to assess whether a petitioner's purpose in seeking a paternity ruling is a proper or legitimate purpose as envisioned by the legislature." (Petitioner's Br. at 15). Such a view of the statute would open the door to many objectively improper uses of the court system, something it is hard to envision the legislature intended when enacting § 767.45(1).

Could a paternity action be filed by a harassing former boyfriend against a woman who miscarried to further harass her? Could a boyfriend or husband bring a paternity action

against a woman to determine the paternity of a fetus she had informed him she was going to abort in order to delay her decision? Such an expansive view of the purpose of § 767.45(1) as urged by Shannon would permit all manner of illegitimate uses of the paternity procedure against women.

The court of appeals avoided opening the door to such absurdities by looking for the legislative purpose underpinning the paternity statutes. It did this by independently researching the lengthy history of the various paternity statutes enacted throughout Wisconsin's history, in order to determine whether there was any evidence that the legislature intended a putative father such as Shannon to bring a paternity action solely for use in a wrongful death action. *See Shannon E.T.*, 2006 WI App 104, ¶ 15-20.

The exhaustive and detailed history and chronology of Wisconsin's paternity statutes as set forth by the court of appeals will not be repeated here. *See id.* It is sufficient to note that the statutory history and legislative analysis documented by the court of appeals, presents a very compelling case that the legislature never envisioned or contemplated a putative father using the paternity statutes in the manner advocated by Shannon in this case. *See id.* As the court of appeals summarized:

> This legislative history shows that the current paternity statute reflects a number of important

> legislative policies and purposes: that mothers and other entities who incur expenses related to the mother's pregnancy, the birth of a child and the care of a child have a procedure to determine paternity so that the father contributes to those expenses; that unmarried fathers have a procedure for establishing their paternity so that they can participate in parenting their child; that courts have the same authority to make orders regarding the care of children in their best interests that they have in other actions affecting the family; and that children of unmarried parents have a procedure for establishing who their father is and obtaining any benefits that flow from that. *None of these policies and purposes appear to encompass bringing a paternity action to determine paternity for the sole purpose of bringing another action. Thus, while legislative history does not conclusively demonstrate that the legislature did not intend this, we view the legislative history as an indication that the legislature did not.*

Shannon, 2006 WI App 104, ¶ 21 (footnote omitted; emphasis added). Other than arguing that the court should not look to the purpose for a putative father's paternity action in the first place, Shannon presents no argument refuting the court of appeals' exhaustive analysis of the legislative history of Wisconsin's paternity statutes.

Finally, the court of appeals concluded that the legislature enacted a different method that may be available to determine the paternity in a civil action outside of Wis. Stat. § 767.45. Wisconsin Statute § 885.23, provides:

> Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.84. The

> results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of the parties refuses to submit to the tests that fact shall be disclosed upon trial.

Wis. Stat. § 885.23. The court of appeals noted this statute "plainly provides for a determination of paternity if it is relevant in a civil action" and that "a paternity action is not the only action in which a determination of paternity may be made." *See Shannon E.T.*, 2006 WI App 104, ¶ 22.

Shannon argues that, at his choosing, he should be able to bring either a separate action under § 767.45 or a motion under § 885.23 to determine the paternity of a stillborn. The court of appeals succinctly concluded that such a view of the statutes was unreasonable. *See Shannon E.T.*, 2006 WI App 104, ¶ 23.

The court noted that when:

> [T]he predecessor to Wis. Stat. § 885.23 was originally enacted in 1935....there already existed a procedure for determining paternity in a civil action within that action, when paternity was relevant, there is no reason to think the legislature intended to create an entirely separate action for that purpose when, in 1979 Wis. Laws, ch. 352, § 25, it expanded the list of persons permitted to bring a paternity action.

See Shannon E.T., 2006 WI App. 104, ¶ 23; *see also* 1935 Wis. Laws, ch. 351, § 1. Moreover, the court noted: "the

legislative history of the paternity statute indicates that the changes in the statute over the years were driven by policies and purposes that do not include creating a separate action to determine paternity for the purpose of bringing another action." *See Shannon E.T.*, 2006 WI App. 104, ¶ 23.

Finally, the court of appeals' decision is proper because it avoids any of the purported constitutional issues that Shannon briefly presents to the court. (Petitioner's Br. at 12-14). If the legislature has provided an alternative method for paternity determinations that may be available in civil cases outside of a paternity action, there are not any equal protection problems by precluding an independent action under § 767.45(1) to determine the paternity of a stillborn for use in a wrongful death case. *See Shannon E.T.*, 2006 WI App. 104, ¶ 234.

In short, Shannon's argument on appeal now primarily attacks arguments not relied upon by the court of appeals or raises issues that are not actually problems given the court of appeals' construction of the statutes. He has provided no basis for the court of appeals decision to be reversed.

II. IT WOULD BE IMPROPER IN THIS APPEAL FOR THE SUPREME COURT TO RULE ON THE CORRECTNESS OF ANY DECISION THAT THE TRIAL COURT IN THE SEPARATE WRONGFUL DEATH ACTION MADE BECAUSE THAT CASE IS NOT ON APPEAL AND INVOLVES DIFFERENT PARTIES NOT BEFORE THE COURT.

Shannon argues in his brief that the trial court in the wrongful death action should have ordered genetic testing under § 885.23 rather than staying the action until paternity was decided. (Petitioner's Br. at 4-5, 8). He seemingly wants the supreme court to issue a ruling in this appeal ordering the trial court in the wrongful death case to order such testing for "judicial economy" purposes. (Petitioner's Br. at 16).

Such a ruling would be entirely inappropriate. Shannon is essentially seeking collateral appellate review of a non-final order of another pending circuit court case, arising out of a different lawsuit, involving different parties. He wants this review even though he concedes that in this case "[t]here is no record of the reason for [the judge's] stay in the ... wrongful death action." (Petitioner's Br. at 9 n.2). Nonetheless, with no basis in the record, he states "[r]ather than ordering genetic testing under Wis. Stat. § 885.23, the trial court entered a stay of the action." (Petitioner's Br. at 8). He also states, again without any documentation in the record from the wrongful death case, that "the trial court stayed the action, and compelled [him]

to institute a separate paternity action." (Petitioner's Br. at 5). In fact, there is nothing in the present record to show that § 885.23 was ever addressed or considered by the trial court in the wrongful death case.

If Shannon wanted to challenge the non-final ruling of the trial court in the wrongful death case, the proper method under Wisconsin law was to seek leave to appeal from that decision, *see* Wis. Stat. § 809.50(2003-04), not to attempt to collaterally attack that non-final decision in a completely separate case and appeal involving different parties. *See e.g., State v. Smith*, 2005 WI 104, ¶ 21, 283 Wis. 2d 57, 699 N.W.2d 508 (stating "'[a collateral attack is an "attempt to avoid, evade or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it."'"(citations omitted)).

As the court of appeals noted:

> We are not ruling on the correctness of the circuit court's decision in the wrongful death action. That decision is not before us. We do not know precisely what that decision was, what the grounds for it were, and what arguments were made to that court.

Id. at ¶ 25. It is unclear how Shannon expects the supreme court to be able to authoritatively rule on a decision of a court when he concedes "[t]here is no record of the reason

for [the judge's] stay in the ... wrongful death action." (Petitioner's Br. at 9 n.2).

Moreover, there could significant due process concerns if the supreme court in this appeal would issue a dispositive and binding ruling on the trial court's decision in the wrongful death case, without that case and decision being appealed and properly before the court, and without the parties to that litigation having any chance to respond or argue against the ruling.[5] *See Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W.2d 370, 374 (1999) (noting issue preclusion can apply to parties that were not part of the previous litigation *only* if the application of the doctrine comports with due process). As this court noted:

> Due process requires that the litigant had sufficient opportunity to be heard. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In other words, due process requires that the litigant have "at least one full and fair opportunity to litigate an issue before being bound by a prior determination of that issue." *Parker v. Williams*, 862 F.2d 1471, 1474 (11th Cir. 1989). *See also Kunzelman v. Thompson*, 799 F.2d 1172, 1174 (7th Cir. 1986). It is fundamental that nonparties cannot be bound

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[5] Shannon states only an insurer of the drivers in the accident were sued in the wrongful death action. (Petitioner's Br. at 4). That is not accurate, Shannon also sued individual defendants that are not part of this appeal and whose interests are not represented in the paternity action in any way. (R19:1)

> by a prior litigation unless their interests are deemed to have been litigated. *Mayonia M.M. [v. Keith N.]*, 202 Wis.2d [460,] 468, 551 N.W.2d 31 [(Ct. App. 1996)]. Anything less is a violation of the litigant's due process rights.

Paige K.B., 226 Wis. 2d at 226, 594 N.W.2d at 377-78.

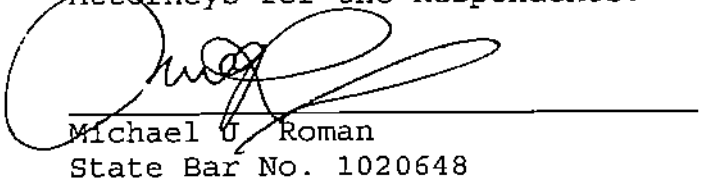
In short, it would be improper for the supreme court in this appeal to rule on the correctness of any ruling in the wrongful death case that is not properly before the court or issue any binding mandate to the trial court in the wrongful death case.

CONCLUSION.

The court of appeals issued a thorough opinion that correctly resolved the novel issue before it. Shannon E.T. has presented no reason for this decision to be reversed. Accordingly, for the reasons set forth above, Alicia M. V.M., Patricia N. and Brian V.M., respectfully request that the supreme court affirm the court of appeals decision in this case.

Respectfully submitted this 1st day of November, 2006.

ZALEWSKI, KLINNER & KRAMER, LLP,
Attorneys for the Respondents.



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), for a brief and appendix produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; a 1.5 inch margin on left side and a 1 inch margins on all other sides. The length of this brief is 32 pages.

Dated this 1st day of November, 2006.

Michael J. Roman
State Bar No. 1020648

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents or juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of November, 2006.

Michael J. Roman
State Bar No. 1020648

RESPONDENTS' APPENDIX TABLE OF CONTENTS

AUG 2[illegible] 2004

STATE OF WISCONSIN CIRCUIT COURT MONROE COUNTY

IN RE PATERNITY OF BABY DOE,
the child of Alicia M. V[redacted] M[redacted]

SHANNON E. T[redacted]
[redacted]

Petitioner

v.

Case No. 04 PA 059
Case Code: 40501
Case Type: Paternity

ALICIA M. V[redacted] M[redacted]
[redacted]

individually, and by her
guardians,

PATRICIA N[redacted] guardian
[redacted]

and

BRIAN V[redacted] M[redacted], guardian
[redacted]

Respondent.

PETITION FOR PATERNITY DETERMINATION

STATE OF WISCONSIN)
) ss.
COUNTY OF MONROE)

Petitioner Shannon E. T[redacted] duly sworn on oath, for his paternity petition, states and alleges as follows:

FILED
MONROE COUNTY, WI
AUG 0 5 2004
CAROL THORSEN
CLERK OF COURTS

Bye, Goff & Rohde, Ltd.
P.O. Box 167
River Falls, WI 54022

SUPREME COURT
STATE OF WISCONSIN

In re the Paternity of C.A. V.M.:

Shannon E.T.,

Petitioner-Appellant-Petitioner,

Bye and Goff & Rohde, Ltd.,

Appellants,

v. Appeal No. 2005AP0077

Alicia M. V.M., an individual, by her guardians Patricia N. and Brian V.M.,

Respondents-Respondents.

REPLY BRIEF OF PETITIONER-APPELLANT-PETITIONER

Moses J. Zimmermann
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MURPHY & PRACHTHAUSER
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ARGUMENT

SHANNON E.T. SEEKS A PATERNITY ADJUDICATION IN ORDER TO PROSECUTE A WRONGFUL DEATH CLAIM ARISING FROM THE STILLBIRTH OF HIS CHILD. THIS COURT SHOULD EXERCISE ITS SUPERINTENDING POWER OVER THE LOWER COURTS TO INSURE THE FAIR ADMINISTRATION OF JUSTICE AND THE PROTECTION OF HIS RIGHTS AS A LITIGANT.

Respondents agree with Petitioner-Appellant-Pettioner, Shannon E.T., that section 767.45(1) and (d) of the Wisconsin Statutes unambiguously sets forth that a man alleging to be the father of child may bring an action for the purpose of deterining the paternity of the child. (Respondents' Brief, p. 19.) Although the statue is plain, the trial court identified the issue to be whether the term "birth of a child" in section 767.45(3) of the Wisconsin Statutes, requires the birth of a living child.[1] Because the child was stillborn, the trial court dismissed Shannon E.T.'s claim on the ground that the paternity statute requires the birth of a living child.

The court of appeals viewed the issue differently than the trial court. Rather, than focusing on the

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

meaning of the word "child," the court of appeals focused on the purpose of the paternity statue. In light of the overall purpose of the paternity statute, the court of appeals held that an unmarried father of a stillborn child may not bring an action to establish paternity for the sole purpose of bringing a wrongful death action. *In re Paternity of C.A.V.M.*, 2006 WI App 104, ¶ 22 -23, 718 N.W.2d 729.

In reaching its conclusion, the court of appeals pointed out that section 885.23 of the Wisconsin Statutes provides a means of establishing paternity in the wrongful death action. The court of appeals reasoned that the existence of section 885.23 suggests that the legislature did not intend that the paternity action be used to merely establish paternity of an alleged father in a wrongful death action.

The relevance of section 885.23 of the Wisconsin Statutes to the holding of the court of appeals is explicitly stated:

> We do not agree with Alicia that § 885.23 is irrelevant to our construction of Wis. Stat. § 767.45. Because § 885.23 provides a procedure for a determination of paternity in a civil action other than a paternity action, when paternity is relevant in that other action,

> the question arises whether the legislature intended that a paternity action be initiated for that purpose, even though no other order regarding the care of the child or expenses associated with the pregnancy or the child's birth is sought. One might reasonably argue that these are simply two vehicles available to a person in Shannon's situation. Alternatively, one might also reasonably argue that the legislature did not intend that a paternity action be initiated solely for the purpose of determining paternity when it is a relevant issue in another action.

In re Paternity of C.A.V.M., 2006 WI App 104, ¶ 22.

No one disputes that there are two potential statutory methods for the adjudication of paternity in this case. Shannon E.T's position is that he should be permitted to establish paternity under either section 767.45 or section 885.23 of the Wisconsin Statutes. Both the trial court and the court of appeals, however, have precluded him from using the paternity statute. This suggests that he must be permitted to proceed under section 885.23.

However, the court of appeals pointedly refused to address whether a motion under section 885.23 should be granted in the pending wrongful death action. *In re Paternity of C.A.V.M.*, 2006 WI App 104, ¶ 25. The court of appeals certainly had the authority to issue a

supervisory writ to the judge in the wrongful death case, since it has jurisdiction over "all actions and proceedings in the courts in the district," as provided by section 752.02 of the Wisconsin Statutes. Also, the Wisconsin Constitution, Art. 7, § 5 (3) provides that "[t]he appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district."[2]

This Court must now determine whether the resolution of Shannon E.T.'s paternity claim is best resolved in the paternity action or by motion in the wrongful death case. As stated in *State v. Holmes*, 106 Wis.2d 31, 315 N.W.2d 703 (1982):

> It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication.
>
> ....
>
> [T]he constitution grants the supreme court power to adopt measures necessary for the due administration of justice in the

[2] Also see section 809.51 of the Wisconsin Statutes pertaining to supervisory writ and original jurisdiction to issue prerogative writs.

> state, including assuring litigants a fair trial, and to protect the courts and the judicial system.

In re Jerrell C.J., 2005 WI 105, ¶ 134, 283 Wis.2d 145, 699 N.W.2d 110, citing *Holmes*, 106 Wis.2d at 44, 315 N.W.2d 703.

CONCLUSION

The paternity statue is plain, and the court of appeals has needlessly complicated the issue as one of statutory interpretation, rather than a matter of judicial policy or supervisory authority. Although the court of appeals strongly suggested that the proper way for Shannon E.T. to establish paternity is in the wrongful death action, it has left the matter in the hands of this Court. The Supreme Court should now exercise its superintending authority and guide the wrongful death litigation in accordance with sound judicial policy and the protection of the rights of Shannon E.T. as a litigant.

Dated: November 14, 2006.

MURPHY & PRACHTHAUSER

By Moses J. Zimmermann

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Attorneys for Petitioner-
Appellant-Petitioner Shannon
E.T.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a monospaced font. The length of this brief is ten pages.

Dated: November 14, 2006.

M. Josef Zimmermann