

WISCONSIN COURT OF APPEALS
DISTRICT I

In re the Marriage of:

JENNIFER HENDRICK,

Appeal No. 2008AP000722

Petitioner-Respondent,

v.

GARRY M. HENDRICK,

Respondent-Respondent,

CHRISTOPHER L. SKARZYNSKI,

Intervener-Appellant.

APPEAL FROM A DENIAL OF A MOTION FOR
INTERVENTION BY THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HONORABLE
FRANCIS T. WASIELEWSKI PRESIDING

**BRIEF OF CHRISTOPHER L. SKARZYNSKI,
INTERVENER-APPELLANT**

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Statement of the Issues

1. Does Wis. Stat. § 803.09(1) provide the putative biological father of a child born during a marriage the right to intervene in a divorce action prior to a determination of whether the child is a product of the marriage?

Answer of the Circuit Court: No.

2. Does Wis. Stat. § 803.09(2) allow the putative biological father of a child born during a marriage to permissively intervene in a divorce action prior to a determination of whether the child is a product of the marriage?

Answer of the Circuit Court: No.

Statement on Oral Argument and Publication

This appeal concerns whether a putative father who is not the husband of the mother of the child has a right to intervene in the mother's divorce case prior to a determination on whether the husband should be excluded as the father of a child presumed to be marital. In a separate appeal, Christopher has appealed the Circuit Court's decision in the companion paternity action involving the child.¹ Due to the interplay of these two cases, Christopher does request oral argument.

A decision in this case will clarify for family courts and the litigants in the family court system whether such a person has a right to intervene. A ruling in favor of Christopher establishing this right would enunciate a new rule of law. This is a case of substantial and continuing public interest to parents and family courts throughout Wisconsin. Pursuant to Wis. Stat. §§ 809.23(1)(a)1 and 5, the decision in this case should be published.

¹ Appeal No. 2008AP000723.

Statement of the Case

This is a divorce action between the Petitioner-Respondent, Jennifer A. Hendrick (Jennifer) and the Respondent-Respondent Garry M. Hendrick (Garry). The Intervener-Appellant Christopher L. Skarzynski (Christopher) was alleged to be the father of a daughter born to Jennifer during her marriage to Garry. Christopher seeks to intervene in the divorce action so the Circuit Court can adequately address the issue of whether Jennifer and Garry should be equitable estopped from overcoming the marital presumption of Brianna's paternity.

The Hendricks were married on September 2, 1999. (R. 1:6, 5:1; A-Ap. 101) Jennifer filed this action for divorce against Garry on January 24, 2006. (R. 1; A-Ap. 101) In her Petition, Jennifer stated she and Garry had two children born during their marriage: Brianna, born on January 25, 2000; and Brian, born on May 15, 2003. (R. 1:6; A-Ap.101) On May 3, 2006, Garry filed an Answer and Counterclaim to the Petition. (R. 5; A-Ap. 102) In his Answer, Garry denied he was the father of Brianna and Brian. (R. 5:1; A-Ap. 102) In his Counterclaim, Garry sought an order declaring he was not the children's father. (R. 5:2; A-Ap. 103)

On June 21, 2006, Garry filed a Motion requesting a Guardian ad Litem be appointed for Brianna and Brian to determine whether the children were a product of the marriage. (R. 7, 8) Jennifer subsequently joined in Garry's request for a Guardian ad Litem. (R. 9) On June 30, 2006, the Circuit Court appointed Attorney Joseph G. Alioto as Guardian ad Litem for Brianna and Brian. (R. 10) Further hearings in the divorce case were rescheduled multiple times, resulting in adjournment of the case well into 2007. (R. 15, 16, 17, 18)

On February 7, 2007, the State of Wisconsin filed a paternity action seeking to establish Christopher as the father of Brianna.² (A-Ap. 117)³ In the paternity action, Christopher argued the paternity case should be dismissed as Brianna was presumed to be a child of the Hendricks' marriage and Garry should be equitably estopped from arguing the marital presumption should be overcome. (A-Ap. 118-120) The Circuit Court in the paternity case refused to dismiss the paternity action and Christopher filed an interlocutory appeal of this non-final order requiring genetic testing of Christopher and Brianna in the paternity case.⁴ (A-Ap. 121) On November 8, 2007, the Court of Appeals declined to hear the interlocutory appeal in the paternity case. (A-Ap 121-124)

On November 19, 2007, Christopher filed a Motion seeking to intervene in the divorce action. (R. 19, 20, 21; A-Ap. 104-106) Christopher argued Wis. Stat. § 803.09 permitted him to intervene in the divorce action and his intervention was necessary for the Circuit Court to determine whether the presumption Garry was Brianna's father should be overcome. (R. 20, 21; A-Ap. 107-108, 118-119, 121-122, 132-134, 137-138)

² Another man is alleged to be the father of Brian. (A-Ap.126-127)

³ All references in this Brief to the transcript of the December 20, 2007, hearing are to the Appendix as the court reporter has yet to file the transcript with the Court. Counsel for the Appellant will be making arrangements for the transcript to be included in the record, however, the transcript is already part of the record in the companion appeal case, Appeal No. 2008AP000723 (R 34).

⁴ Appeal No. 2007AP002398.

After Christopher filed his Motion to intervene in the divorce case, the Circuit Court consolidated the paternity case regarding Brianna and the Hendricks' divorce case. (R. 22; A-Ap. 109-112) A hearing in both cases was held on December 20, 2007. (A-Ap. 115-154) The Circuit Court took no testimony from Jennifer, Garry, or Christopher and simply heard arguments from attorneys for the three parties as well as the Guardian ad Litem. (A-Ap. 116-140)

At the December 20 hearing, the Circuit Court denied Christopher's Motion to intervene in the divorce case. (A-Ap. 140-143) At the same hearing, the Circuit Court determined Christopher to be Brianna's father in the paternity action.⁵ (A-Ap.144-145) A written Order denying Christopher's Motion to intervene in the divorce case was filed on January 7, 2008. (R. 23; A-Ap. 114) Christopher filed a timely Notice of Appeal on March 18, 2008.⁶ (R. 24)

⁵ Christopher has also appealed the Circuit Court's Judgment of Paternity in Appeal No. 2008AP000723.

⁶ Christopher's role in this case was disposed in its entirety when the Circuit Court denied his Motion for Intervention, however, the Hendricks' divorce case is still pending in the Circuit Court and as of this writing is set for a status conference on July 17, 2008.

Standard of Review

This issue in this case is whether Christopher can intervene in the Hendricks' divorce action. Questions of statutory interpretation are reviewed de novo. *State v. Stenklyft*, 2005 WI 71, ¶ 71, 282 Wis. 2d 484, 697 N.W.2d 769 (Wis. 2005) Whether to allow intervention as of right is a question of law. *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 516 N.W.2d 357 (Wis. 1994). Whether to allow permissive intervention is a matter of Circuit Court discretion. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9 at ¶ 120, 745 N.W.2d 1, ___ Wis. 2d ___, (Wis. 2008). Discretion is erroneously exercised when the Circuit Court applied an incorrect legal standard. *State v. Delgado*, 223 Wis. 2d 270, 281, 588 N.W.2d 1 (Wis. 1999).

Argument

This case concerns whether Wis. Stat. § 803.09 allows a putative biological father to intervene in a divorce action prior to a Court determining whether to overcome the rebuttable presumption a child born to the divorcing couple is a product of the marriage. Christopher was alleged to be the father of a daughter born to the Hendricks: Brianna, who is currently eight years old. Under Wis. Stat. § 891.41(1)(a), Garry was presumed to be Brianna's father by virtue of being married to Jennifer at the time she gave birth. Shortly after Jennifer filed a divorce action against him, Garry took the then six-year old Brianna to DNA Diagnostic Centers Inc., a facility at which he had private genetic testing done.⁷ (R. 8:2; A-Ap. 104-105) The genetic testing showed he was not the father of Brianna. (R. 8:2; A-Ap. 105)

While the divorce action was pending, a paternity action was filed against Christopher alleging he was Brianna's father. Christopher moved for a dismissal of the paternity case, arguing the State should be estopped from bringing a paternity case so long after the child's birth because the child was presumed to be a marital child and because he himself was estopped from bringing a paternity action at an earlier date, even if he had known Brianna might be biologically related to him. (A-Ap 121-124) Christopher's attempts to dismiss the paternity action were not successful and an appeal of the paternity judgment is also pending before this Court.⁸

⁷ The availability of private genetic testing has exploded in the past few years. DNA Diagnostic Centers, Inc., the company who operated the testing facility Garry took his children to, now has forty-six locations just in the State of Wisconsin. <http://www.dnacenter.com/locations/wisconsin.html> (Last visited June 26, 2008)

⁸ Appeal No. 2008AP000723.

Christopher sought to intervene in the divorce action, arguing he had the right to intervene pursuant to Wis. Stat. § 803.09(1) or he should be allowed to permissively intervene pursuant to Wis. Stat. § 803.09(2). (R. 20, 21; A-Ap. 107-108, 118-119, 121-122, 132-134, 137-138) The Circuit Court denied Christopher’s Motion to intervene and this appeal now follows.

Christopher seeks to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1) or intervene permissively pursuant to Wis. Stat. § 803.09(2). Should this Court rule in Christopher’s favor on either account, he requests the Court determine Jennifer and Garry should be equitably estopped from overcoming the marital presumption Garry is Brianna’s father, or remand the matter back to the Circuit Court for a determination on whether the presumption Brianna is Garry’s daughter be overcome.

1. Christopher has a right to intervene in the Hendricks’ divorce action pursuant to Wis. Stat. § 803.09(1)

The statute governing whether a party has a right to intervene is Wis. Stats. § 803.09(1), which provides:

Except as provided in s. 20.931, upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest, unless the movants interest is adequately represented by existing parties.

There are four requirements Christopher must satisfy in order to demonstrate he has a right to intervene in the Hendricks’ divorce case:

- 1) his “motion to intervene is timely”;

- 2) he “claims an interest sufficiently related to the subject of the action”;
- 3) “disposition of the action may as a practical matter impair or impede [Christopher’s] ability to protect that interest”; and
- 4) “the existing parties do not adequately represent [Christopher’s] interest. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9 at ¶ 38, 745 N.W.2d 1, ___ Wis. 2d ___, (Wis. 2008).⁹

There was not a dispute over whether Christopher’s Motion to intervene was timely, nor was the issue of whether the motion was timely raised before the Circuit Court. He filed his Motion only days after he was unsuccessful in his attempts to dismiss the paternity action. Only the remaining three criteria are at issue in this case.

While Christopher discusses the remaining three criteria separately for ease of organization, they should not be analyzed in isolation. There must be a blending, interplay, and balancing of the requirements to determine whether Christopher has a right to intervene. *Helgeland* at ¶ 39. Whether to allow Christopher the right to intervene should be decided independently of the Circuit Court. *Id.* at ¶ 41. In the end, intervention as a right “usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes.” *Id.* citing *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113-14 (1st Cir. 1999). In the present case, the Circuit Court made a clear mistake when it denied Christopher the right to intervene in the Hendricks’ divorce action.

⁹ It should be noted the *Helgeland* decision was issued after the Circuit Court made its decision in this case.

A. Christopher has an interest sufficiently related to the divorce action

There is no bright-line rule for determining whether a person has an interest sufficiently related to the subject of the action. The most recent guidance on making such a determination is found in the Wisconsin Supreme Court's decision in *Helgeland*, and bears quotation in full:

We thus approach the second requirement of Wis. Stat. § 803.09(1) with the same flexibility that we bring to the statute as a whole, measuring “the sufficiency of the interest by focusing on the facts and circumstances of the particular case before [us] as well as the stated interest in intervention” and analyzing “these factors against the policies underlying the intervention statute,” namely to strike a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing persons to join a lawsuit in the interest of the speedy and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending.

Helgeland at ¶ 44, citing *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 547, 334 N.W.2d 252 (Wis. 1983). The *Helgeland* Court went on to point out a mere remote interest is not enough for a person to be able to intervene as a matter of right, rather a person should be able to intervene only to “protect a right that would not otherwise be protected in the litigation.” *Helgeland* at ¶ 45, citing *City of Madison v. WERC*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94 (Wis. 2000) (quoting *White House Milk Co. v. Thomson*, 275 Wis. 243, 249, 81 N.W.2d 725 (1957)).

At the heart of this divorce case – and the sole interest Christopher has in this case – is whether the presumption Brianna is Garry's daughter should be overcome. Christopher seeks this very limited intervention and does not seek to intervene on any other issues which may arise between the Hendricks in their divorce case.

Christopher has a direct interest in the Circuit Court not overcoming the presumption Garry is Brianna's father. His is not a remote interest. Should he be allowed to intervene, Christopher seeks to argue the marital presumption should not be overcome because he, as a matter of law, was equitably estopped from asserting himself as Brianna's father for the first six years of Brianna's life.

Wisconsin law "favors preserving the status of marital children, even when it can be positively shown that the husband of the mother could not have been the father of the child." *Randy A.J. v. Norma I.J.*, 2004 WI 41 at ¶ 31, 270 Wis. 2d 384, 677 N.W.2d 610 (Wis. 2004). The Wisconsin Supreme Court, in *Randy A.J.* clearly held a putative biological father could be equitably estopped from asserting himself as the father to a child presumed to be marital. *Id.* Whether the marital presumption should be overcome is a question of whether it is in the best interest of the child. *Id.* at ¶ 25, Wis. Stat. § 767.855. Christopher has a direct interest in whether it is in Brianna's best interest for the Circuit Court to overcome the presumption Garry is her father. This is a direct interest which would not otherwise be protected unless Christopher can intervene in the divorce case.

B. Christopher cannot not protect his interests without intervention

There are two factors for the Court to consider whether Christopher's interests will be harmed if he cannot intervene. First, the Court should consider whether an adverse holding would apply to Christopher. *Helgeland* at ¶ 80. Second, the Court should consider the extent to which a novel holding of law could result in the divorce case. *Id.* at ¶ 81. Both factors are present here.

The “adverse holding” in this case is the Circuit Court’s determination the presumption Garry is Brianna’s father should be overcome. Such a holding would leave Brianna without a legal father and the only logical next step would be to determine whether Christopher is Brianna’s father. This adverse holding did, in fact already occur in the paternity action. It was allowed to occur due to the Circuit Court’s refusal to allow Christopher to intervene in the divorce case. As the Circuit Court did not allow him to intervene in the divorce case, Christopher was unable to argue his estoppel claim based on *Randy A.J.*.

This adverse holding was not only a novel holding of law, it was clearly contradictory to the holding in *Randy A.J.*. The alternative to intervention would be for Christopher to challenge whether he should be adjudicated Brianna’s father in the paternity action. In its denial, the Circuit Court asserted Christopher should not be allowed to intervene because he could raise his estoppel argument in the paternity action. Assuming Christopher would be successful in challenging the paternity action after the court has made a determination Garry is not Brianna’s father, this would result in Brianna being left without a legal father, a result which would benefit none of the parties and which the Circuit Court explicitly stated it would not do. (A-App. 141) In order to avoid such a patently absurd result, intervention is required.

C. The Hendricks do not adequately represent Christopher’s interests

The final requirement of Wis. Stat. § 803.09(1) is whether the Hendricks adequately represent Christopher’s interests. In making such a determination, the Court should “look to see if there is a showing between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative’s interest is

adverse to that of the proposed intervener.” *Helgeland* at ¶ 87. Given these considerations, it is clear the Hendricks do not adequately represent Christopher’s interests. Indeed, they cannot adequately assert the equitable estoppel claim Christopher seeks to make, because they are the parties whose actions Christopher seeks to equitably estop.

The Hendricks position is it is in Brianna’s best interests for the presumption Garry is her father to be overcome. Neither Jennifer, Garry, or the Guardian ad Litem has provided a complete explanation as to why it would be in Brianna’s best interest. Biology and medical history are primary factors they are considering. The law requires the court to consider Brianna’s emotional best interest and other factors in addition to the results of the genetic testing. Wis. Stat. § 767.855.

After consideration of all four requirements for Christopher to meet to intervene as a matter of right under Wis. Stat. § 803.09(1), this Court should reverse the Circuit Court. Christopher filed his motion to intervene in a timely manner. He has a direct interest in whether the marital presumption is overcome. He cannot protect those interests unless he is allowed to intervene. The Hendricks and the Guardian ad Litem do not adequately represent his interests. For these reasons, he should be allowed to intervene in the Hendricks divorce for the limited purpose of presenting his arguments why the presumption Garry is Brianna’s father should not be overcome.

2 The Circuit Court erred in denying permissive intervention pursuant to Wis. Stat. § 803.09(2)

Christopher also seeks to intervene in the Hendricks' divorce under Wis. Stat. § 803.09(2), which allows for permissive intervention as follows:

Except as provided in s. 20.931, upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Allowing intervention under this provision is a discretionary decision of the Circuit Court. The Circuit Court's denial of intervention should be disturbed if the Circuit Court erroneously exercised its discretion. *Helgeland* at ¶ 120.

Christopher argues he was equitably estopped from asserting himself as Brianna's father and thus the presumption Garry is her father should not be overcome. This question of law is common to Christopher's motion and the Hendricks' divorce. The facts at issue in his motion and the Hendricks' divorce are identical.

The Circuit Court erroneously exercised its discretion when it denied Christopher's Motion for Intervention. The Circuit Court found Christopher could assert his estoppel arguments in the paternity case (A-Ap. 142). This is a finding which is clearly erroneous and missed the point of Christopher's estoppel arguments.

Christopher argued the Jennifer and Garry should be estopped from overcoming the marital presumption Brianna is Garry's daughter as he was equitably estopped from asserting he was Brianna's father by virtue of the Hendricks' marriage. When the Circuit Court determined the marital presumption should be overcome, it made no clear findings as to whether this would be in Brianna's best interest. Once the presumption was overcome, Brianna had no legal father. The Circuit Court found Christopher could assert his estoppel arguments in the paternity action, but once the Circuit Court overcame the marital presumption, in the paternity case the Circuit Court had two options: 1) rule against Christopher's estoppel arguments and adjudicate him as Brianna's father or 2) rule in favor of Christopher's estoppel arguments, dismiss the paternity action, and leave Brianna with no legal father. The second option was not a realistic option, as the Circuit Court made clear it would not leave Brianna without a father. (A-Ap. 141) For the Court to thus deny Christopher permissive intervention was an erroneous exercise of the Circuit Court's discretion.

Conclusion

The Circuit Court erred when it concluded Christopher does not have a right to intervene in the Hendricks' divorce. This ruling was clearly contradictory to the established law on the right to intervene under Wis. Stat. § 803.09(1). Christopher timely filed his motion, his interests are directly related to the divorce action, his interests could not be protected without intervention, and the Hendricks do not represent his interests. The Circuit Court erroneously exercised its discretion when it denied Christopher's Motion to permissively intervene pursuant to Wis. Stat. § 803.09(2).

For these reasons, this Court should reverse the decision of the Circuit Court and allow Christopher to intervene in this action. The Court should determine Jennifer and Garry should be equitably estopped from overcoming the marital presumption Garry is Brianna's father, or remand the matter back to the Circuit Court for a determination on whether the presumption Brianna is Garry's daughter be overcome.

Dated this 26th day of June, 2008

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Certification

I certify this Brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4) for a petition produced using proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of pages 1-14 of this Brief is 3,554 words.

Dated this 26th day of June, 2008

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