COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Case No. 2011AP2660

In re the placement of A.M.K.:

Belva M. Bowden,

Petitioner-Appellant-Cross-Respondent,

v.

Amy S. Korslin,

Respondent-Respondent-Cross-Appellant.

PETITIONER-APPELLANT-CROSS-RESPONDENT'S BRIEF

Appeal from the circuit court for Wood County, Hon. Gregory J. Potter, Judge.

NASH LAW GROUP
ATTORNEYS AT LAW, S.C.

Michael J. Lauterbach (1054280)
170 Third Street North
P.O. Box 997
Wisconsin Rapids WI 54495-0997
Telephone: (715) 423-8200

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant requests publication. The issue raised in this appeal is of statewide importance and will clarify the law on an issue of first impression in Wisconsin. Oral argument is requested, as it augurs for the best result.

ISSUES PRESENTED

1. Does the court have authority to order an equitable parent under ***Holtzman v. Knott (in re H.S.H.-K.)***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995) to pay child support pursuant to the family code, when that parent cannot be awarded joint legal custody or other rights under the family code?

The circuit court answered: Yes.

2. If the circuit court did not have authority to order child support, must Korslin repay support received while this appeal is pending?

The circuit court answered: The circuit court did not address this issue.

BACKGROUND

The appeal arises out of a placement dispute between the parties. Alissa was born in April 1998 and is Korslin's biological child. (R. 56:06). Bowden was present at Alissa's birth, and the parties lived together and raised Alissa together as a family from her birth until 2006, when she was eight years old. (R. 56:06). When Bowden and Korslin ended their relationship in 2006, they entered into a written agreement stating they would equally share custody and placement of Alissa. (R. 48: Ex. 2).

In 2008, Korslin informed Bowden that she would no longer be following their agreement, and Bowden would have placement only every other weekend. (R. 56:20). Bowden commenced this action, seeking equal shared placement pursuant to the parties' agreement and the equitable parent doctrine set forth in ***Holtzman v. Knott (in re H.S.H.-K.)***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995). Bowden did not request joint legal custody or any rights under the family code, WIS. STAT. CH. 767.

Two years of court proceedings followed. Ultimately, the circuit court found that:[1]

1. Bowden was an equitable parent as defined in ***Holtzman***. Specifically, Bowden had shown she had a parent-like relationship with Alissa and that a significant triggering event justified court intervention; (R. 80:2-4)

2. Korslin's offer of placement, which was presumed to be in Alissa's best interest, was that Bowden could have placement only at Korslin's sole discretion; (R. 80:4-5)

3. Bowden had rebutted the presumption that Korslin's proposed placement arrangement was in Alissa's best interest; (R. 80:05) and

4. A placement schedule of every other weekend, with weeknight visits and additional time during the summer months and shared holidays, was in Alissa's best interest. (R. 79:04, 80:05).

[1] The court's final decision on all issues is found at R. 80. That decision summarized a number of prior rulings issued throughout the case regarding the placement of Alissa. More facts related to the placement dispute will be set out in Bowden's brief in response to Korslin's cross-appeal.

Neither party made a request for child support during numerous hearings involving this issue. After the court made its ruling on placement, the parties had the following discussion of child support:

> MR. BERKOS [Attorney for Korslin]: With that then, judge, is not it then mandatory that this court also impose the remaining elements of a divorce-type placement order and require Ms. Bowden to pay child support in the amount of 17 percent and a share of the variables in accordance with her placement time?
>
> THE COURT: I would have no problems with that and I agree with you. However, I don't know if there's any legal authority for me to do it; but if I can, I will. It was my understanding, however, through Ms. Boettcher [attorney for Bowden] that she is willing to do that and if I can have a stipulation, I will be more than happy to order that.
>
> (67:13).

After further discussion, the court stated that:

> With respect to child support, to the point or ability that I have, I will order the 17 percent. The problem I have is any legal authority in which to do that; but if I do have that authority, I am definitely going to.
>
> (67:15).

After two rounds of briefing, rulings, and exchange of financial information, the court made its final ruling on child support on July 14, 2011. In that ruling, the court set out its reasoning for ordering support as follows:

> Concerning my authority to order child support, I believe I have such authority under two theories. The first comes from the equitable parent doctrine. As I have stated a few times already, once a court determines that a party is

> equitable parent, as I have done here, there is no distinction between the equitable parent and any other parent. Each is endowed with the same rights and responsibilities of parenthood. When Ms. Bowden initiated this action, she sought the standing of a parent by asking for the right to have shared placement. … Now that she has received less placement than the 50/50 sought, she is claiming that she has no financial obligation for the child.
>
> Equity has a number of facets. If a person wants to be treated as a parent for placement purposes, they should also be treated as a parent for child support purposes. Ms. Bowden cannot seek and expect to receive all the benefits of parenthood without accepting the detriments as well.
>
> The second theory for ordering child support pertains to the contract the parties entered into. When the parties originally split, Ms. Bowden drafted the document called custody and visitation of [Alissa]. According to paragraph four of that agreement, quote, the parties shall share all expenses of [Alissa], including extracurricular school fees, clothing, life insurance, and uninsured health care costs. … Under the theory of contract, I'm just enforcing what the parties agreed to.
>
> (R. 80:15-16).

The court determined the amount of support as follows:

> According to the DWD guidelines, the percent standard for one child is 17 percent of gross income. I then use the shared placement formula and the reason for that is that I gave some weight to Ms. Bowden being an equitable parent versus a biological parent; and based upon that and in applying the formula with the numbers mentioned, I find that normally if it was just a regular placement, Ms. Bowden would be obligated to pay 727 per month. However, again taking into account that she is an equitable parent versus a biological parent and again by applying the shared placement formula, I find that Ms.

> Bowden's child support obligation [will] be 675 per month.
>
> (R. 80:17).

A judgment to that effect was entered August 18, 2011. (R. 81). Bowden timely appealed, and Korslin timely cross-appealed. (R. 86, 87).[2]

STANDARD OF REVIEW

The meaning of a statute and its application to the facts presents a question of law reviewed without deference. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis.2d 561, 691 N.W.2d 379.

ARGUMENT

I. The court lacked authority to order child support.

A. Child support cannot be ordered except by statute.

In Wisconsin, child support awards are governed by statute. Under WIS. STAT. § 767.511(1):

> (1) When ordered. When the court approves a stipulation for child support under s. 767.34, enters a judgment of annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.001(1)(f) or (j), 767.501, or 767.805(3), the court shall do all of the following:

[2] The order on motion for reconsideration notes that it is the final order for purposes of appeal. (R. 81). When a motion for reconsideration is granted in part, as was this one, the time for appeal runs from the entry of the amended order. *See* WIS. STAT. § 805.17(3).

> (a) Order either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child. The support amount must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under s. 767.34(2)(am)1. to 3. are satisfied.

In interpreting a statute, courts begin with the language of 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. That language is given its common, ordinary, and accepted meaning. ***Id.*** It is interpreted in the context in which it is used and in relation to the language of surrounding or closely related ordinances. ***Id.***, ¶46. The court will also consider the scope, history, and the object which the legislature intended to accomplish so far as it can be determined from the text of the statute. ***Id.***, ¶48.

Here, this action simply does not meet the statutory definition of a case where support may be ordered. The statute specifically enumerates those types of cases as:

- "a stipulation for child support under s. 767.34."
- A "judgment of annulment, divorce, or legal separation."
- "an order or a judgment in a paternity action."
- "an action under s. 767.001(1)(f) or (j), 767.501, or 767.805(3)."

None of these qualify. This is not a stipulation for child support, a divorce, an annulment, a legal separation, or a paternity action. An action under WIS. STAT. § 767.001(1)(f) or (j) or § 767.501 is an action "for child support" or for family support under WIS. STAT. § 767.501, which this is not. An action under WIS. STAT. § 767.805(3) is a paternity action, which again this is not.

These statutes are exclusive. Legal custody "is governed exclusively by the custody statutes." ***Id.*** at 687 (citing ***Hamachek v. Hamachek,*** 270 Wis. 194, 198, 70 N.W.2d 595 (1955). Similarly, no Wisconsin case exists in which the court has ordered someone other than a biological parent to pay child support. And courts have specifically held that support arrearages are governed exclusively by statute. *See, e.g.,* ***Barbara B. v. Dorian H.***, 277 Wis.2d 378, 388, 690 N.W.2d 849, 854 (2005) (support arrearage may not be modified except as permitted by statute); ***Douglas County Child Support Enforcement Unit v. Fisher***, 200 Wis.2d 807, 547 N.W.2d 801 (Ct.App.1996) (same).

There are sound reasons for this statutory language. Chapter 767 has specific mechanisms for determining paternity. Paternity is based solely on biology; there is no mechanism for proving that someone other than a biological parent is a parent. Paternity then forms the statutory basis for custody and support. Visitation, on the other hand, can be ordered to many people—grandparents, other relatives, and any other person a biological parent allows to co-parent the child—and is based on the child's need to maintain relationships with individuals who are important in her life.

B. An equitable parent is not an equal parent under the law.

Because the court lacked statutory authority to order child support under any circumstances, it is not necessary to consider the court's exercise of discretion in setting child support. However, even assuming the court did somehow have equitable authority to order support, the court applied the wrong legal standard, and therefore erroneously exercised its discretion. *See, e.g.,* ***Rohde–Giovanni v. Baumgart***, 2004 WI 27, ¶17, 269 Wis.2d 598, 676 N.W.2d 452 (court erroneously exercises its discretion when its decision is based on an error of law).

Here, the circuit court's first premise in ordering support was that Bowden "is endowed with the same rights and responsibilities of parenthood" because she is an equitable parent. (R. 80:15-16). And in a non-legal sense, that may be true. That is, in the eyes of Bowden, Korslin, and Alissa, and in the attachments Alissa has to both, Bowden is a parent. But it is not true in a legal sense. In the eyes of the law, Bowden does not have the rights and obligations of a parent. She has only a limited right to visit and spend time with Alissa. As a result, the circuit court's reasoning is in error.

To understand how far from a legal parent Bowden is, one need look no further than the facts of this case. The court, in its findings, noted that:

- Alissa, through the guardian ad litem, had requested an equal placement schedule (R. 63:12);
- Alissa had a "strong positive relationship" with both Bowden and Korslin (R.63:13);
- That while the parties' ability to communicate and cooperate had "diminished," this "has not had a negative effect on Alissa," (R. 63:15); and
- Korslin had engaged in "game playing" and had used placement as a lever in disputes with Bowden. (R. 63:16).

Despite these findings, the court's ruling granted most overnights to Korslin, awarded sole legal custody to Korslin, and placed significant limits on Bowden's ability to travel with Alissa and purchase gifts for her. (R. 79:4-5). In addition, Korslin received the tax deduction for Alissa in all years.

The bottom line is that Bowden is not, as the court stated, "endowed with the same rights and responsibilities of parenthood."

(R. 80:15-16). Instead, she is permitted only a limited, circumscribed visitation right. This right does not come close to giving her "the same rights and responsibilities of parenthood." (R. 80:15-16). Because the court's decision was based on this legal error, it is an erroneous exercise of discretion. *See* ***id.***

C. There is no contract basis for the court's support order.

The second basis of the court's ruling was contract: that is, that "Under the theory of contract, [the court was] just enforcing what the parties agreed to." (R. 80:15-16). This basis also does not withstand scrutiny.

First, the contract does not call for or contemplate child support. It states that the parties will have shared placement, joint legal custody, and will "share all expenses of Alissa including extra-curricular school fees, clothing, life insurance and uninsured health care costs." (R. 48 ex. 2). The contract also sets out a procedure to be followed by the parties in the event of a disagreement, and states that a substantial change in circumstances is necessary to permit changes to the agreement.

When construing a contract, the court is to "ascertain the true intentions of the parties as expressed by the contractual language." ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis.2d 340, 793 N.W.2d 476 (quoted source omitted). The best indication of the parties' intent is the language of the contracts themselves, which is construed according to their plain and ordinary meaning. ***Id.*** If the contract language is unambiguous, the inquiry "ends with the four corners of the contract, without consideration of extrinsic evidence." ***Id.***

Nothing in this contract calls for payment of child support, sets the amount of child support, or creates any ascertainable formula by which support can be calculated. Instead, the contract calls for the

parties to split expenses. In conjunction with the parties' agreement that shared placement is appropriate, the only reasonable reading of this agreement is that it calls for a split of variable expenses.

Had the parties agreed that child support was to be paid, it would have been easy to include such a provision. Even in a placement with an equal number of overnights, any significant difference in income would have resulted in some child support obligation between the two parents. The parties' silence on this confirms that "expenses" means expenses, not child support.

Second, even assuming the contract somehow calls for child support, it is not severable. Here, the circuit court held the contract was severable because "with respect to placement, the best interest of the child trumps any contractual arrangement the parties had." (R. 80:16-17). A contract can be severed only if enforcing the remaining provisions "will not defeat the primary purpose of the bargain." ***Simenstad v. Hagen***, 22 Wis.2d 653, 661, 126 N.W.2d 529, 534 (1964).

Here, the purpose apparent from the written document is to allow the parties to co-parent as equal parents in all respects. Yet the court did not enforce the portions of the agreement calling for joint legal custody or shared placement. Nor did the court order the parties to follow agreed-upon procedures for resolving disagreements or enforce the provision that allowed a change only in the event of a substantial change in circumstances. In fact, out of six paragraphs, the court enforced **only one paragraph**: the paragraph dealing with sharing of expenses. The purpose of this agreement cannot be accomplished by enforcing only the provision dealing with sharing of expenses, and voiding the rest. As a result, the court erred in severing and enforcing only that provision.

II. Any change in the law must come from the legislature.

The court of appeals is an error correcting court and should not set policy on issues adequately covered by existing precedent. ***Cook v. Cook***, 208 Wis.2d 166, 188, 560 N.W.2d 246 (1997). At this point, the equitable parent doctrine is well-settled law: the non-biological parent is entitled only to a limited placement right, but none of the other rights or obligations of parenthood.

Reasonable minds may differ on whether this is the best or fairest rule of law. Some may view this situation as a case study in legislative failure—a situation where for reasons unrelated to the best interests of the child, parents who were fit and appropriate for shared placement and joint legal custody were denied it. Others may view this balancing as appropriate—that a non-biological parent with a parent-like relationship with a child should have placement but no other rights or obligations. But it is the law, and since 1995, the legislature has not acted to change it.

And it would be a mistake to attempt to fill this legislative vacuum piecemeal, as the circuit court did here. In order to expand the equitable parent doctrine beyond placement, the following questions must be answered:

1. What, specifically, is necessary to establish a person as an equitable parent?

2. Once a person is established as an equitable parent, does that person have some or all of the rights of a parent set out in the family code?

3. Are the rights and obligations of an equitable parent reciprocal? In other words, may a biological parent petition to establish someone else as an equitable parent, and require that person to pay support?

This calls for more than an ad-hoc addition of one right or obligation at a time. It calls for a carefully structured and balanced set of procedures, rights, and obligations, based on a balancing of public policy goals—that is, it calls for the family code or something similar.[3] Creating this scheme is a task for the legislature, not for the courts.

III. Because the court lacked statutory authority to order any support in this case, support paid during the pendency of this appeal must be repaid.

If this court concludes the circuit court lacked authority to order support, it must determine the instructions for the circuit court on remand. Bowden respectfully requests this court remand with directions to the circuit court to order that all support payments be repaid.[4]

When a party successfully challenges the amount of a support obligation on appeal, the circuit court may, in its discretion, make any modification retroactive. ***Overson v. Overson***, 140 Wis.2d 752, 759, 412 N.W.2d 896, 899 (Ct. App. 1987). So, for example, in ***Overson*** the court ordered maintenance of $1,000 per month as part of a divorce judgment entered in 1981. The court of appeals reversed the

[3] In some ways, the new rule set out by the circuit court is a step backward, not forward, in permitting equitable parents to maintain relationships with their children. That is, an equitable parent knows that by petitioning for placement, he will have an uphill struggle just to obtain some limited placement. He has little chance of obtaining shared placement, and no chance of having primary placement. He will have no say in decisions on the child's religion, schooling, or medical decisions. And since he has little chance of obtaining shared placement, he will have to pay child support based on percentage guidelines. If this is truly a desirable policy result, it should come from the legislature, not from the courts.

[4] This issue has not yet been taken up below, and could be the subject of an additional appeal. However, Bowden respectfully requests the court determine its specific remand mandate now in the interests of judicial economy.

maintenance award and remanded to the circuit court in an opinion entered in 1985. ***Id.*** at 755. The circuit court then entered a new judgment ordering maintenance of $600 per month, retroactive to the date of the 1981 judgment. This resulted in a substantial amount of maintenance that was required to be repaid. ***Id.***

The appellate court, in a second appeal, held this was proper:

> If an appellate court points out a trial court's error and remands the case to enable the error to be corrected, yet forecloses upon the very method by which the error can be corrected, an unreasonable and untenable situation is created. … A rule prohibiting a trial court from considering the effect of the original erroneous order on payments made during the period of time that the case is on appeal would work an unnecessary hardship on the party who prevailed on appeal.
>
> ***Id.***

Mandatory repayment is proper here, for two reasons. First, for reasons set out above, this is not a support obligation as defined in statute. The circuit court recognized this, holding that it was acting at least in part "Under the theory of contract." (R. 80:15-16). If this is a contract obligation, it must be treated in the same way as a civil judgment that is partially collected while an appeal is pending, then reversed on appeal. In such a case, any collected funds must be repaid.

Second, the only way to fully correct this error is to order repayment. As the court recognized in ***Overson***, 140 Wis.2d at 759, an "unreasonable and untenable situation is created" when a circuit court is reversed but cannot fully correct its error. Absent repayment, this court would be permitting Korslin to retain thousands of dollars she was never entitled to in the first place. This "unreasonable and untenable situation" can only be remedied by ordering repayment in full. *See* ***id.***

CONCLUSION

For the reasons given above, Appellant-Cross-Respondent Belva Bowden respectfully requests the court reverse the order and remand with directions to order repayment of all support paid.

Dated this 23rd day of February, 2012.

NASH LAW GROUP
ATTORNEYS AT LAW, S.C.

_____

Michael J. Lauterbach (01054280)
Attorneys for Belva Bowden
170 Third Street North
P.O. Box 997
Wisconsin Rapids WI 54495-0997
Telephone: (715) 423-8200

FORM & LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 3,965 words.

MAILING CERTIFICATION

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on February 23, 2012. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

ELECTRONIC FILING CERTIFICATION

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. RULE 809.19(12). I further certify that the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification is included as part of the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of February, 2012.

NASH LAW GROUP
ATTORNEYS AT LAW, S.C.

_____

Michael J. Lauterbach (1054280)
170 Third Street North
P.O. Box 997
Wisconsin Rapids WI 54495-0997
Telephone: (715) 423-8200