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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2017AP002519-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL A. RAKEL,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE MARK A. SANDERS PRESIDING
MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 15CF5146

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE IS INCORRECT THAT "A PERSON" CAN BE ORDERED TO PAY CHILD SUPPORT WHERE THE STATUTES ONLY PROVIDES THAT "EITHER OR BOTH PARENTS" CAN BE ORDERED TO PAY CHILD SUPPORT.

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:

(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.

Rakel is not the biological or adopted father of the victim's minor child. Under no circumstances can the court order to pay child support for the minor child as restitution. Because the court lacks the authority to order child support in this matter that amount should be removed as ordered restitution in this case.

II. THE COURT ORDERED CHILD SUPPORT AS RESTITUTION IN THIS CASE IS SIMPLY SUBSTITUTING RESTITUTION AS LOSS OF SOCIETY AND COMPANIONSHIP DAMAGES WHICH ARE NOT "SPECIAL" BUT "GENERAL" DAMAGES WHICH CANNOT BE AWARDED BY THE COURT AS RESTITUTION.

Section 973.20(5), Stats., provides that "in any case the restitution order do one or more of the following:"

- (a) Pay all special damages, but not general damages substantiated by evidence in the records, which could be recovered in a civil action against the

defendant of his or her conduct in the commission of a crime considered at sentencing.

Section 973.20(5)(a), Stats.

Generally, in wrongful death claims the following damages are sought by a proper plaintiff:

- medical expenses incurred as a result of the negligent act that caused death
- funeral and burial expenses
- financial losses, like lost wages and income the deceased person would have earned if not for the untimely death, and
- loss of society and companionship, up to \$350,000 for a deceased adult and \$500,000 for a deceased minor.

Child support is not a proper damage for a civil action for a wrongful death claim. Rather, the statutes provide various other type of damages that can be brought by the decedent's estate in a civil action. It is understandable that the court is trying to craft a remedy for the minor child who lost his father due to criminal activity, however, a court's restitution order must fit within the confines of the statutory authority provided to the court. It seems that the court is really substituting the restitution award for child support for that of loss of society and companionship. Therefore, child support is not an appropriate restitution award. The victim's family is not without recourse as they could have filed a civil action against the defendant.

III. THE COURT ERRED BY ORDERING RESTITUTION TO BE PAID TO THE MOTHER OF THE VICTIM'S CHILD.

Section 895.04, Stats., outlines who can be considered a Plaintiff in a wrongful death action. Section 895.04(2), Stats., directs the court to ensure that any wrongful death award be set aside for a minor child under the age of eighteen years who support the deceased legal charged to pay. Section 895.04(2), Stats. Section 895.04, Stats., makes clear that these funds for the victim's wrongful death shall be set aside in the name of the minor child rather than the mother of the minor child. The State argues that damages belong to the minor child's mother but this is simply not the case by statute. Therefore, if this court concludes that child support to be paid by defendant is proper under the restitution statute, then this court should determine that the child support claim is really one that should be considered under section 895.04, Stats., and should be set aside solely for the benefit of the minor child.

CONCLUSION

For the aforestated reasons, Rakel respectfully requests that the Court of Appeals remand this matter back to the Circuit Court to vacate the Order for Child Support. In the

alternative, any restitution order made for the benefit of the minor child should be paid directly to the victim's child.

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CERTIFICATION

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

Monospaced font: 10 characters per inch; double spaced; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this brief is 6 pages.

Dated this 20th day of July, 2020.

//s/ Bradley J. Lochowicz
Bradley J. Lochowicz
SBN: 1037739

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of July, 2020.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 of 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 20th day of July, 2020.

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