

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

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

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Argument

1. **Whether Christopher would succeed in his estoppel argument has no bearing on whether he can intervene in the Hendricks' divorce action**

Garry argues the Circuit Court properly denied Christopher's motion to intervene since his estoppel argument should have failed because Christopher did not have "clean hands" in the case. (Resp't Br. 5-6) This argument places the cart before the horse. The Circuit Court never reached a decision in the divorce action regarding whether Christopher could assert his estoppel argument because the Circuit Court denied Christopher the right to intervene, thus closing the door on his ability to make this argument.

Even if the Circuit Court had decided on Christopher's equitable estoppel argument, Garry argues the argument should have failed because there are genetic tests showing Christopher is the father of Brianna and he thus does not have "clean hands" in making his estoppel argument. (Resp't Br. 5-6) Garry's argument ignores the underlying Wisconsin Supreme Court case involving paternity and estoppel upon which Christopher rests his argument. Garry essentially argues if a person is alleged to be the father of a marital child, they can never make an estoppel argument.

The Wisconsin Supreme Court has held the 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 holding of *Randy A.J.* is a putative biological father could be equitably estopped from asserting

himself as the father to a child presumed to be marital. *Id.* The *Randy A.J.* decision did not address the “clean hands” doctrine, yet it allowed for a person Garry would argue has “unclean hands” (the putative biological father) to assert his equitable estoppel argument. Garry offers no support for his blanket assertion a putative biological father such as Christopher cannot make an estoppel argument because he has unclean hands by virtue of being the putative biological father. *Randy A.J.* made it clear a putative biological father can make this argument. In any event, this argument is a diversion from the real question at issue in this appeal: can Christopher intervene in the divorce action?

2. The Circuit Court erred in denying Christopher’s motion to intervene as a right

The basis for whether a party can intervene as a matter of right is set forth at [Wis. Stat. § 803.09\(1\)](#) and Wisconsin courts have discussed at length the four criteria for intervention as a matter of right, most recently in *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 745 N.W.2d 1, 307 Wis.2d 1, (Wis. 2008). Christopher believes he has satisfied all the criteria for intervention as a matter of right: his motion to intervene was timely, he has a direct interest in the divorce action, he cannot protect these interests without intervention, and the parties do not represent his interests.

A. Christopher has a direct interest in the divorce action

Christopher and Garry agree the key issue in this case is whether the marital presumption Garry is Brianna’s father should be overcome. (Appellant’s Br. 8; Resp’t Br. 7) Garry does not claim Christopher does not have a direct interest in the outcome of the Circuit Court answering this question, but instead argues the marital presumption issue does not relate

to any property or any transaction. (Resp't Br. 7-8) Because this issue "relates to a minor child, and does not relate to either property or transaction," Garry argues there is no basis for Christopher to intervene. (Resp't Br. 8) This argument relies on an exceeding narrow reading of the intervention statute which is clearly at odds with the relevant case law.

The Wisconsin Supreme Court has recently set forth a detailed summary on how a court should decide whether a person seeking to intervene in a case has an interest sufficiently related to the action. *Helgeland* at ¶ 44. (Appellant's Br. 8-9) No court has interpreted [Wis. Stat. § 803.09\(1\)](#) so narrowly as Garry argues, which would make it impossible for a person to intervene in any case involving a minor child. While Garry's narrow interpretation of [Wis. Stat. § 803.09\(1\)](#) is certainly creative, he does not cite any support for this reading.¹ Christopher has a very direct interest in the Circuit Court's determination of whether the marital presumption should be overcome. Garry does not assert otherwise.

B. The denial of Christopher's motion did have a direct impact on his ability to protect his interests

There are two factors to consider in determining whether Christopher's ability to protect his interest will be harmed: whether a holding the marital presumption should be overcome would apply to Christopher and whether such a holding would result in a novel holding of law. *Helgeland* at ¶¶ 80-81. (Appellant Br. 9-10) Garry does not directly address either of these factors, but instead argues Christopher

¹ Where this Court to accept Garry's narrow and literal interpretation of [Wis. Stat. § 803.09\(1\)](#), while Christopher does not claim Brianna is property, the underlying issue in this case does concern a "transaction" of the most personal kind between Jennifer and Brianna's father.

will be able to protect his interests in the paternity action, therefore he should not be allowed to intervene. (Resp't Br. 8-10)

Christopher seeks to intervene in order to argue the marital presumption Garry is Brianna's father should not be overcome. Garry is correct the Circuit Court has not yet ruled on this issue. As a result, Brianna has two legal fathers: Garry, who is still presumed to be her father under [Wis. Stat. § 891.41](#), and Christopher who the Circuit Court adjudicated her father in the paternity action. To call this situation novel is an understatement. The Circuit Court's decision has left a child with two legal fathers in a holding contrary to [Randy A.J.](#) This is an exceedingly novel outcome which goes directly to the question of whether Christopher has a right to intervene.

Christopher has appealed the Circuit Court's judgment in the paternity action² and it would thus appear the Circuit Court's denial of his motion to intervene has not had an impact on his ability to protect his interests. As a practical matter, however, once the Circuit Court denied Christopher's motion to intervene and entered the judgment of paternity, his ability to make his equitable estoppel argument ended. The Circuit Court made it absolutely clear it would not overcome the marital presumption in the divorce case and then determine Christopher should not be established as her father in the paternity action, thus leaving Brianna without a father. (A-App.141-142) It is still to be decided in the divorce case whether the Circuit Court will overcome the presumption.³ A decision on this issue will apply directly to Christopher, thus intervention is required.

² Appeal No. 2008AP000723.

³ The divorce case is currently scheduled for a calendar call before the Circuit Court on November 17, 2008.

C. The Hendricks do not adequately represent the relevant interests

Garry has confused the interests in this case with the legal standard by which the Circuit Court should decide whether the marital presumption should be overcome. Garry is absolutely correct the Circuit Court should make this decision based on the best interests of Brianna. *Randy A.J.* at ¶¶ 21-25. This is the legal standard the Court should apply in deciding whether to overcome the presumption Garry is Brianna's father. The issue in this appeal, however, is whether Christopher can intervene in the divorce action. The final criterion of the legal standard for whether he can do so as a matter of right is whether the parties adequately represent his interests.

Christopher asserts none of the parties represent his interests in this action. Garry does not claim to represent Christopher's interests, rather he claims the only interest at issue is Brianna's. (Resp't Br. 11-12) This confuses the standard with the parties' competing interests. Garry presumably has an interest in the Circuit Court overcoming the presumption the child he raised as his own is not his. Christopher has an interest in the Circuit Court not overcoming this presumption on the basis of his equitable estoppel argument. Part and parcel to this argument is Christopher's claim it is not in Brianna's best interests to overcome the marital presumption. Garry argues it is in Brianna's best interests to overcome the marital presumption. The "best interests" of Brianna are the standard the Circuit Court should use in deciding whether to overcome the presumption, not the interests the individual litigants have in the case or whether Christopher should be allowed to intervene.

In order to determine whether the Hendricks or Brianna’s guardian ad litem represent Christopher’s interests, the Court should “look to see if there is a showing of collusion 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. If the existing parties were asserting Christopher’s estoppel claim, Christopher’s argument for intervention as a right would surely be weakened. *Helgeland* at ¶ 86. The bottom line is none of the parties have made this argument for Christopher. There are two potential fathers, one mother, and one child, each of whom have different interests in the case. The parties all agree on which standard the Circuit Court should use in deciding the marital presumption question (the best interests standard), but it cannot be said they all have the same interests in the outcome of this case.

Garry does not claim to represent Christopher’s interest, nor does he assert any party represents Christopher’s interests. Unless he is allowed to intervene, Christopher will not be able to protect his interests. He made his motion to intervene in a timely manner, he has a direct interest in this case, he will not be able to protect this interest without intervention, and no other party represents or claims to represent his interests. For these reasons and as further set forth in Appellant’s Brief, this Court should reverse the decision of the Circuit Court and allow Christopher to intervene in the Hendricks divorce action pursuant to [Wis. Stat. § 803.09\(1\)](#).

3. The Circuit Court abused its discretion when it denied Christopher's motion to intervene permissively

The parties agree it is a discretionary decision of the Circuit court whether to allow Christopher to intervene permissively under [Wis. Stat. § 803.09\(2\)](#). (Appellant's Br. 12; Resp't Br. 13) A discretionary decision should not be disturbed "so long as the record reflects 'the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case.'" [Helgeland](#) at ¶ 120, citing [State v. Delgado](#), 223 Wis. 2d 270, 281, 588 N.W.2d 1 (Wis. 1999); see also [Ness v. Digital Dial Communications, Inc.](#) 227 Wis.2d 592, 599-600, 596 N.W.2d 365 (Wis. 1999).

Garry argues the Circuit Court made an appropriate decision when it denied Christopher's motion to intervene permissively. (Resp't Br. 13-14) The denial of Christopher's motion resulted in Brianna having two legal fathers. To reach this end, the Circuit Court failed to consider the relevant facts and indeed took no testimony in case prior to deciding on Christopher's motion. The Circuit Court failed to consider the appropriate criteria for intervention in its decision. (A-Ap.140-143)

The questions of fact in the divorce case and the paternity action are identical. The question of law is whether Christopher can assert his equitable estoppel argument. Under the permissive intervention statute, these requirements have been clearly met and for the Circuit Court to hold otherwise was an erroneous exercise of its discretion.

Conclusion

For the reasons set for in Appellant's Brief and this Reply Brief, 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 18th day of August, 2008

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Certification

I certify this Reply 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 1-8 of this Reply Brief is 2,056 words.

Dated this 18th day of August, 2008

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