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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. ARIZONA) No. 1 CA-CV 11-0821
DEPARTMENT OF ECONOMIC SECURITY)
(STANYA A. BITAHEY),) DEPARTMENT A
)
Petitioners/Appellees,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
MICHAEL A. GONZALES,) Procedure)
)
Respondent/Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-052896

The Honorable Mina E. Mendez, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Jamie R. Heller, Assistant Attorney General
Attorneys for Petitioners/Appellees

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By David L. Goldfarb
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Attorneys for Respondent/Appellant

D O W N I E, Judge

¶1 Michael Gonzales appeals the dismissal of his petition to terminate child support. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Stanya Bitahay gave birth to a son ("G.B.") in October 2002. On January 9, 2005, Gonzales and Bitahay signed an Arizona Department of Economic Security ("ADES") Acknowledgment of Paternity ("Acknowledgment") form before a witness and a notary public. The following language appears on the Acknowledgment immediately above the parents' signatures:

This Acknowledgement is being signed voluntarily with no threat or harm or duress. I have received written and oral notice and have read the back of this form. I understand my alternatives, the legal consequences and the rights and responsibilities. I swear and affirm under penalty of perjury pursuant to A.R.S. § 13-2702 that this application and any accompanying documents have been examined by me and to the best of my knowledge and belief are true and correct.

The back of the ADES form stated that by signing the document, the parties were giving up the "right to a court hearing to determine paternity as well as the right to have genetic testing done." The Acknowledgment also advised that it had **"the same force and effect as a Superior Court judgment pursuant to A.R.S. § 25-812."**

¶13 In December 2005, ADES filed a "Post-Paternity" request to establish child support. ADES alleged that paternity had previously been determined and that Gonzales was G.B.'s father.

¶14 Bitahay and Gonzales appeared in superior court regarding ADES' child support request on March 7, 2006. At that hearing, the court issued a stipulated judgment ("2006 Judgment") that included the following language:

MICHAEL A. GONZALES, is the father of the above-named minor child(ren) pursuant to a determination of paternity entered on 01-14-2005 pursuant to () A.R.S. §§ 25-801 and 25-809 () Voluntary acknowledgement filed with Clerk of Court - A.R.S. § 25-812 A-C, (X) Administrative process per A.R.S. §§ 25-812(D) or () _____.

¶15 Gonzales and Bitahay both signed the judgment and initialed a line stating that they had been informed of the right to a hearing and were stipulating of "free will, without having been threatened or coerced." The court ordered Gonzales to pay past and current child support.

¶16 In 2009, Gonzales filed a "Motion for DNA Genetic Paternity Testing."¹ He "fully acknowledge[d] signing the acknowledgment of paternity," but alleged he "was never afforded the opportunity to fully litigate the issue of paternity." ADES

¹ Gonzales acknowledged in the superior court that he and Bitahay had a sexual relationship "[a]t the time of and for at least 10 months preceding" G.B.'s birth.

opposed the motion, arguing, *inter alia*, that paternity had already been established. The superior court denied Gonzales' motion.

¶7 In June 2011, Gonzales filed a Motion For Relief From Judgment Per Rule 85(C) ("Rule 85(C) Motion"), alleging, *inter alia*:

In early 2011, Respondent was able to get in touch with Mother through a mutual friend, and arrange to pick up the child for a short visit of just about one hour. This visit allowed Respondent to obtain a sample of the child's DNA through a mouth swab. Respondent was then able to have DNA testing performed by Identigene. It is confirmed through genetic testing that Respondent is excluded as the biological father of the child.

¶8 ADES opposed the Rule 85(C) Motion, arguing it was untimely and that *res judicata* principles barred Gonzales from relitigating paternity. ADES also contended the "home use genetic testing kit" Gonzales used lacked a reliable chain of custody.² The superior court denied the Rule 85(C) Motion in June 2011. Gonzales filed a notice of appeal from that decision, but later withdrew his appeal.

² The testing laboratory's report states that the "collection, transport and testing" were not "performed in compliance with established Chain-of-Custody guidelines." It disclaims responsibility "for the integrity of these samples prior to arriving at the laboratory."

¶9 In September 2011, Gonzales filed a Petition to Terminate Support Pursuant to Arizona Revised Statutes ("A.R.S.") section 25-503(F) ("support termination petition"). ADES opposed the petition and asked the court to dismiss it. The superior court dismissed the support termination petition, and Gonzales timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶10 The only issue before us is whether the superior court erred by dismissing the support termination petition. Gonzales contends that petition was proper because his paternity was established pursuant to A.R.S. § 25-814. ADES counters that paternity was established under § 25-812(E), rendering a petition to terminate child support based on § 25-503(F) legally impermissible. Based on our *de novo* review of the statutes, *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 456-57, ¶ 16, 224 P.3d 950, 953-54 (App. 2010), we agree with ADES.

¶11 The 2006 Judgment adjudicated Gonzales' paternity and expressly stated that his paternity had been established pursuant to A.R.S. § 25-812(D). Gonzales did not appeal from this judgment and may not now collaterally attack the determination that paternity in this case was established under § 25-812.

¶12 Even without the express finding in the 2006 Judgment, the record demonstrates that paternity was established under A.R.S. § 25-812. That statute permits parents of a child born out of wedlock to establish paternity by, among other things, filing with ADES, the superior court, or the department of health services "[a] notarized or witnessed statement that contains the social security numbers of both parents and that is signed by both parents acknowledging paternity." The Acknowledgement at issue here is an ADES form containing the requisite information that was signed by both parents, notarized, witnessed, and filed with ADES in 2005.

¶13 Section 25-503(F), upon which Gonzales' support termination petition is based, applies only to "presumption[s] of paternity" arising under § 25-814.³ Section 25-503(F) reads, in pertinent part:

³ Section 25-814(A)(4), titled "Presumption of paternity," provides that a man is presumed to be the father of the child if:

A notarized or witnessed statement is signed by both parents acknowledging paternity or separate substantially similar notarized or witnessed statements are signed by both parents acknowledging paternity.

This statute, which merely gives rise to a *presumption* of paternity, does not require the statement to be filed with ADES, the court, or the department of health services. Also unlike acknowledgments under A.R.S. § 25-812(A), such statements do not have "the same force and effect as a superior court judgment." See A.R.S. § 25-812(D).

On petition of a person who has been ordered to pay child support pursuant to a presumption of paternity established pursuant to § 25-814, the court may order the petitioner's support to terminate if the court finds based on clear and convincing evidence that paternity was established by fraud, duress or material mistake of fact.

(Emphasis added.)

¶14 The remedy set forth in A.R.S. § 25-503(F) is available only in cases when child support has been ordered "pursuant to a presumption of paternity established pursuant to § 25-814." Here, however, we are dealing with an acknowledgment filed under § 25-812, which "has the same force and effect as a superior court judgment." A.R.S. § 25-812(D). Additionally, we have a final judgment of paternity issued by the superior court.

¶15 As ADES notes, Gonzales had several other legal options regarding the paternity issue, including: (1) requesting genetic testing before voluntarily acknowledging paternity, see A.R.S. § 25-812(A)(2); (2) rescinding his acknowledgment of paternity pursuant to § 25-812(H); (3) challenging the voluntary acknowledgment under § 25-812(E); (4) appealing the 2006 Judgment; or (5) filing a timely motion to set aside the 2006 Judgment. As a matter of law, though, Gonzales may not bring a support termination petition under § 25-503(F). The superior court therefore properly dismissed his petition.

CONCLUSION

¶16 We affirm the judgment of the superior court.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
JOHN C. GEMMILL, Judge