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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002208-ME

M.G.T. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 97-FC-000023

L.W. (NOW M.) AND
COMMONWEALTH OF KENTUCKY,
ex rel CABINET FOR HEALTH
AND FAMILY SERVICES APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING

** ** ** ** **

BEFORE: KELLER, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: M.G.T.,[1] hereinafter Appellant, appeals from an order of the Jefferson Circuit Court, Family Division, denying his motion to set aside a judgment of paternity and dismissing without prejudice his counterclaim for

[1] Because this case involves a minor child, the parties' names will not be used.

reimbursement of child support payments. Appellant argues the court should have set aside a 1997 judgment of paternity and allowed him to proceed against L.W., hereinafter Mother, and the Cabinet for Health and Family Services, hereinafter Cabinet, to recover damages. We affirm in part, reverse in part and remand.

D.T., hereinafter Child, was born out of wedlock in October 1995. In September 1997, Appellant and Mother executed an agreed judgment of paternity and orders for child support. Appellant states that he believed he was the father of Child because Mother had assured him that he was her only sexual partner. No DNA testing was done at this time.

Sometime in 2005, Appellant became suspicious of his paternity and conducted an at-home paternity test shortly after Child's tenth birthday. The test suggested that he was not Child's biological father. Appellant, *pro se*, moved to set aside his child support obligations on the grounds that he was not the father and used the home paternity test as evidence. The court denied the motion noting that the at-home test was not admissible as evidence and unauthorized. Rather than attacking the paternity judgment, Appellant then orally moved for enforcement of the parties' visitation agreement and a decrease in his child support obligations.[2] Appellant did not appeal the trial court's rulings.

In February 2006, Mother filed a motion requesting genetic testing, apparently in hopes of demonstrating to Appellant that he was the father. The court entered orders in March and May of 2006 for genetic testing, but Appellant

[2] The court passed these motions for a hearing, but Appellant did not appear.

did not take the requisite steps to have the tests done. Finally, two years later in November 2008, DNA testing was done on the parties' own initiative. The results excluded Appellant as Child's biological father.

Appellant then moved pursuant to CR 60.02, to set aside the nearly ten-year-old judgment of paternity, to cease having to pay child support, and to file a counterclaim and complaint seeking to recover past child support payments and other damages. The trial court permitted Appellant to file his counterclaim and complaint and terminated future child support payments. The issue of the paternity judgment was left open.

After the filing of the counterclaim and complaint, Appellees moved to dismiss the action and requested that the 1997 judgment of paternity remain. The trial court dismissed the case holding that too much time had passed since the judgment of paternity and the CR 60.02 motion was time barred because it was not filed within a reasonable time. The court noted that Child considered Appellant her father since he acknowledged paternity in 1997 and that he had "drifted in and out of her life, developing a relationship with her and at time, pursuing enforcement of his parenting time." Appellant's child support obligations were terminated by agreement of the parties in February 2009. The court also held that the Jefferson Family Court did not have jurisdiction over matters alleged in the counterclaim and complaint, and that the "regular" Jefferson Circuit Court was the more appropriate venue. This appeal followed.

Appellant claims that the trial court erred by not vacating the judgment of paternity because such action was mandated by statute and case law. We disagree. To the contrary, we agree with the family court that the analysis in *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005), applies to this case.

In *S.R.D.*, the Court recognized the doctrine of paternity by estoppel. We note at the outset that in *S.R.D.* the parties were married, unlike the case at bar. Nonetheless, the principles underlying the Court's rationale for its decision in *S.R.D.* are present in this case. Facts figuring into the Court's decision included that throughout the parties' marriage, the mother "threatened and intimated" to the appellant that he was not the child's biological father. Nonetheless, the appellant continued to treat the child as his own. And, during the parties' divorce proceedings, the appellant did not contest that he was the biological father of the child, and he agreed to joint custody and to pay child support. After the parties had been divorced for six years, the husband had DNA testing done and confirmed he was not the biological father of the child. Even knowing this, he entered into an agreed order modifying the parties' parenting schedule. Later, the appellant filed a CR 60.02 motion, *inter alia,* to set aside the original finding declaring him as the biological father. The court denied his motion.

In reviewing the case on appeal, the Court applied the doctrine of equitable estoppel regarding paternity. *Id.* at 506-07. Because the appellant conducted himself as the child's father even under circumstances when he was

aware that he may not have been the biological father, the Court held that equitable estoppel applied.

Here, Appellant voluntarily acknowledge paternity when Child was approximately two-years old. Nearly eight years later, based on his in-home DNA testing, Appellant had reason to believe that he was not the child's biological father. Yet, Appellant continued to seek a relationship with the child and exercise his visitation rights with her; by this time, the Child was over ten years old and had only considered Appellant as her father.

As in *S.R.D.*, Appellant represented to the child that he was her father despite the fact that for at least three years, he was aware that this "representation may be a biological fiction," *id.* at 508; Appellant "acted with the intention that [the Child] would consider him as her father" *id.*; and the Child relied upon this conduct, believing Appellant to be her father. Despite the representations that Appellant's conduct and role as father undoubtedly impressed upon Child, Appellant sought to set aside a decade-old paternity judgment pursuant to CR 60.02. We agree with the family court--and believe that *S.R.D.* directs--that this motion was not filed in a reasonable time and that Appellant is now equitably estopped from attacking the paternity judgment.

We pause to note that we approve of the family court's interpretation of Kentucky Revised Statute (KRS) 406.111, which discusses the relevance of DNA testing and states in relevant part that "[i]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests,

are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly." Given the *S.R.D.* opinion regarding application of the doctrine of equitable estoppel, a paternity judgment that is over ten-years old, Appellant's conduct, and the other relevant facts explained *supra*, we agree with the family court that there is a need for finality of judgments and that "there are consequences when parties make acknowledgments or fail to take actions available to them." Accordingly, we affirm the family court regarding its denial of Appellant's CR 60.02 motion to set aside the judgment of paternity.

As for the family court jurisdiction issue, Appellant argues that he should be allowed to go forward with his counterclaim and complaint in family court. Appellant is seeking damages and reimbursement based on fraud and misrepresentation. He is also seeking punitive damages, a trial by jury, and any other relief he may be entitled to. We find the family court does have jurisdiction based on statutory language and case law. We will note that this outcome was probably not intended by the General Assembly when it established the family court system; however, we are bound by statutory language and case law.

We will first discuss the jurisdiction of family courts set out by statute and the Kentucky Constitution. Section 112(6) of the Kentucky Constitution states that "[t]he Supreme Court may designate one or more divisions of Circuit Court within a judicial circuit as a family court division. A Circuit Court division so designated shall retain the general jurisdiction of the Circuit Court and shall have

additional jurisdiction as may be provided by the General Assembly. Kentucky Revised Statute 23A.100 states:

> (1) As a division of Circuit Court with general jurisdiction pursuant to Section 112(6) of the Constitution of Kentucky, a family court division of Circuit Court shall retain jurisdiction in the following cases:
> (a) Dissolution of marriage;
> (b) Child custody;
> (c) Visitation;
> (d) Maintenance and support;
> (e) Equitable distribution of property in dissolution cases;
> (f) Adoption; and
> (g) Termination of parental rights.
>
> (2) In addition to general jurisdiction of Circuit Court, a family court division of Circuit Court shall have the following additional jurisdiction:
> (a) Domestic violence and abuse proceedings under KRS Chapter 403 subsequent to the issuance of an emergency protective order in accord with local protocols under KRS 403.735;
> (b) Proceedings under the Uniform Act on Paternity, KRS Chapter 406, and the Uniform Interstate Family Support Act, KRS 407.5101 to 407.5902;
> (c) Dependency, neglect, and abuse proceedings under KRS Chapter 620; and
> (d) Juvenile status offenses under KRS Chapter 630, except where proceedings under KRS Chapter 635 or 640 are pending.

Both Section 112(6) of the Kentucky Constitution and KRS 23A.100 state that family courts are circuit courts with general jurisdiction, but that they may also have additional jurisdiction. It is the "general jurisdiction" language that Appellant points to for his argument that the family court has jurisdiction over his original action. As will be discussed below, Appellant has a cause of action to

recoup past child support payments and other damages. Undoubtedly, this cause of action would be ripe for adjudication in a "regular" circuit court, but Appellant argues that the family court can also adjudicate it. We have to agree based on the "general jurisdiction" language of the Kentucky Constitution and Kentucky Revised Statute.

Case law also supports our holding that the family court has jurisdiction over this matter. Historically, once child support payments became due, they had to be paid and could not be recovered. However, recent case law has made an exception to this rule. In *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006), the Kentucky Supreme Court held that a father could recover past child support payments from the mother if the support obligation arose from her fraudulent claim that he was the child's biological father. The *Denzik* case was an original action brought in circuit court.

Other cases brought in family courts, such as *Calfee v. Commonwealth Cabinet for Health and Families*, 230 S.W.3d 601 (Ky. App. 2007), and *Wheat v. Commonwealth Cabinet for Health and Family Services, ex rel. C.P.*, 217 S.W.3d 266 (Ky. App. 2007), have applied the *Denzik* rule to child support arrearages and allowed a father to set aside any arrearage owed if it is found that the mother committed fraud or misrepresentation to secure a child support obligation. In these two cases, previous panels of this Court have remanded the question of whether fraud was committed to family courts to decide.

We are bound by statutory language and case law. While a family court has the specific jurisdiction set forth by KRS 23A.100(1) and (2), it also retains the general jurisdiction of a circuit court. Based on the above "general jurisdiction" language and the cases of *Denzik*, *Calfee*, and *Wheat*, we find that the family court has jurisdiction to hear Appellant's counterclaim and complaint.

For the foregoing reasons, we affirm the family court regarding denial of Appellant's CR 60.02 motion, reverse regarding the family court's jurisdiction regarding Appellant's fraud claims, and remand this case to the Jefferson Family Court for proceedings not inconsistent with this opinion.

KELLER, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPIONION.

STUMBO, JUDGE, DISSENTING. Respectfully, I must dissent from that part of the majority opinion which affirms the trial court's decision to not vacate the judgment of paternity. In my view, the case cited by the majority is distinguishable because here the parties were never married and it was not until some eight years after the birth of the child that evidence on non-paternity was found. The plain language of KRS 406.111 and its application in *Crowder v. Commonwealth ex rel Gregory*, 745 S.W.2d 149 (Ky. App. 1988), require vacation of the judgment of paternity.

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