RENDERED: SEPTEMBER 9, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000624-ME

BUDDY BROCK — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE MARCUS L. VANOVER, JUDGE
ACTION NO. 13-CI-00930

COMMONWEALTH OF KENTUCKY
EX REL: BRIANNA BROCK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

COMBS, JUDGE: Appellant, Buddy Brock, appeals from an Order establishing child support. Appellee is Commonwealth of Kentucky Ex Rel:[1] Brianna Brock. After our review, we affirm.

[1] A suit *ex rel.* is typically brought by the government upon the application of a private party (called a *relator*) who is interested in the matter. *Black's Law Dictionary* 603 (7th ed. 1999).

Buddy and Brianna were married on April 24, 2009. During the marriage, Brianna conceived a child by artificial insemination from an anonymous sperm donor. The parties separated several months after the child was born. On August 27, 2013, Buddy filed a verified Petition for Dissolution of Marriage in Pulaski Circuit Court, stating as follows:

> 7. The child **born of this marriage** is … [KEB], born xx-xx-2013. During the life of the child, she have [sic] resided with the parties in Pulaski County, Kentucky, until the date of separation and with the parties in Pulaski County, Kentucky from that date forward. (Emphasis added.)
> …

Buddy requested an award of joint custody and equal time-sharing with Brianna.

On August 27, 2013, Buddy also filed a Motion for Temporary Custody seeking temporary joint custody and equal time share "of the parties' one (1) minor child; K.E.B…." In his accompanying Affidavit, Buddy recited as follows:

> The minor child, K.E.B., born xx-xx-2013, was born during our marriage. She was conceived by an anonymous donor through artificial insemination, however, I am on the child's birth certificate and have been acknowledged as the father by [Brianna] since conception.

The parties attended mediation. The Mediation Agreement and Order entered December 11, 2013, states that "[t]he parties agree that [Buddy] shall terminate his rights to the child born during the time of the parties' marriage." On February 18, 2014, the trial court scheduled a final hearing for

jurisdictional proof for March 26, 2014. On March 12, 2014, Brianna filed a Motion to set aside a portion of the Mediation Agreement on ground that since its signing, Buddy had visited with the minor child, contributed financially to her care, indicated to Brianna that he wanted to have a relationship with the child, and had "taken no steps whatsoever to obtain a termination of his parental rights to the minor child." The matter was heard on March 26, 2014.

On April 2, 2014, the Pulaski Circuit Court, Family Court Division, entered its decree of dissolution of marriage. In its Findings of Fact, it found in relevant part as follows:

> 5. One minor child was born during the course of the parties marriage … namely, [KEB] age (1). The minor child lives and resides primarily with [Brianna] and visits occasionally with [Buddy]. The parties follow no set timeshare schedule.
>
> 6. The parties entered into a Mediation Agreement in December, 2013.
>
> 7. In Paragraph One (1) of the Mediation Agreement, the parties agreed that [Buddy] would terminate his rights to the minor child born during the course of the parties marriage ….
>
> 8. [Brianna] has moved the Court to set aside Paragraph One (1) of the …Mediation Agreement, arguing that due to a change in circumstances, specifically [Buddy's] exercising visitation with the minor child, that a termination would no longer be in the child's best interest. Additionally, [Brianna] argues that if allowed to remain, Paragraph One (1) of the … Mediation Agreement would require [Buddy] to file said termination.
>
> 9. [Buddy] argues that the parties agreed that he … would terminate his rights to the minor child and that is what he intends to do. [Buddy] asserts that Paragraph One (1) of the … Mediation Agreement should remain.

> 10. Removal of Paragraph One (1) of the … Mediation Agreement does not bar [Buddy] from seeking a voluntary termination of his parental rights to the minor child born during the marriage ….
>
> . . .
>
> 13. As it is anticipated that [Buddy] will be filing for a voluntary termination of his parental rights, the Court will not make any findings as to child custody, child support or timeshare. If however, [Buddy] has not filed for a voluntary termination of his parental rights within ninety (90) days, those issues may be brought back before the Court upon motion of either party.

The court ordered the marriage dissolved and incorporated the Mediation Agreement by reference except for Paragraph One, which was set aside by the court. The court further ordered the action stricken from its docket and relieved Briana's attorney and Buddy's attorney "of further duties herein."

Buddy did not appeal, nor did he file for voluntary termination of parental rights within 90 days after April 2, 2014, or thereafter. The Commonwealth subsequently moved to intervene and to set child support and medical coverage. The trial court granted the motion to intervene, but overruled the motion to set child support and medical coverage on procedural grounds. On August 12, 2014, the Commonwealth again filed a Motion to Set Child Support and Medical Coverage, which was heard on August 22, 2014; Buddy objected, contending that he was not the father. The court allowed the parties time to submit written memoranda on the issue.

On September 4, 2014, counsel[2] for Brianna filed a Memorandum of Law emphasizing that Buddy has "on various occasions acknowledged the minor child … as his own; …has signed the birth certificate; pled in his Petition for Dissolution that this child was born during the marriage…." Relying on *Moore v. Commonwealth,* 954 S.W.2d 317 (1997), Brianna argued that Buddy's course of conduct should preclude him from now asserting that he has no legal rights or obligations with regard to the child.

The Commonwealth filed a Memorandum, and Buddy filed a Response. Buddy objected to the Commonwealth's tender of copies of the consent forms relating to the artificial insemination procedure, and the trial court left the record open for certified records to be submitted. On December 16, 2014, the parties filed a Motion to Seal Medical Records and Stipulation of Facts stating that: "[t]he envelope filed with the court contains both a copy with numbered pages … and an unmarked copy with a color copy of the two consent forms."

On March 27, 2015, the court entered the following Order Establishing Child Support:

> This matter is before the Court on motion … to establish child support …. [Buddy] has objected … on grounds that he claims he is not the biological father… .It is acknowledged throughout this action that this child was born during the marriage; however, the child was conceived via artificial insemination using sperm from an anonymous donor. The Respondent argues that [Buddy] is estopped from claiming that he is not the father of the child. The Respondent also argues [that

[2] Due to staff transition at the County Attorney's office, Brianna had to resort to private counsel. The Commonwealth later assumed its present role in this case.

Buddy] is barred from challenging paternity by the doctrine of res judicata. …

The record reflects that [Buddy] did sign a "Therapeutic Donor Insemination Consent Form", which stated that, "We understand that, if a woman is artificially inseminated with the consent of her husband, the husband is treated in law as if he were the natural father of a child or children thereby conceived." This Court did not find any authority directly on point from the appellate courts of this Commonwealth. Most courts who have dealt with this issue have considered the child as that of the father, and that the father has all the legal responsibilities of paternity, including support. *See* 83 A.L.R.4th 295, *citing In Re Baby Doe,* 291 S.C. 389, 353 S.E.2d 877 (1987). If [Buddy] had not consented, other jurisdictions may have relieved him from his paternity obligations; however, his consent would bar him from disclaiming paternity. The Courts of Kentucky have applied equitable estoppel in paternity issues. *See Hinshaw v. Hinshaw,* 237 S.W.3d 170 (Ky. 2007); *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005). ...[H]erein, [Buddy] engaged in a course of conduct that led to the birth of the child (signing the consent), acted with knowledge of the effects of that course of conduct (acknowledge[d] he was the legal father by agreeing to terminate his parental rights in a separate action), and is barred by equitable estoppel from now taking a position inconsistent with that course of conduct.

…

[Buddy] also argues that the finding that the child was born "during the course of the marriage" is different than being born "of the marriage" and that "during the course" is not a finding of paternity that is binding for res judicata purposes. The Court finds that this distinction is not significant. The paternity statute that establishes the obligation of a father refers to children born in "lawful wedlock, or within (10) months thereafter." KRS 406.011.[3] Black's Law Dictionary,

[3] Kentucky Revised Statute[s] (KRS) 406.011, which is entitled, "Obligations of father; presumption of paternity," provides in relevant part: "A child born during lawful wedlock, or

> 9th Ed., defines wedlock as "the state of being married; matrimony." Identifying that the child was born during the marriage and a finding to that effect is sufficient to identify that the child is born in lawful wedlock, thus establishing paternity under the statute. Thus, the finding of legal paternity was established. The time for appeal has passed. Therefore [Buddy] is barred by res judicata [sic] from now challenging that legal paternity was found by the Court.
> …
>
> As noted above, the Court is not persuaded by [Buddy's] arguments. … The Court hereby finds that [Buddy] has been established as the father in the decree, so [Buddy] is barred from claiming that he is not the father by the doctrine of res judicata. Further [Buddy] is estopped from claiming he is not the father.
>
> Based upon the finding that [Buddy] is the father of the child, [Brianna] is entitled to seek child support from [Buddy] in accordance with the child support guidelines. [Buddy] did not seek to have his parental rights terminated within 90 days is [sic] anticipated by the decree. … [Buddy] is ordered to pay child support in the amount of $965.09 per month effective August 12, 2014, the date of filing of the motion. A separate order shall be entered indicating the method of payment and duration of payment and setting a monthly arrearage.

That separate order was entered on April 6, 2015, and the trial court ordered Buddy to pay continuing child support to the Division of Child Support in the amount of $965.09 per month effective August 12, 2014, and it ordered the arrearage of $7,720.72 to be paid in the amount of $241.27 per month in addition to the regular child support. The trial court also set forth requirements

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within ten (10) months thereafter, is presumed to be the child of the husband and wife."

for Buddy to obtain medical insurance for the minor child. On April 9, 2015, Buddy filed a Motion to Alter, Amend, or Vacate the March 27, 2015, Order Establishing Child Support. By Order of April 24, 2015, the trial court denied Buddy's CR[4] 59.05 Motion as untimely filed and rejected his argument that his untimely CR 59.05 Motion should be considered filed pursuant to CR 60.02.

On April 24, 2015, Buddy filed a Notice of Appeal to this Court from: (1) the March 27, 2015, Order establishing child support; (2) the April 6, 2015, Order seeking monthly support payments and arrearages; and (3) the April 24, 2015, Order denying his motion to alter, amend or vacate. On appeal, Buddy argues that: (1) the trial court did not cite statutory or common law that he is the father of the child as the result of artificial insemination; (2) the doctrine of equitable estoppel is not supported by the specific facts of his case; (3) *res judicata* is not applicable to this situation; and (4) it is inequitable to award child support without a hearing or to require retroactive child support.

We first address Buddy's argument that *res judicata* is inapplicable. As this is an issue of law, our review is *de novo*. *W. Kentucky Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787 (Ky. App. 2001).

Buddy questions how he could be held "to the knowledge and belief that he was the 'legal father' of the child when he agreed during mediation … to terminate his parental rights[.]" Buddy contends that he could easily rebut the legal

[4] Kentucky Rules of Civil Procedure.

presumption through DNA testing. He also claims that the court has essentially imposed the status of paternity upon him without his having ever acknowledged it.

In *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 508 (Ky. 2005), our highest Court has clearly established that biological paternity is not a prerequisite to legal paternity: "[T]here is no doubt that a man can be a child's 'legal father' without actually being her 'biological father.'" Buddy never attempted to rebut the presumption of paternity before the decree was entered. On the contrary, he held himself out as KEB's father. In his verified Petition for Dissolution, Buddy identified KEB as the child "born of this marriage." Buddy filed a Motion seeking temporary joint custody "of the parties' one (1) minor child, K.E.B." In his accompanying Affidavit, Buddy avowed that KEB "was born during our marriage. She was conceived by an anonymous donor through artificial insemination, however, I am on the child's birth certificate[5] and have been acknowledged as the father by [Brianna] since conception."

As the Commonwealth observes, such acknowledgments constitute judicial admissions. A judicial admission is defined as a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it.

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[5] KRS 213.046 governs registration of births. Subsection (9) provides in relevant part that:

> (a) If there is no dispute as to paternity, the name of the husband shall be entered on the certificate as the father of the child. …

Subsection (13) provides that: "The birth certificate of a child born as a result of artificial insemination shall be completed in accordance with the provisions of this section."

Center v. Stamper, 318 S.W.2d 853, 855 (Ky. 1958).

In *Moore,* 954 S.W.2d at 317, cited by Brianna in her memorandum of Law of September 4, 2014, the Logan Circuit Court entered a decree dissolving the marriage of Opal and John Day. The decree incorporated their property settlement agreement acknowledging that one child had been born of the marriage. Prior to entry of the decree, the Days had undergone paternity testing which excluded John Day as the father. Opal subsequently moved with the child to another state and filed a petition in Warren District Court seeking child support from the Appellant, William Moore. The district court granted summary judgment for Opal and for the Cabinet for Human Resources, after genetic testing established a statistical probability 99% or more of Moore's paternity -- sufficient for the presumption set forth in KRS 406.111.

The Kentucky Supreme Court granted discretionary review. Moore argued, *inter alia,* that *res judicata* barred the paternity action. Noting the parties' various "intriguing arguments," the Court felt "compelled to dispose of the matter on the basis of collateral estoppel." *Id.* at 318. The Court explained that:

> a close cousin to the doctrine of *res judicata* is the theory of collateral estoppel, or issue preclusion. Kentucky's highest court adopted the preclusion doctrine in *Sedley v. City of West Buechel*, Ky., 461 S.W.2d 556 (1970), stating the following:
>
> > Many jurisdictions, however, have adopted the doctrine of "claim preclusion" or "issue preclusion" under which a person who was not a party to the former action nor in privity with such a party may assert

> res judicata against a party to that action, so as to preclude the relitigation of an issue determined in the prior action. The rule contemplates that the court in which the plea of res judicata is asserted shall inquire whether the judgment in the former action was in fact rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case. *Id*. at 559 (emphasis in original).
>
> Thus, the Court abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action.

Moore, 954 S.W.2d at 317, 318-19 (footnotes omitted). Essential elements of collateral estoppel are: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with a full and fair opportunity for the estopped party to litigate; (4) a prior losing litigant. *Id.* at 319. "Offensive collateral estoppel refers to the successful assertion by a party seeking affirmative relief that a party to a prior adjudication who was unsuccessful on a particular issue in that adjudication is barred from relitigating the issue in a subsequent proceeding." *City of Covington v. Bd. of Trustees of Policemen's & Firefighters' Ret. Fund of City of Covington*, 903 S.W.2d 517, 521 (Ky. 1995) (citation omitted).

In *Moore,* our Supreme Court explained that Opal was a party to both actions regarding the child's paternity. She had named her then husband, John Day, as the child's father on the birth certificate and stipulated that the child was

born of the parties' marriage in the property settlement agreement which was incorporated into the decree of dissolution -- despite the fact that genetic testing had excluded John Day as the father. The Court held that the decree of dissolution was a final judgment on the merits. "[P]aternity and the issues related thereto were necessary issues to the dissolution action which Opal had a full and fair opportunity to litigate. Having failed to set aside or amend the original judgment, Opal is precluded from relitigating the paternity issue." *Id.* at 320.

In the case before us, we conclude that the doctrine of offensive collateral estoppel applies. The Decree of Dissolution was a final judgment on the merits. Paternity was a necessary issue to the dissolution proceeding which Buddy had a full and fair opportunity to litigate. Buddy's voluntary acknowledgement that KEB was born of and during the parties' marriage constitutes a judicial admission of that fact. We agree with the trial court that the statutory presumption applies; *i.e.,* that paternity was established in the decree and that the time to appeal it has long passed. Thus, Buddy is precluded from relitigating the issue of paternity in Commonwealth's subsequent proceeding to establish child support.

We now turn to Buddy's final argument – that it is inequitable to award child support without a hearing or to require retroactive child support. "[W]e review a trial court's decision in this context for an abuse of discretion. An abuse of discretion will only be found when a trial court's decision is arbitrary,

unreasonable, unfair, or unsupported by sound legal principles." *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014).

Child support is statutorily determined. KRS 403.211(2) provides as follows:

> At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support.

KRS 403.212(2)(f) provides that documentation of the incomes of both parents be provided to the court. "Suitable documentation shall include, but shall not be limited to, income tax returns, paystubs, employer statements, or receipts and expenses if self-employed."

The Commonwealth filed suitable documentation of the parties' incomes with its August 12, 2014, Motion to Set Child Support and Medical Coverage. Buddy had ample opportunity to respond. The trial court did not order child support retroactively. It found that "the parties' incomes are in the amounts contained in the attached chart, based upon the proof provided with the … motion filed August 12, 2014. … [and ordered Buddy] to pay child support … effective August 12, 2014, the date of the filing of the motion." Thus, the record on its face refutes Buddy's argument

After our review, we find no abuse of discretion. Accordingly we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ralph D. Gibson Somerset, Kentucky	Gregory A. Ousley Somerset, Kentucky